SUPREME COURT OF THE UNITED STATES

No. 01–400

RICKY BELL, WARDEN, PETITIONER *v.* GARY BRADFORD CONE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 28, 2002]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Tennessee Court of Appeals rejected respondent's claim that his counsel rendered ineffective assistance during his sentencing hearing under principles announced in *Strickland* v. *Washington*, 466 U. S. 668 (1984). The Court of Appeals for the Sixth Circuit concluded that *United States* v. *Cronic*, 466 U. S. 648 (1984), should have controlled the state court's analysis and granted him a conditional writ of habeas corpus. We hold that respondent's claim was governed by *Strickland*, and that the state court's decision neither was "contrary to" nor involved "an unreasonable application of clearly established Federal law" under the provisions of 28 U. S. C. §2254(d)(1).

I

In 1982, respondent was convicted of, and sentenced to death for, the murder of an elderly couple in Memphis, Tennessee. The killings culminated a 2-day crime rampage that began when respondent robbed a Memphis jewelry store of approximately $112,000 in merchandise

on a Saturday in August 1980. Shortly after the 12:45 p.m. robbery, a police officer in an unmarked vehicle spotted respondent driving at a normal speed and began to follow him. After a few blocks, respondent accelerated, prompting a high-speed chase through midtown Memphis and into a residential neighborhood where respondent abandoned his vehicle. Attempting to flee, respondent shot an officer who tried to apprehend him, shot a citizen who confronted him, and, at gunpoint, demanded that another hand over his car keys. As a police helicopter hovered overhead, respondent tried to shoot the fleeing car owner, but was frustrated because his gun was out of ammunition.

Throughout the afternoon and into the next morning, respondent managed to elude detection as police combed the surrounding area. In the meantime, officers inventorying his car found an array of illegal and prescription drugs, the stolen merchandise, and more than $2,400 in cash. Respondent reappeared early Sunday morning when he drew a gun on an elderly resident who refused to let him in to use her telephone. Later that afternoon, respondent broke into the home of Shipley and Cleopatra Todd, aged 93 and 79 years old, and killed them by repeatedly beating them about the head with a blunt instrument. He moved their bodies so that they would not be visible from the front and rear doors and ransacked the first floor of their home. After shaving his beard, respondent traveled to Florida. He was arrested there for robbing a drugstore in Pompano Beach. He admitted killing the Todds and shooting the police officer.

A Tennessee grand jury charged respondent with two counts of first-degree murder in the perpetration of a burglary in connection with the Todds' deaths, three counts of assault with intent to murder in connection with the shootings and attempted shooting of the car owner, and one count of robbery with a deadly weapon for the

jewelry store theft. At a jury trial in the Criminal Court of Shelby County, the prosecution adduced overwhelming physical and testimonial evidence showing that respondent perpetrated the crimes and that he killed the Todds in a brutal and callous fashion.

The defense conceded that respondent committed most of the acts in question, but sought to prove that he was not guilty by reason of insanity. A clinical psychologist testified that respondent suffered from substance abuse and posttraumatic stress disorders related to his military service in Vietnam. A neuropharmacologist recounted at length respondent's history of illicit drug use, which began after he joined the Army and escalated to the point where he was daily consuming "rather horrific" quantities. Tr. 1722–1763. That drug use, according to the expert, caused chronic amphetamine psychosis, hallucinations, and ongoing paranoia, which affected respondent's mental capacity and ability to obey the law. Defense counsel also called respondent's mother, who spoke of her son coming back from Vietnam in 1969 a changed person, his honorable discharge from service, his graduation with honors from college, and the deaths of his father and fiancée while he was in prison from 1972–1979 for robbery. Although respondent did not take the stand, defense counsel was able to elicit through other testimony that he had expressed remorse for the killings. Rejecting his insanity defense, the jury found him guilty on all charges.

Punishment for the first-degree murder counts was fixed in a separate sentencing hearing that took place the next day and lasted about three hours. Under then-applicable Tennessee law, a death sentence was required if the jury found unanimously that the State proved beyond a reasonable doubt the existence of at least one statutory aggravating circumstance that was not outweighed by any mitigating circumstance. Tenn. Code. Ann. §39–2–203 (1982). In making these determinations,

the jury could (and was instructed that it could) consider evidence from both the guilt and punishment phases. *Ibid.;* Tr. 2219.

