

No. 22-982

**In the
Supreme Court of the United States**

RYAN THORNELL,

Petitioner,

v.

DANNY LEE JONES,

Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF OF PETITIONER

A Ninth Circuit panel has again failed to apply required deference to the findings of another court. This time, the panel failed to defer to the district court's factual findings on the credibility of witnesses and the persuasiveness of evidence, which are deemed correct unless found clearly erroneous. While paying lip service to the deferential standard owed to the district court's factual findings, the panel ignored that standard and substituted its own findings for those of the lower court. It then lowered the high bar established by *Strickland v. Washington*, 466 U.S. 668 (1984), by reviewing only the evidence favorable to the panel's desired outcome, failing to perform the required weighing of aggravating and mitigating circumstances, and rendering its own sentencing judgment rather than focusing on what sentence an Arizona court would have rendered absent any constitutional error.

Jones minimizes the errors committed by the panel and contends that Petitioner merely "seeks fact-bound error correction on a question of *Strickland* prejudice." BIO 11. But 10 judges of the Ninth Circuit disagreed with the 3-judge panel decision and dissented from the denial of en banc review. In a well-reasoned dissent, Judge Bennett meticulously identified the errors committed by the panel. App. 70–111.

I. The panel failed to defer to the district court's factual findings.

The Petition established, and Jones does not contest, that the Ninth Circuit may reject a district court's factual findings only if the findings are clearly erroneous. Jones asserts that the panel

applied this standard in rejecting the district court's findings, but at best he establishes only that the record might support the panel's conclusions. BIO 14. This is insufficient to establish clear error in the district court's factual findings. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)); *see Amadeo v. Zant*, 486 U.S. 214, 223 (1988) ("[I]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." (quoting *Anderson*, 470 U.S. at 573–74)).

First, Jones claims that the testing performed by his habeas experts supports the panel's conclusions that he has brain damage, PTSD, ADHD, and other disorders, contrary to the district court's findings. BIO 14. But the district court credited the State's experts, who did not make such diagnoses. *See* App. 218–23. In doing so, the district court fully detailed the experts' conclusions and explained the reasons for its credibility findings.¹ *Id.* For example, the district court discussed in detail the various experts' opinions and explained why it believed Jones had failed to demonstrate either a history of head injuries or resulting impairments. The district court

¹ Jones asserts that the district court's "characterizations of the experts' work histories," on which the court relied (in part) in making its credibility findings, are "clearly erroneous." BIO 17 n.11. But the district court merely related the experts' own characterizations of their work histories. *See* App. 218–19 (citing experts' testimony). Its conclusions, therefore, are supported by the record.

explained that no documentation corroborated the experts' conclusions that Jones had ever incurred any head injuries, and the testimony of Jones and his family members was inconsistent as to "the dates and details—and even the occurrence—of the injuries." App. 220. Moreover, the experts' findings of cognitive impairment were contradicted by the fact that Jones's standardized test scores were in the average range. *Id.*

In contrast to the district court's detailed description of the evidence supporting its findings, the panel opinion (and Jones) uncritically accepts the diagnoses offered by Jones's experts without considering the basis for those opinions or the evidence contradicting them. App. 52–53. Given that the panel ignored the evidence supporting the district court's findings, any claim that the district court's findings were clearly erroneous must fail.

The panel also purported to rely on circuit precedent to conclude that the district court should not have assessed the credibility of Jones's experts or considered the contradicting opinions of the State's experts. App. 51–52 ("It was improper for the district court to weigh the testimony of the experts against each other in order to determine who was the most credible.") (citing *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008)). Jones asserts that this was a correct assessment of the prejudice analysis that *Strickland* requires. BIO 16–17. But a court reviewing an ineffectiveness claim "must consider all the evidence—the good and the bad—when evaluating prejudice." *Wong v. Belmontes* 558 U.S. 15, 26 (2009). As Judge Bennett explained, this necessarily requires a court to "assess the weight or probable effect of the evidence on the sentencer by,

