No. 24-7302

In the Supreme Court of the United States

STERLING ATKINS, JR.,
Petitioner.
v.
JEREMY BEAN, Warden, et. al.,
Respondent.

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

REPLY BRIEF OF PETITIONER

CAPITAL CASE

A. Richard Ellis
105 Quarry Road
Mill Valley, CA 94941
TEL: (415) 389-6771
FAX: (415) 389-0251
a.r.ellis@att.net

Member, Supreme Court Bar
Counsel of Record for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 24-7302

In the Supreme Court of the United States

STERLING ATKINS, JR.,
Petitioner,
-v-
JEREMY BEAN, WARDEN, ET. AL.
Respondent.

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

REPLY BRIEF OF PETITIONER

I. Introduction.

Respondent's Brief in Opposition ("BIO") is based on a gross misreading of the facts, namely that "[a]t the time of the penalty phase, trial counsel presented significant evidence in mitigation." (BIO at i). From that error, the BIO derives its arguments: that *Strickland v. Washington*, 466 U.S. 668 (1984) resolves the ineffective assistance of counsel claims (BIO at 12-15) and that Atkins has not shown deficient performance or prejudice. (BIO at 18-30). Respondent's ill-formulated "questions presented" follow from that: "can an ineffective assistance of counsel claim be denied on the basis of an alleged

failure to show what trial counsel did rather than what they failed to do...when the record shows that nothing could be done." (BIO at i). These premises are false.

Certiorari should be granted because the shocking facts of this case go well beyond any attorney ineffectiveness sanctioned by *Strickland* and its progeny, and, if the Ninth Circuit's opinion is left standing, it would set a new and extremely problematic standard with these issues, an opinion which could be cited to justify virtually any deficient attorney performance, no matter how perfunctory.

On December 2, 2024, the Ninth Circuit issued a published opinion affirming the denial of habeas corpus relief as to issues mainly dealing with ineffective assistance of counsel at the penalty phase. *Atkins v. Bean*, 122 F.4th 760 (9th Cir. 2024) (App. A).[1] That opinion conflicts with decisions of this Court and a grant of certiorari is necessary to maintain the uniformity of this Court's decisions.

II. The Record Shows That Trial Counsel Were Indisputably Ineffective.

Respondent either minimizes or ignores the most important and shocking facts of this case: lead trial counsel proceeded to trial only six days after her appointment when the trial judge told her that if she answered "not ready" he would not assign her the case.

[1] Three ineffective assistance of counsel issues were granted a certificate of appealability: 1) defense counsel failed to investigate and present substantial readily available mitigating evidence at the penalty phase (Issue One(a) in the Ninth Circuit); 2) ineffective assistance of counsel in the preparation and presentation of defense expert Dr. Colosimo at the penalty phase (Issue One(b)); and 3) cumulative ineffective assistance of counsel at the penalty phase (Issue One(c)).

(USCA9-285, 340-344, 507).[2] As a result, she failed to ask for a continuance. (USCA9-340-344). Her earlier work on the case was minimal and had nothing to do with the penalty phase mitigation issues currently before this Court. It completely ceased shortly after the preliminary hearing, nine months prior to Mr. Atkins' trial. Second-chair counsel Mr. Kent Kozal was, in his own words, "a newly-licensed attorney a few months out of law school;" "had never tried a jury trial, much less a capital case;" and "was not qualified under Nevada Supreme Court Rule 250 to serve on a capital case." (USCA9-512-514).

By allowing the trial to proceed with these unqualified and unprepared attorneys, both defense counsel and the trial court *prima facie* deprived Mr. Atkins of his Sixth Amendment right to effective counsel. Tellingly, neither Respondents nor trial counsel themselves can point to any substantive pre-trial preparation. The performance of Mr. Atkins' counsel fell below reasonable standards of representation, to his prejudice, in that his attorneys failed to exercise the skill, judgment, and diligence expected of reasonably competent criminal defense lawyers in investigating and presenting mitigating evidence and challenging the prosecution's aggravating evidence.

Contrary to Respondent's argument, *Strickland* does not resolve the case in Respondent's favor. (BIO at 12-15).