During its opening statement, the State said it would prove four aggravating factors: that (1) respondent had previously been convicted of one or more felonies involving the use or threat of violence to a person; (2) he knowingly created a great risk of death to two or more persons other than the victim during the act of murder; (3) the murder was especially heinous, atrocious, or cruel; and (4) the murder was committed for the purpose of avoiding unlawful arrest. In his opening statement, defense counsel called the jury's attention to the mitigating evidence already before them. He suggested that respondent was under the influence of extreme mental disturbance or duress, that he was an addict whose drug and other problems stemmed from the stress of his military service, and that he felt remorse. Counsel urged the jury that there was a good reason for preserving his client's life if one looked at "the whole man." App. 26. He asked for mercy, calling it a blessing that would raise them above the State to the level of God.

The prosecution then called a records custodian and fingerprint examiner to establish that respondent had three armed robbery convictions and two officers who said they tried unsuccessfully to arrest respondent for armed robbery after the jewelry store heist. Through cross-examination of the records custodian, respondent's attorney brought out that his client had been awarded the Bronze Star in Vietnam. After defense counsel successfully objected to the State's proffer of photos of the Todds' decomposing bodies, both sides rested. The junior prosecuting attorney on the case gave what the state courts

described as a "low-key" closing.[1] Defense counsel waived final argument, preventing the lead prosecutor, who by all accounts was an extremely effective advocate, from arguing in rebuttal. The jury found in both murder cases four aggravating factors and no mitigating circumstances substantial enough to outweigh them. The Tennessee Supreme Court affirmed respondent's convictions and sentence on appeal, *State* v. *Cone*, 665 S. W. 2d 87, and we denied certiorari, 467 U. S. 1210 (1984).

Respondent then petitioned for state postconviction relief, contending that his counsel rendered ineffective assistance during the sentencing phase by failing to present mitigating evidence and by waiving final argument. After a hearing in which respondent's trial counsel testified, a division of the Tennessee Criminal Court rejected this contention. The Tennessee Court of Criminal Appeals affirmed. *Cone* v. *State*, 747 S. W. 2d 353 (1987). The appellate court reviewed counsel's explanations for his decisions concerning the calling of witnesses and the waiving of final argument. *Id.,* at 356–357. Describing counsel's representation as "very conscientious," the court concluded that his performance was within the permissible range of competency, citing *Baxter* v. *Rose*, 523 S. W. 2d 930 (Tenn. 1975), a decision the Tennessee Supreme Court deems to have announced the same attorney performance standard as *Strickland* v. *Washington,* 466 U. S. 668 (1984). See, *e.g., State* v. *Burns*, 6 S. W. 3d 453, 461 (1999). The court also expressed its view that respondent received the death penalty based on the law and facts, not on the shortcomings of counsel. 747 S. W. 2d, at 357–358. The Tennessee Supreme Court denied respondent permission to appeal, and we denied further review, *Cone* v. *Tennessee*, 488 U. S. 871 (1988).

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[1] See *Cone* v. *State*, 747 S. W. 2d 353, 357 (Tenn. Crim. App. 1987).

In 1997, after his second application for state postconviction relief was dismissed, respondent sought a federal writ of habeas corpus under 28 U. S. C. §2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996. His petition alleged numerous grounds for relief including ineffective assistance at the sentencing phase. The District Court ruled that respondent did not meet §2254(d)'s requirements and denied the petition.

The Court of Appeals affirmed the refusal to issue a writ with respect to respondent's conviction, but reversed with respect to his sentence. 243 F. 3d 961, 979 (CA6 2001). It held that respondent suffered a Sixth Amendment violation for which prejudice should be presumed under *United States* v. *Cronic,* 466 U. S. 648 (1984), because his counsel, by not asking for mercy after the prosecutor's final argument, did not subject the State's call for the death penalty to meaningful adversarial testing. 243 F. 3d, at 979. The state court's adjudication of respondent's Sixth Amendment claim, in the Court of Appeals' analysis, was therefore an unreasonable application of the clearly established law announced in *Strickland*. 243 F. 3d, at 979. We granted certiorari, 534 U. S. 1064 (2001), and now reverse the Court of Appeals.

