FILED

NOV 7 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANNY LEE JONES, Petitioner-Appellant, v. CHARLES L. RYAN, Respondent-Appellee.	No. 18-99005 D.C. No. 2:01-cv-00384-SRB ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Hon. Susan R. Bolton, District Judge, Presiding

Argued and Submitted February 16, 2021
San Francisco, California

BEFORE: S.R. THOMAS, and HAWKINS, and CHRISTEN, Circuit Judges

Order;
Amended Opinion by Judge S.R. Thomas;
Dissent from Order by Judge Bennett;
Dissent from Order by Judge Ikuta

SUMMARY*

Habeas Corpus / Death Penalty

The panel filed an amended opinion, denied a petition for panel rehearing, and denied on behalf of the court a petition for rehearing en banc, in a case in which the panel, applying the appropriate standards pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), reversed the district court's judgment denying Danny Lee Jones's habeas corpus petition challenging his Arizona death sentence, and remanded to the district court with instructions to issue the writ.

In Claim 1, Jones asserted that his trial counsel was constitutionally ineffective by failing to request a mental health expert in advance of the sentencing hearing. The panel held that the state court record demonstrates that trial counsel was constitutionally ineffective by failing to secure a defense mental health expert, and that, pursuant to 28 U.S.C. § 2254(d)(1), the Arizona Supreme Court's contrary conclusion was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. Holding that the state post-conviction review (PCR) court's decision was also based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2), the panel agreed with Jones that (1) the PCR court employed a defective fact-finding process when it denied PCR counsel's funding request for a defense neuropsychological expert, effectively preventing the development of Claim 1; and (2) the state court's failure to hold a hearing on Claim 1 resulted in an unreasonable determination of the facts. The panel wrote that if the state court had reached the question of *Strickland* prejudice, the panel would be required to afford the decision deference under AEDPA, but because the PCR court did not reach the issue of prejudice, the panel reviewed the issue de novo. Noting that Jones was diligent in attempting to develop the factual basis for the claim in state court, the panel wrote that the district court did not err in its expansion of the record, and the panel considered the evidence developed in the district court in conducting its de novo review. The panel wrote that on de novo review, it must weigh the aggravating factors against the mitigation evidence, as developed in the state court record that was available, but not presented. The panel also considered the mitigation evidence that was presented. Reweighing the evidence in aggravation against the totality of

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the available mitigating evidence, the panel concluded that there is at least a reasonable probability that development and presentation of mental health expert testimony would have overcome the aggravating factors and changed the result of the sentencing proceeding. The panel therefore concluded on de novo review that Jones demonstrated *Strickland* prejudice, and, accordingly, reversed the district court's denial of relief on Claim 1.

In Claim 2, Jones asserted that his trial counsel was constitutionally ineffective by failing to seek neurological or neuropsychological testing prior to sentencing. The panel wrote that counsel's failure to promptly seek neuropsychological testing ran contrary to his obligation to pursue reasonable investigations under *Strickland*, and in particular, his obligation to investigate and present evidence of a defendant's mental defect. The panel therefore concluded that the PCR court's decision that defense counsel's performance did not fall below an objectively reasonable standard was an unreasonable application of *Strickland*, and that Jones satisfied § 2254(d)(1). The panel also held that the state PCR court's decision was based on an unreasonable determination of the facts, satisfying § 2254(d)(2), where the PCR judge made factual findings regarding the necessity of neuropsychological testing, not on the basis of evidence presented by Jones, but on the basis of his own personal conduct, untested memory, and understanding of events—and by plainly misapprehending the record, which included a forensic psychiatrist's testimony, six years earlier, strongly suggesting that neuropsychological testing was essential. Because the PCR court did not reach the issue of prejudice, the panel reviewed the issue de novo. Noting that Jones was diligent in attempting to develop the factual basis for the claim in state court, the panel wrote that the district court did not err in its expansion of the record, and the panel considered the evidence developed in the district court in conducting its de novo review. The panel concluded that Jones demonstrated *Strickland* prejudice because there is a reasonable probability that had such testing been conducted, and had the results been presented at sentencing, Jones would not have received a death sentence. The panel wrote that, in combination, the testing results and the presentation of contributing factors would have dramatically affected any sentencing judge's perception of Jones's culpability for his crimes, even despite the existence of aggravating factors.

Because the panel determined that Jones is entitled to relief and resentencing on the basis of Claims 1 and 2, the panel did not reach whether new evidence presented at the federal evidentiary hearing fundamentally altered these claims such that they were unexhausted, procedurally defaulted, and excused in light of *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), and *Martinez v. Ryan*, 566 U.S. 1

(2012). The panel likewise did not reach the merits of any of Jones's other claims.

Judge Bennett, joined by Judges Callahan, R. Nelson, Bade, Collins, Lee, Bress, Bumatay, and VanDyke, dissented from the denial of rehearing en banc. He wrote that the panel improperly and materially lowered *Strickland*'s highly demanding standard and failed to afford the required deference to the district court's findings—essentially finding that no such deference was due. He wrote that the court should have taken this case en banc (1) to secure and maintain uniformity in our case law; (2) because this case involves issues of exceptional importance; and (3) so that the Supreme Court, which has already vacated this court's judgment once in this case, does not grant certiorari a second time and reverse.

Judge Ikuta, joined by Judges Callahan and VanDyke, dissented from the denial of rehearing en banc. She agreed with Judge Bennett that even if the panel had been correct in conducting a de novo review of the state court's decision, it erred in failing to defer to the district court's factual findings. In her view, however, the panel had no business conducting such a de novo review in the first place. She wrote that in reaching the issue of prejudice de novo, the panel mischaracterized the state court opinion and disregarded the admonitions of the Supreme Court to give such opinions proper deference.

COUNSEL

Amanda Bass (argued) and Leticia Marquez, Assistant Federal Public Defenders; Jon M. Sands, Federal Public Defender, District of Arizona; Federal Public Defenders' Office, Tucson, Arizona; Jean-Claude André, Bryan Cave Leighton Paisner LLP, Santa Monica, California; Barbara A. Smith and J. Bennett Clark, Bryan Cave Leighton Paisner LLP, St. Louis, Missouri; Kristin Howard Corradini, Bryan Cave Leighton Paiser LLP, Chicago, Illinois; for Petitioner-Appellant.

Jeffrey L. Sparks (argued), Assistant Attorney General, Capital Litigation Section; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General of Arizona; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

ORDER

The opinion filed June 28, 2021, *Jones v. Ryan*, 1 F.4th 1179 (9th Circ. 2021) is amended and superseded by the opinion filed concurrently with this order.

The full court has been advised of the petition for rehearing en banc. A judge of this Court requested a vote on the petition for rehearing en banc. A majority of the non-recused active judges did not vote to rehear the case en banc. Fed. R. App. 35. The petition for panel rehearing and for rehearing en banc is DENIED. No further petitions for panel rehearing or rehearing en banc will be entertained.

Amended Opinion by Judge Sidney R. Thomas

S.R. THOMAS, Circuit Judge:

Danny Lee Jones, an Arizona inmate on death row, appeals the district court's denial of his petition for writ of habeas corpus on remand from this court and the Supreme Court of the United States. Applying the appropriate standards pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we conclude that Jones was denied the effective assistance of counsel at sentencing. We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.