---

[2] The trial judge made this explicit: "I'll note for the record that this Court would not have excused Mr. Sgro if Ms. Melia had indicated that she would not be prepared for it." (USCA9-342). The federal record on appeal in the Ninth Circuit Court of Appeals (the excerpts of record) is referred to as "USCA9-[page]."

Respondent makes the following false or misleading arguments in the BIO:

> 1) That "the record did not include information to show what investigation counsel performed; how much investigation counsel performed; or what information was uncovered or the avenues counsel failed to pursue," which the Ninth Circuit held was "fatal" to the claim. (BIO at 9; *see also* BIO at 26, citing App. 8).

However, the record plainly showed that virtually nothing was done nor any information uncovered mainly because *there was no investigator and no time to investigate*.[3] Lead counsel Ms. Melia substituted in on March 14, 1995, only six days[4] prior to the commencement of Atkins's trial (USCA9-569) and two of those days were devoted to another case.[5] She had no involvement with his case since June of 1994, nine months prior to the trial. (USCA9-507). Melia admits that she had spent only "*numerous hours in the last several days* preparing the case;" and "I did not have the opportunity to do any further investigation," meaning *any* investigation since the preliminary hearing, which had nothing to do with penalty phase issues. (USCA9-341) (emphasis added). So too co-counsel Kent Kozal does "not recall any investigator being used in Mr. Atkins' defense." (USCA9-513). Even without considering the new declarations presented in

---

[3] At the beginning of the trial, Mr. Atkins complained that the previous investigators, hired by attorney Sgro for the preliminary hearing, had quit (USCA9-285), and there is no evidence that new investigators were hired.

[4] As mentioned *supra*, Ms. Melia effectively had only four days to prepare, as she appeared in the Nevada Supreme Court in another case on two of those days. (USCA9-284).

[5] March 14, 1995 was the day the substitution was approved (USCA9-569); the actual order of appointment is dated later, on May 24, 1995. (USCA9-575). In that order the Court refers to March 10, 1995, which is the date of the filing of the substitution motion. (USCA9-567-575).

federal court as Respondent argues (BIO at 9-10), it is clearly ineffective assistance for counsel to proceed to trial in a capital case without investigating the case. Atkins cannot be faulted for failure to show what does not exist.

2) That *Strickland* has already resolved the ineffective assistance of counsel issues. (BIO at 12-15).

Strickland looks to reasonable standards of representation in investigation and presentation of mitigating evidence. By any objective standard, it cannot be reasonable performance for lead counsel to proceed to trial in a capital case a few days after being appointed with a co-counsel fresh out of law school who had never tried a case to a jury. *Strickland* does not sanction unprepared lead counsel's failure to request a continuance because that would have meant she would have been deprived of her appointment to the case. *Strickland* does not sanction proceeding to trial without an investigator or a mitigation investigation, or having a psychologist interview the defendant after the trial was underway. *Strickland* does not sanction defense counsel reviewing 500 pages of juror questionnaires two hours before jury selection.[6] These were all abject failures, yet Respondent asserts there has been no showing of "what counsel failed to do" (BIO at 12) and that these were "reasonable decisions" or "strategic choices." (BIO at 13-14). The failures have been clearly shown from the record, and they cannot be categorized as

[6] Although the trial court authorized juror questionnaires "some months" prior to trial, they were not prepared by defense counsel until March 20, 1995, the day jury selection began. (USCA9-283). The Court granted her two hours. (USCA9-284).

"reasonable decisions" under *Strickland* or any of this Court's ineffective assistance of counsel guidelines.

3) Respondent attempts to show counsel was effective by claiming there was pre-trial investigation by the former attorney and Mr. Kozal.

Respondent claims that Petitioner "utterly ignores the investigation conducted by Mr. Sgro and Ms. [sic] Kozal in the year following the preliminary hearing, or the nearly month-long period between the guilt and penalty phases" (BIO at 19) and "the prior investigation which Ms. Melia specifically reviewed in preparation for trial." (BIO at 20). This is totally contrary to the record. There is no evidence any investigator was ever assigned to this case after the preliminary hearing, either by Mr. Sgro, Ms. Melia or Mr. Kozal. There simply was no pre-trial investigation, nor has Respondent ever identified any. As discussed *supra*, both Ms. Melia and Mr. Kozal admit there was no time to investigate and Mr. Kozal, the only defense attorney on the case in the months prior to trial, and the person in charge of the penalty phase, admits he does "not recall any investigator being used in Mr. Atkins' defense." (USDA9-513).