II

The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas "retrials" and to ensure that state-court convictions are given effect to the extent possible under law. See *Williams* v. *Taylor,* 529 U. S. 362, 403–404 (2000). To these ends, §2254(d)(1) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits

in State court proceedings unless the adjudication of the claim—

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[2]

As we stated in *Williams*, §2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. 529 U. S., at 404–405. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. *Id.,* at 405–406. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. *Id.,* at 407–408. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. *Id.,* at 409–410. See also *id.,* at 411 (a federal habeas court may not issue a writ under the unreasonable application clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

Petitioner contends that the Court of Appeals exceeded its statutory authority to grant relief under §2254(d)(1) because the decision of the Tennessee courts was neither contrary to nor an unreasonable application of the clearly

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[2] JUSTICE STEVENS' dissent does not cite this statutory provision governing respondent's ability to obtain federal habeas relief, much less explain how his claim meets its standards.

established law of *Strickland*. Respondent counters that he is entitled to relief under §2254(d)(1)'s "contrary to" clause because the state court applied the wrong legal rule. In his view, *Cronic*, not *Strickland*, governs the analysis of his claim that his counsel rendered ineffective assistance at the sentencing hearing. We address this issue first.

In *Strickland*, which was decided the same day as *Cronic*, we announced a two-part test for evaluating claims that a defendant's counsel performed so incompetently in his or her representation of a defendant that the defendant's sentence or conviction should be reversed. We reasoned that there would be a sufficient indication that counsel's assistance was defective enough to undermine confidence in a proceeding's result if the defendant proved two things: first, that counsel's "representation fell below an objective standard of reasonableness," 466 U. S., at 688; and second, 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. Without proof of both deficient performance and prejudice to the defense, we concluded, it could not be said that the sentence or conviction "resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable," *id.,* at 687, and the sentence or conviction should stand.

In *Cronic*, we considered whether the Court of Appeals was correct in reversing a defendant's conviction under the Sixth Amendment without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial. 466 U. S., at 650, 658. We determined that the court had erred and remanded to allow the claim to be considered under *Strickland*'s test. 466 U. S., at 666–667, and n. 41. In the course of deciding this question, we identified three situations implicating the right to counsel that involved circumstances "so likely to

prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.,* at 658–659.

First and "[m]ost obvious" was the "complete denial of counsel." *Id.,* at 659. A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at "a critical stage," *id.,* at 659, 662, a phrase we used in *Hamilton* v. *Alabama,* 368 U. S. 52, 54 (1961), and *White* v. *Maryland,* 373 U. S. 59, 60 (1963) *(per curiam),* to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused.[3] Second, we posited that a similar presumption was warranted if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic, supra,* at 659. Finally, we said that in cases like *Powell* v. *Alabama,* 287 U. S. 45 (1932), where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the

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[3] In a footnote, we also cited other cases besides *Hamilton* v. *Alabama* and *White* v. *Maryland* where we found a Sixth Amendment error without requiring a showing of prejudice. Each involved criminal defendants who had actually or constructively been denied counsel by government action. See *United States* v. *Cronic*, 466 U. S. 648, 659, n. 25 (1984) (citing *Geders* v. *United States,* 425 U. S. 80, 91 (1976) (order preventing defendant from consulting his counsel "about anything" during a 17-hour overnight recess impinged upon his Sixth Amendment right to the assistance of counsel); *Herring* v. *New York,* 422 U. S. 853, 865 (1975) (trial judge's order denying counsel the opportunity to make a summation at close of bench trial denied defendant assistance of counsel); *Brooks* v. *Tennessee,* 406 U. S. 605, 612–613 (1972) (law requiring defendant to testify first at trial or not at all deprived accused of "the 'guiding hand of counsel' in the timing of this critical element of his defense," *i.e.*, when and whether to take the stand); *Ferguson* v. *Georgia,* 365 U. S. 570, 596 (1961) (statute retaining common-law incompetency rule for criminal defendants, which denied the accused the right to have his counsel question him to elicit his statements before the jury, was inconsistent with Fourteenth Amendment); *Williams* v. *Kaiser,* 323 U. S. 471 (1945) (allegation that petitioner requested counsel but did not receive one at the time he was convicted and sentenced stated case for denial of due process)).

proceedings were affected. *Cronic*, *supra,* at 659–662.

