FRANK G. SPISAK, JR., Petitioner-Appellant, v. BETTY MITCHELL, Warden, Respondent-Appellee.

No. 03-4034

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0388p.06; 465 F.3d 684; 2006 U.S. App. LEXIS 26001; 2006 FED App. 0388P (6th Cir.)

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II. Ineffective Assistance of Counsel During Mitigation Phase

The Supreme Court first articulated the now familiar two-part test for determining whether counsel is ineffective in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, a defendant seeking to establish that his counsel's assistance was ineffective must show: (1) that his counsel's performance was deficient, in other words, that it "fell below an objective standard of reasonableness;" and (2) that the defense was prejudiced by the attorney's deficient performance. *Strickland*, 466 U.S. at 687-88. Although trial counsel's performance here is subject to *de novo* [**51] review, the reviewing Court's scrutiny of counsel's performance is highly deferential, and counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996) (overruled on other grounds). The reviewing Court [*704] must "evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors." *Id*. (citations omitted). "Trial counsel's tactical decisions are particularly difficult to attack, and a defendant's challenge to such decisions must overcome a presumption that the challenged action might be considered sound trial strategy." *Id*. (internal citations and quotations omitted).

In order to establish deficiency under *Strickland*, Defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed [Defendant] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To satisfy the prejudice prong of the *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's [**52] unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. The inquiry, when a defendant challenges a conviction, is whether "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id*. at 695; *see also Wiggins v. Smith*, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (Defendant demonstrates prejudice if he can show that there is a reasonable probability that "at least one juror would have struck a different balance").

The *Strickland* Court explained that while strategic choices made after a thorough investigation

> are virtually unchallengeable . . . strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary.

Id. at 690-91. Thus it follows that any decision to forego mitigation evidence [**53] is unreasonable if not made after a reasonable decision to cease further investigation. *See id.*

A. Hostile Remarks During The Closing Argument Of The Mitigation Phase

Defendant first argues that his counsel rendered ineffective assistance during his closing argument at sentencing by repeatedly stressing the brutality of the crimes and demeaning Defendant. We agree. The transcript reveals that in the early part of the closing, trial counsel did focus rather heavily on what he called the aggravating circumstances and the heinousness of the crimes. Defendant's trial counsel addressed the jury, telling them that "so little really needs to be said about [***17] the degree of aggravating factors, clearly horrendous," and pointed out that no one involved in the trial was ever going to forget it or Defendant. (J.A. at 3061.) Trial counsel went on to make the following disturbing remarks:

> [E]veryone of us who went through this trial, we know we can feel that cold day . . . or see that cold marble, and will forever . . . see Horace Rickerson dead on the cold floor. Aggravating circumstances, indeed it is . . . the reality of what happened there . . . you can smell almost [**54] the blood. You can smell, if you will, the urine. You are in a bathroom, and it is death, and you can smell the death . . . and you can feel, the loneliness of that railroad platform . . . And we can all appreciate, and you can understand, and we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses and looked into the muzzle of a gun that kept [*705] spitting out bullets . . . And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children . . . you and I and everyone one of us, we were sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never [sic] what hit him, and we can feel that bullet hitting, and that's an aggravating circumstance . . . There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky.

(Id. at 3062-65.) The district court concluded that this extremely graphic and overly descriptive recounting of Defendant's crimes were an appropriate part of trial counsel's [**55] strategy to confront the heinousness of the murders before the prosecution had the opportunity to do so. The district court reasoned that once counsel identified with their emotions towards Defendant, he could then explain to them that their feelings were misplaced because Defendant was mentally ill. Had Defendant's trial counsel actually done the latter, and spent a substantial amount of the time humanizing and rehabilitating Defendant in the eyes of the jury by arguing that Defendant was misguided or mentally ill and deserved to have his life spared, then the district court might be correct that this was permissible trial strategy. The record reveals, however, that trial counsel did very little to offset the negative feelings that his own hostility and disgust for Defendant may have evoked in the jury. Instead, as Defendant argues, trial counsel further denigrated Defendant and even went so far as to tell the jury that Defendant was undeserving of mitigation.

