IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16–1013

CHIJIOKE BOMANI BEN-YISRAYL,	)	Appeal from
Petitioner-Appellant	)	the United States District Court
	)	for the Southern District of
v.	)	Indiana, Indianapolis Division
	)	
RON NEAL,	)	Case No. 1:12–cv–661–TWP–MJD
Superintendent,	)	
Indiana State Prison,	)	The Honorable
	)	Tanya Walton Pratt, Judge.
Respondent-Appellee.	)	

REPLY BRIEF OF CHIJIOKE BOMANI BEN-YISRAYL, PETITIONER-APPELLANT

Michael K. Ausbrook

P.O. Box 1554
Bloomington, IN 47402

812.322.3218
mausbrook@gmail.com

Counsel for Chijioke Bomani Ben-Yisrayl,
Petitioner-Appellant

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Argument

I. Ben-Yisrayl did not forfeit or waive his trial ineffective-assistance claim in the district court.

Ben-Yisrayl's habeas petition, filed *pro se*, was a complaint. Set aside Ben-Yisrayl's Rule 59(e) motion. By statute, the district court was required to dispose of the petition "as law and justice require." 28 U.S.C. § 2243(a). Set aside "justice" as well.

As a matter of law, Ben-Yisrayl cannot have defaulted his trial ineffective assistance claim by failing to raise it in his direct appeal from his resentencing. The district court's contrary conclusion should be astonishing in light of *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998), in which the Indiana Supreme Court specifically said, "[T]he doors of postconviction must be open to adjudicate ineffective assistance if it is not raised on direct appeal." *Id.* at 1220. The district court's conclusion should be more than astonishing in light of *Ben-Yisrayl II*, in which the Indiana Supreme Court affirmed a grant of post-conviction relief—which is what lead to Ben-Yisrayl's resentencing—because Ben-Yisrayl's lawyer, in Ben-Yisrayl's first direct appeal, had been ineffective for inadequately raising trial ineffective-assistance in his direct appeal. *Ben-Yisrayl II*, 738 N.E.2d 253, 267-68 (Ind. 2000); App. 52a. *Ben-Yisrayl II* also held, after the state post-conviction trial court had found Ben-Yisrayl's original trial counsel ineffective, that the issue was *res judicata* because trial ineffective assistance had been raised in *Ben-Yisrayl I*, Ben-Yisrayl's original direct appeal. *Ben-*

Yisrayl II, 738 N.E.2d at 259; App 45a. In so holding, *Ben-Yisrayl II* specifically applied *Woods*. *Ben-Yisrayl II*, 738 N.E.2d at 259; App. 45a.

Similarly, as a matter of law, Ben-Yisrayl was entitled to a hearing in the district court on his claim, unheard by the state courts, that the lawyers at his resentencing had been ineffective for filing a 2-page sentencing memorandum when Ben-Yisrayl was facing, effectively, a sentence of life in prison without the possibility of parole—a sentence in Indiana available only under the same standards as a death sentence. See, *e.g.*, *Conley v. State*, 972 N.E.2d 864, 871 (Ind. 2012) ("A sentence of life without parole (LWOP) is subject to the same statutory standards and requirements as the death penalty."). It has never been Ben-Yisrayl's claim that a 2-page sentencing memorandum, *per se*, proves ineffective assistance. As a matter of law, he should have been permitted to produce the evidence *at a hearing* showing why, *in his case*, the 2-page memorandum that was filed constituted ineffective assistance *in fact*.

Indeed, Rule 8(a) of the Rules Governing Section 2254 and 2255 cases directs district courts, if they do not summarily dismiss a petition, to review the state-court records to determine if a hearing is necessary: "If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." *Id*. Notably, Rule 8(a) does not

require district courts to review any reply by a petitioner. From this it can be inferred that nothing is waived or forfeited when a habeas petitioner does not file a reply to a respondent's answer. (A reply is not even required, unless ordered by a district court. Rule 5(e) of the Rules Governing Section 2254 and 2255 Cases. The district court did not order Ben-Yisrayl to file a reply, but merely gave him time in which to file one. D.E. 39.) And the state-court record, which the district court presumably reviewed, shows in some detail why the filing of a 2-page sentencing memorandum *might* constitute ineffective assistance: that sentencing memorandum omitted any mention of the substantial mitigation evidence omitted by his first trial lawyer, for which omission his first trial lawyer was found ineffective.