Respondent argues that his claim fits within the second exception identified in *Cronic* because his counsel failed to "mount some case for life" after the prosecution introduced evidence in the sentencing hearing and gave a closing statement. Brief for Respondent 26. We disagree. When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, *supra,* at 659 (emphasis added). Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind.[4]

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[4] In concluding that *Cronic* applies to respondent's ineffective-assistance claim, the dissent relies in part on inferences it draws from evidence that his attorney sought treatment for a mental illness four years after respondent's trial. See *post*, at 15. While the dissent admits that counsel's mental health problems "may have onset after [respondent's] trial," it speculates that counsel's mental health problems began earlier based on its "complete reading of the trial transcript and an assessment of [counsel's] actions at trial." *Ibid.* But, as the dissent concedes, respondent did not present *any* evidence regarding his counsel's mental health in the state-court proceedings. Before us, respondent does not argue that we could consider his attorney's medical records obtained in the federal habeas proceedings in assessing his Sixth Amendment claim, nor does he suggest that his counsel suffered from mental health problems at the time of his trial. Furthermore, any implication that trial counsel was impaired during his representation is contradicted by the testimony of the two experts called during the state postconviction hearing. Both had extensive experience in prosecuting and defending criminal cases and were familiar with trial counsel's abilities. Wayne Emmons said that counsel was "not only fully capable, but one of the most conscientious lawyers [he] knew." State Postconvic-

The aspects of counsel's performance challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components. In *Darden* v. *Wainwright,* 477 U. S. 168, 184 (1986), for example, we evaluated under *Strickland* a claim that counsel was ineffective for failing to put on any mitigating evidence at a capital sentencing hearing. In *Burger* v. *Kemp,* 483 U. S. 776, 788 (1987), we did the same when presented with a challenge to counsel's decision at a capital sentencing hearing not to offer any mitigating evidence at all.

We hold, therefore, that the state court correctly identified the principles announced in *Strickland* as those governing the analysis of respondent's claim. Consequently, we find no merit in respondent's contention that the state court's adjudication was contrary to our clearly established law. Cf. *Williams,* 529 U. S., at 405 ("The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed'" (quoting Webster's Third New International Dictionary 495 (1976))).

III

The remaining issue, then, is whether respondent can obtain relief on the ground that the state court's adjudication of his claim involved an "unreasonable application" of *Strickland*. In *Strickland* we said that "[j]udicial scrutiny of a counsel's performance must be highly deferential" and

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tion Tr. 73. And Stephen Shankman said he considered respondent's counsel "to be one of the finest practitioners in [the] community in the area of criminal defense work," *id.,* at 182, and "an extremely experienced lawyer" whom he would be "hardpressed to second guess," *id.,* at 190.

that "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U. S., at 689. Thus, even when a court is presented with an ineffective-assistance claim not subject to §2254(d)(1) deference, a defendant must overcome the "presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Ibid.* (quoting *Michel* v. *Louisiana,* 350 U. S. 91, 101 (1955)).

For respondent to succeed, however, he must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under §2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. See *Williams*, *supra,* at 411. Rather, he must show that the Tennessee Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner. This, we conclude, he cannot do.

Respondent's counsel was faced with the formidable task of defending a client who had committed a horribly brutal and senseless crime against two elderly persons in their home. He had just the day before shot a police officer and an unarmed civilian, attempted to shoot another person, and committed a robbery. The State had near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings. Making the situation more onerous were the facts that respondent, despite his high intelligence and relatively normal upbringing, had turned into a drug addict and had a history of robbery convictions.