Trial counsel's efforts at presenting mitigating evidence consisted of telling the jury about what he described as Defendant's "sick twisted mind" and his association with the Third Reich and the Nazis, and what counsel perceived [**56] it was like to be inside Defendant's mind, based on Defendant's testimony about the murders. While trial counsel did then try to stress that Defendant was mentally ill, even if not legally insane, trial counsel proceeded to undermine this limited effort by making the following inexplicable remarks:

> Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands none. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. He is sick, he is twisted. He is demented, and he is never going to be any different.

(J.A. at 3069.) Trial counsel's performance did not improve after this, but rather counsel continued to do further harm to Defendant by rambling incoherently towards the end of the closing statement about integrity in the legal system. Trial counsel's final moments were not devoted to a discussion of the reasons why Defendant's mental illness made him deserving of mitigation, but rather to discussing all the other participants in the trial. Namely, trial counsel discussed the jurors, [**57] lawyers, the judge, policemen, and the victims' families, and focused on the importance of the jury's decision [***18] to all of these various individuals, instead of arguing how and why the mitigating factors outweighed the aggravating factors. Most shocking of all, however, trial counsel suggested to the jury that either outcome,

death or life, would be a valid conclusion, by stating to the jury that "whatever you do, we are going to be proud of you." (J.A. 3101.)

[*706] We find persuasive Defendant's argument that in pursuing this course, trial counsel abandoned the duty of loyalty owed to Defendant, as was the case in *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997). In *Rickman*, counsel pursued a similar strategy of attempting to portray his client as a "sick" and "twisted" individual which should mitigate the death sentence. Trial counsel's strategy in *Rickman* involved repeated attacks on his client's character, eliciting damaging character evidence about his client, making disparaging comments to any witness who spoke favorably about his client, and apologizing to the prosecutors for his client's crime. *Id*. at 1157. This court concluded that [**58] counsel's performance was "outrageous" because his attacks on Rickman equaled or exceeded those of the prosecution. *Id*. The court found that the defendant was effectively deprived of assistance of counsel in light of the severity of counsel's conduct. *Id*. at 1160.

We believe that trial counsel's actions discussed above are so egregious that they are equivalent to those in *Rickman*, and similarly deprived Defendant of effective assistance of counsel, in violation of the Sixth Amendment. Here, as in *Rickman*, trial counsel's hostility toward Defendant aligned counsel with the prosecution against his own client. Much of Defendant's counsel's argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim. As was the case in *Rickman*, "[th]e effect [counsel] created was not one of pity for a pathetic [Defendant], but one of hostility toward the hated and violent freak." *Id* . at 1160. In light of all the circumstances of this case, and even conceding that counsel faced some unique challenges, we still find that Defendant has [**59] rebutted the "strong presumption" that counsel's actions constituted "sound trial strategy." *Strickland*, 466 U.S. at 689. Defendant is correct that "there cannot be any objectively reasonable tactical reason to argue to the jury in a mitigation phase that one's client has no redeeming qualities, will never be rehabilitated, has never done a good deed, is not deserving of no (sic) sympathy, and is entitled to no mitigation." (Def.'s Br. at 64.) Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death, and may have voted for life instead. Therefore, we reverse the district court's denial of habeas on this claim.

B. Failure To Adequately Investigate Defendant's Background

We find unpersuasive, however, Defendant's claim that trial counsel should have presented more evidence to the jury during the mitigation phase of the trial. The Supreme Court has now applied *Strickland* in the AEDPA context at least three times to hold that a defense attorney's failure to adequately investigate [**60] and present mitigating evidence at the sentencing phase of a death penalty trial constitutes ineffective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 383, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); *Wiggins*, 539 U.S. at 537-38; *Williams*, 529 U.S. at 390. In those cases, the Court cautioned that trial counsel has an "obligation to conduct a thorough investigation of the defendant's background" in death penalty cases. *Wiggins*, 539 U.S. at 522 (citing ABA guidelines advising attorneys to conduct through investigations); *Williams*, 529 U.S. at 396. In this context, the Supreme Court has warned [*707] against a tendency to invoke "strategy" as a "*post-hoc* rationalization of counsel's conduct [rather] than an accurate description of their deliberations prior to sentencing" to explain counsel's decisions. *Id.* at 527.