for example, making credibility determinations.” App. 95.²

In assessing Dr. Stewart’s credibility, the district court relied in part on Dr. Stewart’s declaration, where he stated: “It is my professional opinion that Danny’s psychological profile supports the events as described by Danny Jones on the night of the crimes, including Frank’s responsibility for Tisha Weaver’s murder.” App. 87 n.9 (quotation marks, alteration, and emphasis omitted). Because this statement “endors[ed] [Jones’s] account of the crimes,” the district court found that it diminished Dr. Stewart’s credibility. App. 206–07 n.7. The panel disagreed, and Jones defends the panel’s position by attempting to put a different spin on Dr. Stewart’s opinions. But Jones does not dispute that the record contains the information on which the district court relied to reach its conclusions. Accordingly, the panel erred to the extent it found the district court’s conclusion clearly erroneous.

² Jones criticizes the Petition’s reliance on *Knowles v. Mirzayance*, 556 U.S. 111 (2009), *Amadeo*, 486 U.S. 214, and *Lambert v. Blodgett*, 393 F.3d 943 (9th Cir. 2004), requiring deference to the district court’s credibility findings, because those cases did not involve capital sentencings. BIO 19 n.12. But the petitioner in *Amadeo* was sentenced to death. 486 U.S. at 217. In any event, circuit courts owe deference to a district court’s credibility assessments no matter the underlying offense or sentence. And Jones is incorrect that *Correll* held that district courts should not make credibility findings in assessing evidence. To the contrary, in *Correll* the Ninth Circuit reviewed the district court’s credibility finding for clear error. See *Correll*, 539 F.3d at 953 n.7 (finding the district court’s credibility finding clearly erroneous); see App. 94.

Jones also defends the panel's disregard of the district court's conclusion that Dr. Potts's sentencing testimony was more persuasive on the topic of his neurological damage than was any of the testimony presented in the evidentiary hearing. BIO 15; *see* App. 232. But his mere citation to the panel's reasons for discounting the district court's finding does nothing to establish that the record does not support the finding. *Id.* Moreover, even if, as Jones asserts, his later-retained experts spent more time with him and provided more voluminous reports, this does not inevitably mean that the opinions are more compelling. BIO 15. As the district court explained, "[t]he record developed since Dr. Potts's report has added detail but also ambiguity to the diagnoses Dr. Potts offered in mitigation." App. 231; *see* App. 232 ("[T]he Court has not been presented with evidence confirming that Petitioner suffers from neurological damage caused by head trauma or other factors."). The panel's (and Jones's) disagreement with the district court's finding does not render the finding clearly erroneous.³

The district court followed *Strickland's* requirements by assessing the credibility and opinions of the experts to conclude there was no reasonable probability that the outcome would have been different had "all the evidence" been presented to the sentencing court. The panel, in contrast,

³ Jones notes that Dr. Potts opined that the later-developed expert opinions were more compelling. BIO 16. But while Dr. Potts stated that the new reports were "exhaustive," he also noted that "[i]t doesn't mean I would have had to agree with all of them." ER 667. This is consistent with the district court's questioning of the credibility of Jones's experts and the bases of their findings.

considered only the evidence favorable to Jones to conclude he was prejudiced.

The panel made improper independent findings, contrary to its own legal precedent, that ignored the district court’s careful consideration and weighing of the evidence. *See Earp v. Davis*, 881 F.3d 1135, 1145 (9th Cir. 2018) (“Because we cannot substitute our own judgment of the credibility of a witness for that of the fact-finder, and the record shows that the district court carefully and thoughtfully weighed all of the testimony, we hold that the district court did not clearly err in weighing the credibility of the witnesses in light of the evidence adduced at the hearing.” (internal citation, quotation marks, and alteration omitted)).

II. The panel improperly and materially lowered *Strickland’s* highly demanding prejudice standard.

As previously discussed, the panel failed to give proper deference to the district court’s factual findings, including that court’s credibility determinations. That error led to the panel’s subsequent misapplication of *Strickland’s* required prejudice analysis in Jones’s case.