As for the month between the guilt and penalty phases (BIO at 21), the record also shows that little was done, as obvious witnesses such as Evelyn Gomez, Alicia Palencia, and Vaedra Sowerby-Jones were not interviewed and no investigator or mitigation expert ever retained. To term this as a "strategic determination regarding additional investigation in the month between the guilt and penalty phases" (BIO at 21) is a gross distortion of the

record. And the claim that Petitioner "fails to address the mitigation investigation" in that period (BIO at 21-22) fails for the same reason.

Neither Respondent nor the record point to any minimally adequate mitigation investigation or presentation. Only two family witnesses were presented, Sterling Atkins Sr., and Stephanie Normand, Atkins' father and half-sister. Sterling Sr. testified on direct for seven pages of transcript (USCA9-356-363) and Stephanie Normand also testified for seven pages on direct with only bare-bones mentions of Atkins' parents' alcoholism and fighting. (USCA9-366-373). This is a total of fourteen pages of transcript regarding mitigating evidence, a few minutes of testimony on Mr. Atkins' behalf, after the defense completely failed to present any defense at all at the guilt phase. (USCA9-336).[7]

Nor does Dr. Colosimo's appointment "necessarily support[] the fact that counsel conducted some investigation prior to Ms. Melia's appointment which was used in the penalty phase." (BIO at 20, citing App. 8). Atkins was never evaluated for competency or psychiatric issues prior to the trial. Dr. Colosimo was substituted as a court-appointed psychologist on March 14, 1995 (USCA9-565-566) only a few days before trial. Subpoenas for Atkins' medical records were not issued until the same day. (USCA9-554-557). Dr. Colosimo's 6-line "evaluation" was received March 21, 1995, *after* the trial had

[7] At the penalty phase, the defense also presented a warden who testified briefly regarding prison conditions, and Dr. Philip Colosimo, who, as a result of his unpreparedness, told the jury that Mr. Atkins was a sociopath.

commenced. (USCA9-544).[8] As a result of his non-preparation, his testimony was a disaster. Nor was any mitigation specialist hired to gather family and background information, another serious omission. All of this belies Respondent's contention that "Atkins fails to present any evidence that Ms. Melia specifically was not prepared for the penalty phase." (BIO at 20).

It is also misleading for Respondent to assert that former counsel Mr. Sgro "asked for a continuance of the trial not because he was unprepared but due to a scheduling conflict with another murder trial...No one required or requested a continuance because they were not prepared." (BIO at 21). This ignores the obvious: Mr. Sgro expected to be granted a continuance for Mr. Atkins' trial, which was not granted, which caused him to withdraw on the eve of trial because he was not prepared to try his case. Sgro himself admitted this in his "Motion To Allow Substitution of Attorneys," filed on March 10, 1995, virtually on the eve of Atkins' trial. (USCA9-564-572).

4) Respondent claims that Petitioner's abuser was an adequate and competent presenter of his abuse.

Respondent goes to great lengths to construe defense counsels' calling of Petitioner's father, Sterling Atkins Sr., as an adequate and competent presenter of the abuse when he himself was the main perpetrator of the abuse. (BIO at I, 4-5, 19, 26-29).

[8] It was a cursory six-line statement of "preliminary findings" that "the patient has emotional and intellectual dysfunctions and deficits" by the newly-appointed Colosimo. (USCA9-548). There were no details as to competency or any other matters that could have helped at the guilt phase.

This is multiply flawed. Sterling Sr. testified on direct for only seven pages of transcript (USCA9-356-363) and gave misleading and false testimony about his taking an active role in his son's life and portraying Atkins' mother as doing "the best she could" (USCA9-359) while minimizing his own abuse and neglect. It cannot be objectively reasonable trial strategy to rely on the main perpetrator of the abuse to present a full, unvarnished, and unbiased picture of that abuse to the jury. This pales in comparison to the penalty phase mitigating testimony Petitioner's brother Shawn Atkins could have given regarding the full extent of their father's abuse along with the testimony of other un-investigated and un-presented penalty phase witnesses such as Evelyn Gomez, Alicia Palencia, and Vaedra Sowerby-Jones.