This Court has to first determine whether counsel conducted a reasonable investigation of Defendant's background. Prior to trial, an extensive social history was obtained on Defendant, based on interviews with Defendant, his father, mother, and two sisters as well as various medical [***19] [**61] records. The report contained information about the family dynamics, including the fact that Defendant's father was emotionally distant and that his mother was a strict disciplinarian. Defendant argues that this information should have led to further investigation into his background, and that trial counsel should have presented various childhood experiences as mitigating evidence. However, the only relevant background that Defendant argues should have been put forth is the fact that he had an extremely strict mother who humiliated and hit him when he displayed sexual behavior, and who also taught him to hate people of color and others whom she deemed to be "undesirable" or "repulsive." (Def.'s Br. at 68-72.) Defendant argues that this information would have helped the jury understand his troubled history and would have provided some explanation for his behavior.

Despite Defendant's claim that more information should have been presented, the record shows that the various mental health experts retained by defense counsel to establish an insanity defense all testified and talked about Defendant's childhood, and the fact that it was marked by social isolation and a lack of ability to [**62] form inter-group relationships. The experts also discussed Defendant's gender confusion, and how that was tied to violent tendencies and

the urge to kill. During Dr. Bertschinger's testimony, counsel inquired into, and Bertschinger discussed, Defendant's pursuit of a sex change operation.

In light of the evidence that was presented, we do not agree that trial counsel was ineffective in failing to properly investigate Defendant's background. Moreover, even if there should have been more investigation, Defendant must demonstrate that he suffered prejudice as a result of counsel's omission, and that at least one juror would have reached a different result had this additional evidence been presented. *See Wiggins*, 539 U.S. at 536; *Hamblin v. Mitchell*, 354 F.3d 482, 493 (6th Cir. 2003). Defendant has not shown that a reasonable probability exists that one juror would have reached a different conclusion given additional evidence. The best chance of mitigation available was in fact the evidence that Defendant was, to some degree, mentally ill. If the extensive evidence of Defendant's severe personality disorder, flirtation with the idea of having a sex change, [**63] sexual confusion, and social isolation was not enough to sway jurors, then we do not believe that evidence that Defendant's mother was a strict disciplinarian would have changed the mind of at least one juror.

Furthermore, this additional evidence does not rise to the level that this court generally has required to demonstrate prejudice. *See Hamblin*, 354 F.3d at 490-91 (where counsel failed to discover evidence of extreme poverty, neglect, violence, and instability, as well as a mental disorder); *Coleman v. Mitchell*, 268 F.3d 417, 450-51 (6th Cir. 2001) (where counsel did not discover defendant's history of abandonment, physical and psychological abuse, and pedophilia, as well as personality disorder and probable psychosis); *Greer v. Mitchell*, 264 F.3d 663, 678 (6th Cir. 2001) (counsel did not follow-up on [*708] knowledge of family history which included violence, foster care, incarceration, and alcoholism); *Carter v. Bell*, 218 F.3d 581, 596-97 (6th Cir. 2000) (counsel did not investigate childhood history of violence and instability). Defendant's only additional evidence is that his mother was a strict disciplinarian, [**64] his father was often absent, that his mother would hit him for expressing sexual behavior, and that his mother taught him to distrust black people. Taken together, this is not enough to establish prejudice. Indeed, Defendant's childhood appears to have been relatively stable, with no poverty, and an absence of physical abuse, other than corporal punishment.

We should also note that we find unpersuasive Defendant's argument that it was unreasonable for trial counsel to utilize the same experts who were retained to testify as to Defendant's sanity. This argument has no merit where the record establishes that these experts did in fact testify during mitigation about the effects that Defendant's childhood, sexual confusion, racism, and "personality disorders" may have had on his behavior. There was no need for counsel [***20] to retain a new battery of experts to essentially reproduce what had been done by doctors Markey, McPherson, and Bertschinger.

Lastly, we do not believe that it was unreasonable for trial counsel to push to have the mitigation phase of the trial begin the day after the jury rendered the verdict. Several of the experts were leaving town, and trial counsel decided [**65] not to seek a continuance. While Defendant argues that this expeditious push to mitigation meant that trial counsel had not had time to prepare the strongest possible mitigation case, we have no way to determine from the record below how or when trial counsel prepared for mitigation. As far as we know, trial counsel may have had, and certainly should have had, a team working on mitigation for weeks beforehand, thereby making it unnecessary to seek a continuance. We are not in a position to say that trial counsel's failure to seek a continuance constituted a deficiency that caused Defendant prejudice.

In conclusion, we grant Defendant habeas relief on his ineffective assistance of counsel claim on the basis of counsel's hostile and inept statements and lack of advocacy during the closing argument of the mitigation phase of the trial.