As Judge Bennett noted, this Court has “routinely” reversed the Ninth Circuit’s decisions in capital cases, including decisions resulting from the circuit’s misapplication of *Strickland*. App. 71 n.2.⁴

⁴ Judge Bennett specifically noted the following reversals: *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (per curiam); *Cullen v. Pinholster*, 563 U.S. 170 (2011); *Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); and *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam). *Id.* Eight other Ninth Circuit judges joined Judge Bennett’s dissent. App. 70.

Because the panel’s misapplication of *Strickland* in Jones’s case will lead to binding circuit precedent that lowers the highly demanding prejudice standard set by this Court in its *Strickland* jurisprudence, intervention by this Court is once again merited.

A. *Strickland*’s prejudice standard and reweighing process.

As pertinent here, under *Strickland*’s prejudice analysis, “prejudice exists if there is a reasonable probability that, but for [] counsel’s ineffectiveness,” a defendant would not have been sentenced to death. *Andrus v. Texas*, 140 S. Ct. 1875, 1885–86 (2020); see also *Wiggins v. Smith*, 539 U.S. 510, 536 (2003); *Strickland*, 466 U.S. at 694. In determining whether a petitioner has made that showing, a reviewing court must consider all of the available mitigation evidence—including evidence adduced by the state courts, as well as that adduced in the habeas proceedings—and reweigh that evidence against all of the aggravating evidence. *Andrus*, 140 S. Ct. at 1886; *Wiggins*, 539 U.S. at 534.

In order to balance mitigation against aggravation, the reviewing court must necessarily assign weight to, and make credibility findings concerning, the evidence being considered. See, e.g., *State v. Hidalgo*, 390 P.3d 783, 797–98, ¶¶ 62, 69 (Ariz. 2017) (holding that, in independently reviewing the death sentence,⁵ the Arizona Supreme

⁵ Because Jones murdered the victims in 1992, on direct appeal the Arizona Supreme Court independently reviewed the propriety of his death sentences. App. 266–85. In conducting this independent reweighing of aggravating and mitigating circumstances, and affirming Jones’ death sentences, the court gave “mitigating weight to [Jones’s] history of substance abuse,

Court “consider[s] the quality and the strength, not simply the number, of aggravating and mitigating factors.”).

B. The panel failed to conduct the reweighing *Strickland* requires.

As Judge Bennett explained, the panel “failed to give appropriate deference to the district court’s careful and thorough evaluation of the evidence” and credibility findings. App. 95. And in erroneously substituting its own contrary factual findings, primarily based on its reading of the 15-year-old cold record of the district court’s evidentiary hearing,⁶ the panel improperly pushed its thumb down on the mitigation side of the reweighing scale. *Id.* This alone distorted the proper *Strickland* reweighing process.

The panel compounded its error by failing to balance the mitigating evidence against the aggravating evidence. Jones argues that the panel acknowledged three times in its order and amended opinion that it had an obligation to consider all the evidence and to reweigh the aggravation against the mitigation. BIO 22. He further asserts that the panel twice acknowledged the aggravating factors. *Id.* But there is a difference between acknowledging this obligation and actually conducting the required reweighing, and the amended opinion clearly indicates that the panel failed to conduct the

intoxication at the time of the offenses, and head injuries.” *Id.* at 284.

⁶ The district court’s 3-day hearing was conducted in March, 2006. App. at 167.

reweighing mandated by this Court's *Strickland* jurisprudence.⁷

Although the panel briefly recited the facts of the crimes, App. 8, and acknowledged the death-qualifying aggravating circumstances found by the sentencer, App. 14, it failed to ascribe any weight or value to that aggravation. Instead of conducting the required *Strickland* reweighing of mitigation against aggravation, the panel merely undertook a comparative analysis of Jones's case to cases in which this Court and the Ninth Circuit have found trial counsel's deficient presentation of mitigation to be prejudicial. *See* App. 58–61.