Because the defense's theory at the guilt phase was not guilty by reason of insanity, counsel was able to put before the jury extensive testimony about what he believed to be the most compelling mitigating evidence in the case—

evidence regarding the change his client underwent after serving in Vietnam; his drug dependency, which apparently drove him to commit the robbery in the first place; and its effects. Before the state courts, respondent faulted his counsel for not recalling his medical experts during the sentencing hearing. But we think counsel reasonably could have concluded that the substance of their testimony was still fresh to the jury. Each had taken the stand not long before, and counsel focused on their testimony in his guilt phase closing argument, which took place the day before the sentencing hearing was held. Respondent's suggestion that the jury could not fully consider the mental health proof as potentially mitigating because it was adduced during the guilt phase finds no support in the record. Defense counsel advised the jury that the testimony of the experts established the existence of mitigating circumstances, and the trial court specifically instructed the jury that evidence of a mental disease or defect insufficient to establish a criminal defense could be considered in mitigation. Tr. 2221.

Respondent also assigned error in his counsel's decision not to recall his mother. While counsel recognized that respondent's mother could have provided further information about respondent's childhood and spoken of her love for him, he concluded that she had not made a good witness at the guilt stage, and he did not wish to subject her to further cross-examination. Respondent advances no argument that would call his attorney's assessment into question.

In his trial preparations, counsel investigated the possibility of calling other witnesses. He thought respondent's sister, who was closest to him, might make a good witness, but she did not want to testify. And even if she had agreed, putting her on the stand would have allowed the prosecutor to question her about the fact that respondent called her from the Todds' house just after the killings.

After consulting with his client, counsel opted not to call respondent himself as a witness. And we think counsel had sound tactical reasons for deciding against it. Respondent said he was very angry with the prosecutor and thought he might lash out if pressed on cross-examination, which could have only alienated him in the eyes of the jury. There was also the possibility of calling other witnesses from his childhood or days in the Army. But counsel feared that the prosecution might elicit information about respondent's criminal history.[5] He further feared that testimony about respondent's normal youth might, in the jury's eyes, cut the other way.

Respondent also focuses on counsel's decision to waive final argument. He points out that counsel could have explained the significance of his Bronze Star decoration and argues that his counsel's failure to advocate for life in closing necessarily left the jury with the impression that he deserved to die. The Court of Appeals "reject[ed] out of hand" the idea that waiving summation could ever be considered sound trial strategy. 243 F. 3d, at 979. In this case, we think at the very least that the state court's contrary assessment was not "unreasonable." After respondent's counsel gave his opening statement discussing the mitigating evidence before them and urging that they choose life for his client, the prosecution did not put on

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[5] Respondent cites *Cozzolino* v. *State*, 584 S. W. 2d 765 (Tenn. 1979), to argue that calling additional witnesses would not have opened the door to evidence about his prior bad acts. We need not express any view as to Tennessee law on this issue except to point out that *Cozzolino* does not state such a broad, categorical rule. *Cozzolino* held that a trial court erred in admitting evidence that the defendant committed crimes *after* the murder because that evidence was not relevant to any aggravating factors or mitigating factors raised by the defense. *Id.,* at 767–768. In this case, at a minimum, any evidence about respondent's *prior* robbery convictions would have been relevant because the State relied on those convictions to prove an aggravating circumstance.

any particularly dramatic or impressive testimony. The State's witnesses testified rather briefly about the undisputed facts that respondent had prior convictions and was evading arrest.

When the junior prosecutor delivered a very matter-of-fact closing that did not dwell on any of the brutal aspects of the crime, counsel was faced with a choice. He could make a closing argument and reprise for the jury, perhaps in greater detail than his opening, the primary mitigating evidence concerning his client's drug dependency and posttraumatic stress from Vietnam. And he could plead again for life for his client and impress upon the jurors the importance of what he believed were less significant facts, such as the Bronze Star decoration or his client's expression of remorse. But he knew that if he took this opportunity, he would give the lead prosecutor, who all agreed was very persuasive, the chance to depict his client as a heartless killer just before the jurors began deliberation. Alternatively, counsel could prevent the lead prosecutor from arguing by waiving his own summation and relying on the jurors' familiarity with the case and his opening plea for life made just a few hours before. Neither option, it seems to us, so clearly outweighs the other that it was objectively unreasonable for the Tennessee Court of Appeals to deem counsel's choice to waive argument a tactical decision about which competent lawyers might disagree.

We cautioned in *Strickland* that a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight. 466 U. S., at 689. Given the choices available to respondent's counsel and the reasons we have identified, we cannot say that the state court's application of *Strickland*'s attorney-performance standard was objec-

tively unreasonable. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.