No. 08-7229

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2008

DANIEL WAYNE COOK,

Petitioner,

v.

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Respondent.

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

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REPLY BRIEF

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The state has not disputed that the three Questions Presented are substantial. Virtually its entire opposition merely argues why this case should not be the vehicle to decide these Questions. But this case squarely and cleanly poses each of the three Questions Presented.

1. Neither the trial court nor the Arizona Supreme Court considered mitigation unrelated to the offense. Question One of the Petition poses the question whether the Arizona courts unreasonably applied *Lockett v. Ohio,* 438 U.S. 586 (1978) and subsequent cases, by holding that unless mitigation evidence had a "nexus" with the crime, it could not be considered. The state does not disagree with petitioner's description of what the *Lockett* cases require. It does not argue that the issue is not substantial.

Nor does it assert that *if* the Arizona courts imposed a "nexus" requirement, that doing so would nonetheless not be an "unreasonable application" of (or, perhaps more precisely, unreasonable refusal to apply), *Lockett*. Rather, the state argues that the Arizona Supreme Court imposed no such restriction, and – without saying it in so many words – that it complied with *Lockett*. *E.g.* Brief in Opposition p. 8 ("Brief") ("the state courts considered mitigation evidence, including mental health information that was available in the record.") *See also, id.* p. 10 ("the Arizona courts did not disregard Cook's mental health evidence. Instead, the state courts simply disagreed with Cook's post-sentencing analysis of the significance of that evidence.").

The Arizona Supreme Court opinion in petitioner's case demonstrates that neither Arizona court complied with *Lockett*. When petitioner's case was decided by the Arizona Supreme Court, a "nexus" constraint had been well established and long applied. The state glosses over this important point. The most the state will concede is that petitioner asserts "that the Arizona Supreme Court has allegedly imposed a causal nexus requirement . . ." Brief p. 11. But there is no question that Arizona *has* insisted upon "nexus." As demonstrated, Petition, pp. 14, 15, the Arizona Supreme Court had established its "nexus" policy at least eleven years before, and has reiterated and adhered to it for years after, deciding this case. *See e.g. State v. Wood,* 180 Ariz. 53, 72, 881 P.2d 1158 (1994); *State v. Brewer,* 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *State v. Wallace,* 160 Ariz. 424, 427, 773

P.2d 983, 986 (1989); *State v. Vickers,* 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981).[1]

As Petitioner also apprised this Court, Pet. p. 14, *State v. Brewer, supra,* was being written as Petitioner's case was decided, and issued just seven days after the Arizona Supreme Court denied rehearing in this case. In *Brewer* the Arizona court recognized that Brewer had a troubled background and personality disorder, but, applying its nexus policy, refused to consider them because there had been no showing that those experiences affected Brewer at the time of the crime. It is inconceivable to believe that the Arizona Supreme Court made a special exception to its nexus requirement for petitioner in this case. And it didn't.

In Arizona as in other states with capital prosecutions, the sentencing judge must consider both mitigating factors identified by state statute, and any others – the *Locket*, or non-statutory factors. Here, the Arizona Supreme Court first described how the trial court dealt with the statute:

> "Under [§ 13-703(G)(1),] the sentencing judge must consider whether the "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." The trial court acknowledged that there was some evidence of intoxication and drug use in the record, but that on the evidence before him, he did not feel justified in finding that Cook was under the

[1] Additionally, as we noted in the Petition, n. 9, in 2000 the Arizona Supreme Court discussed at length the reasons for its insistence upon a "nexus," citing numerous cases both before and after its opinion in Petitioner's case. *State v. Hoskins,* 199 Ariz. 127, 151, 14 P.3d 997, 1021 (2000)(family dysfunction or mental impairment "can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts. *We reaffirm that doctrine here.*"(emphasis supplied)).

> influence of alcohol or drugs such that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was affected." 170 Ariz. at 64.