This sort of comparative analysis is clearly contrary to this Court's *Strickland* jurisprudence, which requires the reviewing court to determine whether there is a reasonable probability that, absent the deficient performance, the sentencer *in the defendant's case* would have rendered a different verdict. *See Strickland*, 466 U.S. at 695.

Even had the panel correctly found the district court's factual and credibility findings clearly erroneous, requiring a reweighing of the allegedly new mitigating evidence, it should have directed its

⁷ This is not the first time that the Ninth Circuit's pronouncements have not matched its actions. In *Kayer*, although the Ninth Circuit acknowledged the correct deferential standard of review under 28 U.S.C. § 2254(d), this Court observed that “the panel ‘essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court’s decision was unreasonable.” 141 S. Ct. at 523 (quoting *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018)). *Beaudreaux* itself was another reversal of a Ninth Circuit case. *Id.*

focus on what sentence an Arizona court would render, absent the errors. Had the panel done so, it would have necessarily had to take into account, as the dissent points out, that Arizona sentencers “consistently” give “extraordinary weight” to the multiple homicides aggravator, which was applied in Jones’s case. App. 108 (quoting *State v. Poyson*, 475 P.3d 293, 302, ¶ 43 (Ariz. 2020); see also *Hidalgo*, 390 P.3d at 798, ¶ 69; *State v. Garza*, 163 P.3d 1006, 1022, ¶ 81 (Ariz. 2007). In fact, “[e]ven when the multiple homicides aggravator is the only aggravator weighed against multiple mitigating factors, [Arizona sentencers have] found the mitigation insufficient to warrant leniency.” *Poyson*, 475 P.3d at 302, ¶ 43 (citing *State v. Moore*, 213 P.3d 150, 172, ¶¶ 137–38 (Ariz. 2009); *State v. Dann*, 207 P.3d 604, 629, ¶ 153 (Ariz. 2009); and *State v. Armstrong*, 189 P.3d 378, 393, ¶¶ 83–84 (Ariz. 2008)).

Similarly, given the brutal manner in which Jones murdered victims Robert and Tisha Weaver, App. 242–45, as well as the fact that pecuniary gain was the catalyst for the murders, App. 267–68, the heinous, cruel, or depraved and pecuniary gain aggravators would have been (and were) given great aggravating weight by an Arizona sentencer. See *Poyson*, 475 P.3d at 302, ¶ 42 (finding the cruelty aggravator was entitled to “great weight” based on the “prolonged and brutal way” the two victims were murdered, and that the pecuniary gain aggravator “weigh[ed] heavily in favor of [the] death sentence[s]” because pecuniary gain was the “catalyst for the entire chain of events leading to the murders”).

Moreover, in addition to the three weighty aggravators of multiple homicides, cruelty, and pecuniary gain found for both murders, the

additional aggravator of the victim being under 15 years of age was applied to Jones's murder of 7-year-old Tisha. Jones attempts to sanitize his murder of 7-year-old Tisha by stating that he killed her after he "encountered" her. BIO 1. In fact, while Jones was attacking her great-grandmother, Tisha ran to hide under a bed. App. 243. Jones "found Tisha and dragged her out from under the bed" and "then struck Tisha in the head at least once with the baseball bat, placed a pillow over her head, and suffocated her, or strangled her, or both." *Id.*

The panel failed to place any weight on the aggravating circumstances or reference any Arizona cases relating to the weight Arizona courts would have given the aggravation, contrary to the reweighing required by *Strickland*. By failing to give proper deference to the district court's factual findings, conducting a comparative analysis instead of the required reweighing of mitigation and aggravation, and substituting its own judgment for that of an Arizona sentencer, the panel improperly and materially lowered *Strickland's* highly demanding standard.

CONCLUSION

This Court should grant the petition for writ of certiorari and summarily reverse the Ninth Circuit's grant of habeas relief.

Respectfully submitted.

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