5) Respondent's argument regarding Ms. Melia's conflict.

The trial judge stated that "this Court would not have excused Mr. Sgro if Ms. Melia had indicated that she would not be prepared for it" (USCA9-340), which meant that she would not have been appointed had she truthfully answered "not ready." This put her in a conflict of interest with her client: either proceed unprepared to her client's detriment or ask for more time to prepare, and lose the appointment, which would have hurt her financially. Respondent treats this entirely as a financial conflict of interest, another claim which was denied a certificate of appealability. (BIO at 10-11). However, the conflict shows the reason for counsel's rush to trial: her desire to keep the case. Respondent claims that "[i]t does not appear from the record that Ms. Melia believed she

would lose the appointment if she sought a continuance..." (BIO at 11). The record shows the exact opposite, as there was no other reason for her to not ask for a continuance.

III. Prejudice Has Been Shown.

Respondent argues there was no prejudice in asserting that the un-presented evidence was mainly cumulative of that presented. (BIO at 25-29). This sleight-of-hand is accomplished by vastly exaggerating the paucity of family mitigating evidence presented by two family members in a total of 14 pages of direct testimony, and by claiming that any new evidence was cumulative to that minimal presentation.

Respondent repeats the Ninth Circuit's holding that "none of the new evidence addressed what investigation took place regarding Atkins' upbringing or social history." (BIO at 26, citing App. 8). As discussed supra, Atkins cannot be penalized for not showing what does not exist.

The prejudice analysis in ineffective assistance claims focus on what was *not done* and what *should or could have been done*. *See, e.g., Williams v. Taylor,*529 U.S. 362, 395, 398 (2000) (defense counsel ineffective for failing to present "Williams' childhood, filled with abuse and privation, that he was 'borderline mentally retarded," and "did not begin to prepare for [the punishment] phase of the proceeding until a week before the trial"); *Wiggins v. Smith,* 539 U.S. 510, 532-536 (2003) (defense counsel ineffective for failure to investigate and present evidence of dysfunctional family history, physical abuse,

homelessness "relevant to assessing a defendant's moral culpability"); *Rompilla v. Beard,* 545 U.S. 374, 381-382, 391-393 (2005) (mitigation investigation and presentation far more extensive than in Atkins' case was inadequate; defendant was "actively obstructive" to the investigation, unlike Atkins).

Respondent focuses mainly on irrelevant or minor factual differences of *Williams, Wiggins* and *Rompilla* from Mr. Atkins' case to argue that his reliance on them is misplaced, but ignores their underlying holdings. (BIO at 12, 14, 22, 23, 29). *Williams* is deemed irrelevant because in that case defense counsel "improperly focused on a different strategy without first conducting a proper investigation" (*Id.* at 22), yet Williams' counsel presented more mitigating evidence than Atkins' attorneys;[9] similarly failed to present the full extent of childhood privation; and "did not begin to prepare for [the punishment] phase of the proceeding until a week before the trial." (*Williams* at 395). Here, there is no evidence at all of pre-trial penalty phase preparation, which apparently began in the midst of trial. Even the main defense witness, Dr. Colosimo, did not evaluate Atkins until a few days before the trial (USCA9-566; *see also* USCA9-541-548,561-566) and that 6-line evaluation was received by defense counsel on March 21, 1995, *after* the trial had commenced. (USCA9-544).

As for *Wiggins*, Respondent attempts to distinguish it because "that case involved trial counsel prematurely discontinuing their investigation of mitigating evidence in favor

[9] Williams' defense counsel presented "testimony of Williams' mother, two neighbors, and a taped excerpt from...a psychiatrist." *Williams*, 529 U.S. at 369.

of a different strategy in the penalty phase" and here "there was no allegation in the first habeas appeal in state court that counsel improperly focused on a different strategy without first conducting a proper investigation in this case." (BIO at 22). Here there is no evidence of pre-trial strategy at all, or even sufficient time to formulate a strategy, let alone a different strategy. *Wiggins* recognized that even a "half-hearted" mitigation case can be insufficient, and evidence of a dysfunctional family history and physical abuse and homelessness are "relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 526, 532-535.