Then, the opinion described the trial court's second step – consideration of non-statutory factors:

> "The trial court also stated that it had considered Cook's history of mental problems evidenced by the Rule 11 examination reports and the presentence report. He further noted Cook's previous attempts at suicide. He concluded, however, that "I simply do not find there to be any connection between any of these prior mental problems and the offenses that were committed in this case." 170 Ariz. at 64

The Arizona Supreme Court obviously knew that the trial court had imposed the nexus requirement upon non-statutory mitigating factors, for as has just been seen, it quoted the words by which the trial judge did so. Then, it gave its stamp of approval to the trial court relative to non-statutory, "*Lockett,"* mitigation. In the segment of its opinion clearly directed at non-statutory mitigation, the court said:

> "We are satisfied from the record that the trial judge's consideration of the evidence of Cook's mental history was sufficient to have identified any *independent* [*i.e.* non-statutory] mitigating circumstance weighing in favor of leniency." 170 Ariz. at 64 (emphasis supplied.) [2]

That it did so is no surprise, given its well established nexus jurisprudence.

[2] Just before making this statement, the Arizona Supreme Court said "Our review, however, does not end here. We have previously held that even if the trial court does not find sufficient evidence to establish the § 13-703(G) mitigating circumstance of 'insufficient capacity,' the court must further review all of the evidence for any *independent mitigating* effect that suggests in some way that the defendant be treated with lenience." 170 Ariz. at 64 (emphasis supplied.) The Court next immediately expressed its approval of the trial judge insisting upon "nexus" for independent mitigating circumstances, in the words quoted.

Winding up its discussion of mitigation in petitioner's case, the Arizona Supreme Court said:

> "We also agree with the trial court's finding that there is insufficient evidence to establish any of the statutory mitigating factors. We find no evidence supporting any independent mitigating factor warranting leniency. Because the aggravating factors outweigh the mitigating circumstances, we find that the trial court correctly imposed the death sentences."

In light of the Court's well-developed nexus jurisprudence in general and its explicit approval of the nexus approach taken by the trial court in this case, the foregoing general statement simply expresses a conclusion that flows from application of the nexus limitation. Potential mitigating factors were eliminated from consideration because they bore no relationship to the crime. Thereafter, the Court struck a balance favoring the death sentence, without weighing petitioner's mental health or intoxicatiion.

Thus the state is just mistaken in arguing that the Arizona Supreme Court made a "factual finding" that either it or the trial court complied with *Lockett.*

2. The state makes a fundamental mistake of fact in opposing a grant of *certiorari* for Question Two. One of the subordinate issues for Question Two was the point reserved in *Coleman v. Thompson,* 501 U.S. 722, 755 (1991): was petitioner at the least entitled to effective counsel in PCR proceedings for issues that could only have been raised there? There were here three constitutional claims which could only be raised in PCR, thereby posing the issue reserved in *Coleman*: 1) Ineffectiveness of *appellate* counsel

in failing to challenge the trial court exclusion of evidence of intoxication in the guilt trial;[3] 2) Ineffectiveness of *appellate* counsel in failing to challenge the trial court refusal to order a mental examination of petitioner for use at capital sentencing; and 3) Ineffectiveness of trial counsel prior to petitioner taking over his own defense. The state opposes a grant of *certiorari* on Question Two because, it says the first two claims "could have been raised on direct appeal." Brief p. 16. That clearly is not so.[4] As to the third claim, it does not assert that ineffectiveness of trial counsel could have been raised on direct appeal.

The state was simply mistaken about what claims in categories 1) and 2) in the preceding paragraph petitioner sought to excuse from exhaustion. The state thought the claims were the trial court preclusion of evidence of intoxication, and its refusal to order a mental health examination. Brief p. 16. It wasn't those claims which were defaulted by PCR counsel's ineffectiveness. It was the appellate counsel's ineffectiveness for failing to raise them on direct appeal. As we pointed out, Petition p. 19 n. 23, either of the appellate counsel ineffectiveness issues, by itself, raises Question 2 a), for each is an independent claim if ever the claim can be reached. The state overlooked that the claims involved for this issue were the ineffectiveness of appellate counsel, not the underlying claims not raised by appellate counsel.

[3] The nature of the claim is described, Petition p. 6 n.7

[4] Under Arizona law, the claims relating to ineffectiveness of trial and direct appeal counsel could *only* be raised in post conviction proceedings. *State v. Apelt,* 176 Ariz. 369, 861 P.2d 654 (1993)

In any event, the state's mistaken argument only bears upon Question Two a). Only in that Question is it contended that PCR counsel ineffectiveness might be limited to only those claims which cannot be raised elsewhere than in PCR proceedings.

The state cannot of course argue that the third basis for Question 2 a), trial counsel ineffectiveness, could have been raised in some other proceeding, n. 4, herein, so it argues the merits of the claim. In doing so it makes numerous *non sequiturs* which have no bearing upon Question Two. We here mention only three.

First, whether or not petitioner's trial counsel's deficiencies forced petitioner to represent himself – *see* Brief p. 18 – (a serious issue not posed in this Petition), is far afield from whether PCR counsel's ineffectiveness should excuse failure to exhaust claims that trial and appellate counsel were ineffective.

Second, the state argues that Cook "personally waived mitigation," and therefore, supposedly, the claim of ineffective trial counsel fails. The state cites *Schriro v. Landrigan,* 550 U.S. 465 (2007) but this case is quite different. In *Landrigan,* this Court was reviewing the *state court* determination that Landrigan had waived the presentation of mitigating evidence, and held "that the Arizona postconviction court's determination of the facts [*i.e.* that Landrigan waived presentation of mitigation evidence] was reasonable." Here, *no court* has determined that petitioner waived the right

to present mitigating evidence. Therefore, whether ultimately a claim of ineffectiveness of trial counsel may fail because petitioner might have waived the benefits of an effectively-prepared mitigation case will depend upon a court determining the waiver point in the future. It is not for this Court in the first instance to make a factual waiver determination.

When a court *is* faced with the waiver-of-mitigation issue, petitioner will seriously dispute it. In fact petitioner did not waive mitigation. He had asked the trial court for a mental health examination. He asked the trial court at sentencing to consider sentencing disparity. 170 Ariz. at 64. And the statement made by petitioner, quoted Brief p. 18, that the only sentence he would accept is the penalty of death can be found to be a statement of frustration by petitioner that he was being sentenced by a judge biased against him, who had refused him the most important mitigation he could think of – the mental health evaluation. The trial judge doubtless knew petitioner's statement was nothing more than an expression of his frustration, because the court had read pre-sentence reports materials, including a letter petitioner had written to the probation officer, which expressed the same frustration in the same way, but then proceeded to make statements in support of mitigation and a life sentence. (Cook to Elaine Grissom, filed Superior Court 8/8/1988.)

Third, no hearing has been held on trial counsel's ineffectiveness, and therefore no finding has been made whether such ineffectiveness probably

changed the outcome – at least for sentencing. This Court has recognized that counsel must begin serious investigation and preparation of a mitigation case well beforehand. *Williams v. Taylor,* 529 U.S. 362, 395 (2000)(counsel ineffective because they "did not begin to prepare for that phase of the proceeding until a week before the trial.")

Petitioner's counsel didn't do that, and it is highly likely this prejudiced petitioner, who was incarcerated, took over his own defense just before trial, and had no practical way to investigate a mitigation case. However, all of this has virtually nothing to do with the issues posed by Question Two.

The Court needn't and shouldn't get into the thicket of the merits resolution of a claim, when the issue is whether the federal courts may even entertain the claim, under the doctrine of cause to excuse failure of exhaustion; and Question 2 a) stands on two other bases independent of the merits of the ineffectiveness of trial counsel – *i.e.* appellate counsel ineffectiveness.

3. The state does not dispute that there are cogent reasons to revisit *Murray v. Giarratano* and *Pennsylvania v. Finley;* it makes no response whatever to Question 2 c). It is noteworthy that the state said nothing about a major consideration bearing upon Question Two a) and b). The factual – or perhaps procedural – impediment to recognizing a right to counsel for PCR proceedings has been this Court's conclusions, in the

plurality opinion of *Murray v. Giarratano,* 492 U.S. 1 (1989), and in *Pennsylvania v. Finley,* 481 U.S. 551 (1987), that there is no right to counsel in a PCR proceeding because it is not part of the criminal prosecution. This Petition challenges that premise, in light of the current nature of capital case proceedings. If petitioner's point is accepted, this premise of *Murray* and *Finley* changes. Yet the state does not challenge petitioner's premise. The Petition presents substantial reasons to re-examine this central premise of *Murray* and *Finley*. But the Brief in Opposition presents no explanation for why it should not be.

4. Neither 28 U.S.C. § 2254(i) nor Teague v. Lane present any impediment to reaching Question Two. The state says that the proviso of 28 U.S.C. § 2254(i), that "the ineffectiveness of post-conviction counsel proceedings shall not be a ground for relief" in *habeas corpus*, should bar the recognition of a right to PCR counsel, whose ineffectiveness would constitute cause excusing failure to exhaust a claim in the state courts. Brief pp. 8, 15 – 16. The state ignored the point made in the Petition, p. 33 n.37 that there is a difference between excusing the failure to exhaust a claim in state court, and granting relief on the merits of a constitutional claim. As we there noted, if ineffective post conviction counsel excused exhaustion of a federal claim, that claim would still have to stand on its own and be separately measured against clearly established precedent of this Court before there would be "ground for relief." The state had no response to that explanation.