In a similar vein, Respondent claims reliance on *Rompilla* is unavailing because it involved a failure to review court files and here "Atkins never alleged that counsel failed to look at court files..." (BIO at 23). *Rompilla* is not limited to situations involving the non-discovery of court files. Although Rompilla's trial counsel conducted a far more extensive investigation than Atkins' attorneys as they interviewed various family members and presented testimony from five of them at trial, and consulted with three mental health experts, this was held insufficient. *Rompilla*, 545 U.S. at 381-382. And Rompilla's "own contributions to any mitigation case were minimal" as he was uninterested in helping counsel and at times "even actively obstructive" (*Id*. at 381), unlike Mr. Atkins.

Because counsel unreasonably relied on Atkins's father, the main perpetrator of the abuse, the true scope and extent of his abuse was never revealed to the jury. Nor was

Ms. Normand able to tell the jury the full story of Atkins's abuse, neglect, poverty, and emotional and intellectual disabilities. The expert witness, Dr. Colosimo, was so ill-prepared that he was a liability. Coupled with defense counsels' complete abdication at the guilt phase, where no witnesses or evidence was presented (USCA9-338), this amounted to a virtual complete abandonment of Atkins' right to a defense.

The prejudice analysis looks to the weight of the available evidence and its effect on the case. *Strickland*, at 693-95. "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. Atkins's jurors sentenced him to death "knowing hardly anything about him." *Porter*, 558 U.S. at 33.

Respondent ignores the abject failures both with delay in contacting the expert Dr. Colosimo, his belated reports, and the debacle that ensued from this inadequate preparation. The failure to have Atkins timely evaluated by Dr. Colosimo led to the inability to show Atkins's incompetency and diminished responsibility at the guilt phase.[10] and consigned him to penalty phase testimony, which was harmful. Kozal

[10] No EEG or CAT scans were done, despite many red flags. (USCA9-418). The witness did not spend any time "reviewing the facts and circumstances of this particular crime of which the Defendant's charged." (USCA9-422). Yet Dr. Colosimo's report stated that "the defendant was competent at the time of the incident." (*Ibid*.) By "competent" the witness meant that "he knew right from wrong, was not under the influence of any psychoactive drugs or illicit drugs at the time of the incident, had not any particular history of illness during the time that this occurred." (USCA9-429). The witness was comfortable in rendering this opinion of "competence" without reviewing any of the reports or facts and circumstances of the case or the incident. (USCA9-423). It was based on "his [Atkins's] version of the facts." (*Ibid*.)

himself admits this failure and states he "may have met with this doctor, and I got a sense from his testimony that he was upset because we should have consulted or prepped him more. I got the feeling that this doctor felt put on the spot during the hearing because we did not prep him enough for it." (USCA9-513). Respondent ignores the harmful effects and the prejudice it thereby engendered.

This Court, in *Sears v. Upton,* 561 U.S. 945 (2010) (*per curiam*) reviewed the mitigating evidence that was available through reasonable investigation and pointed out that, as in Atkins' case, a finding of prejudice under *Strickland* has never been limited to cases "in which there was little or no mitigation evidence presented." *Ibid*. at 955.

Atkins has shown deficient performance, the first prong of *Strickland*, as well as prejudice, and has shown that the Nevada Supreme Court's holding was both contrary to clearly established law under 2254(d)(1) and an unreasonable determination of the facts under 2254(d)(2).

IV. Conclusion.

The dismaying, and even shocking facts of this case, show that Mr. Atkins received no real defense at all. But these facts have resonance well beyond this case. Left uncorrected, it would legitimize counsel appointed only days prior to the trial spending only hours preparing for a capital case; the failure to investigate; the failure to timely have the defendant evaluated; and the failure to present readily-available mitigating evidence. This is a prime example of a rare "extreme malfunction in the state criminal justice

system," *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022), citing *Harrington v. Richter*, 562 U.S. 86, 102 (2010), for which federal habeas corpus relief is specifically reserved.

Dated this 8th day of September, 2025

Respectfully submitted,

/s/ A. Richard Ellis

A. RICHARD ELLIS
105 Quarry Road
Mill Valley, CA 94941
(415) 389-6771
FAX (415) 389-0251
a.r.ellis@att.net
CA Bar No. 64051
Attorney for Petitioner