The distinction between excusing exhaustion, and having ground for relief on the merits also disposes of the state's reliance upon *Teague v. Lane,* 489 U.S. 288 (1989). The rule announced in Teague was: "Unless they fall within an exception to the general rule, *new constitutional rules of criminal procedure* will not be applicable to those cases which have become final before the new rules are announced. 489 U.S. at 310 (emphasis supplied.). It would be virtually impossible to impose *Teague* upon this issue. *If* recognizing that ineffective PCR counsel excused state exhaustion were to be a "rule of criminal procedure" it would have to apply to *habeas corpus* petitioners – otherwise the non-retroactivity rule of *Teague* would make no sense. Question Two involves proceedings under § 2254, and the threshold requirement of state exhaustion of claims. It is entirely outside the scope of *Teague.*

5. Question Three involves presenting a state law claim that is identical to its federal counterpart. The state ignores the precise nature of the issue, as well as the existence of an extensive circuit split. The state would have this Court turn back petitioner's claim by doing what some courts have done – merely apply the general statement of *Baldwin v. Reese,* 541 U.S. 23, 34 (2004) that a petitioner must "indicate a federal law basis" in his claim to the state court. Brief. P. 21. It ignores *Baldwin's* acknowledgment that there is an unresolved question about the presentation of a claim which is identical under both federal law and the law

of the particular state. 541 U.S. at 33 –34. The state's citation to *Adams v. Robertson,* 520 U.S. 83 (1997) for its statement that mere invocations of due process do not meet the minimal requirement, is unhelpful. It predates *Baldwin* by seven years. It doesn't speak to the "identical claim" circumstance. The Court receives no help from the state in considering whether to review Question Three, the issue reserved in *Baldwin*. The state does not speak to the circuit split; presumably because it would simply have to acknowledge its existence.

The state also suggests that the claim of judicial bias *may* be "somewhat similar" to the federal standard. Brief p. 21. The state does not, however discuss let alone dispute the explanation, Petition pp. 36 – 38 of how identical the Arizona and federal standards are.

Finally, the state claims that petitioner defaulted the judicial bias claim because he did not present it again to the Arizona Supreme Court in his petition for review. There is no Arizona authority requiring such a presentation after once taking it to the court – as petitioner did with the appellate remedy of a "special action."[5] The state cites *State v. Greenway,* 170 Ariz. 155*,* 823 P.2d 22, 25 (1991), and *State v. Poland,* 144 Ariz. 388 (1985) as *examples* of cases in which a motion for change of judge was renewed on appeal. Neither case *requires* that it be done that way.

[5] A Special Action is the title given in Arizona to the writs of prohibition, mandamus, certiorari, etc. Rules of Procedure for Special Actions, 17 Ariz. Rev. Stat. Ann.

In Arizona, a Special Action is a recognized and common method of seeking review of a trial court denial of a motion for change of judge. *Taliaferro v. Taliaferro,* 186 Ariz. 221, 921 P.2d 21 (1996)(appellate review of denial of notice of peremptory change of judge in civil case must be obtained by special action because "an appeal makes no sense."); *Chavez v. Superior Court (State ex. rel. Romley),* 181 Ariz. 93, 887 P.2d 623 (App. 1994). Indeed respected commentators in Arizona, in a treatise on appellate practice often cited by the Arizona courts, opine that special action "may be the *only remedy* for a party aggrieved by the denial of a notice of change of judge." ARIZONA APPELLATE HANDBOOK (VOLUME ONE) §7.2.2.4.14, p. 7-15 (2003 & Supp. 2006)(emphasis supplied.)

Petitioner properly exhausted the claim. He presented a claim identical in its state and federal versions. The case squarely presents the issue reserved in *Baldwin,* and which is the subject of an extensive circuit split. *See,* Petition pp. 39 – 40, and cases cited.

CONCLUSION

The writ of *certiorari* should be granted.

Respectfully Submitted.

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January, 2009 *Counsel of Record for Petitioner*