Ben-Yisrayl's Rule 59(e) motion was, in fact, completely proper. By that motion, Ben-Yisrayl tried to alert the district court to these manifest mistakes of law. As Ben-Yisrayl said in his Rule 59(e) motion, D.E. 53 at 8-9, and argues in this Court, Br. of Appellant at 20-24, without a hearing, the district court had no basis to rule on the merits of Ben-Yisrayl's trial ineffective-assistance claim—and certainly not by mischaracterizing Ben-Yisrayl's trial ineffective-assistance claim as it did.

II. Ben-Yisrayl has not procedurally defaulted his trial ineffective-assistance claim: He presented exactly as required by the Indiana Supreme Court.

Again, as a matter of law, Ben-Yisrayl cannot have defaulted his trial ineffective-assistance claim by not raising it in the direct appeal

from his resentencing. Again, the Indiana Supreme Court in *Woods* was clear: if not raised on direct appeal, a state post-conviction petitioner must be free to raise it in a post-conviction petition. 708 N.E.2d at 1220. The appeal from Ben-Yisrayl's resentencing *was* a direct criminal appeal, and Ben-Yisrayl should have been able to rely *both* on *Woods and* on the earlier treatment of his case in *Ben-Yisrayl II*, in which: 1) his appellate lawyer was found ineffective for inadequately raising a trial ineffective-assistance claim; and 2) the post-conviction trial ineffective-assistance claim, itself, was held to be barred by *res judicata*, because trial ineffective assistance had already be raised in *Ben-Yisrayl I.*

Ben-Yisrayl also fairly presented his claim to the state courts—twice, actually—and those courts wanted none of it. In his *pro se* post-conviction petition filed in the post-conviction trial court, Ben-Yisrayl alleged that the lawyers at his resentencing had been ineffective for filing a 2-page sentencing memorandum: "That legal counsel provided the Sentencing Court with simply a two (2) page memorandum that provided little support to Petitioner Ben-Yisrayl." Proposed Successive Petition for Post-Conviction Relief, D.E. 42-28 at 38. This is from the post-conviction petition that Ben-Yisrayl filed, *pro se*, in Marion County and that was attached as an exhibit to Ben-Yisrayl's parallel request for permission to file a successive post-conviction petition.

The request to file a successive post-conviction petition, itself, filed by the Indiana Public Defender, alleged: "The other claim in the *pro se* petition is that counsel were ineffective in their representation of Ben-Yisrayl at the resentencing hearing." D.E. 42-28 at 4. And the request then asked for permission to file Ben-Yisrayl's *pro se* petition already on file in Marion County: "[C]ounsel requests that the Court direct that the Marion Superior Court show that Ben-Yisrayl's petition was properly filed in September 2011. D.E. 42-28 at 5. And the proposed post-conviction petition attached to the request was Ben-Yisrayl's *pro se* petition. D.E.42-28 at 35-42.

Finally, the district court certainly did not find that Ben-Yisrayl had failed to fairly present the claim in the state courts. It only found that he had procedurally defaulted the claim by failing to raise it in his direct appeal from his resentencing. Entry, D.E. 51 at 13; App. 14a. And the district court denied denied relief on the merits of Ben-Yisrayl's ineffective assistance claim with respect to the sentencing memorandum. Entry D.E. 51 at 16; App. 17a ("Second, as to Ben-Yisrayl's criticism that his counsel only filed a two-page sentencing memorandum, criticism of brief length alone is insufficient to demonstrate that counsel's performance was deficient.") It reiterated the procedural default and the denial on the merits in its entry after Ben-Yisrayl's Rule 59(e) motion: "The Court denied this claim because it was procedurally defaulted and, in the alternative, because it lacked merit." Entry, D.E. 56 at 4. And there the district

court specifically referred to its original entry denying relief, "Filing No. 51 at 13-16," where it had said nothing about any failure to fairly present Ben-Yisrayl's trial ineffective assistance claim to the state courts. D.E. 56 at 4.

III. The district court had no basis to decide Ben-Yisrayl's trial ineffective assistance claim on its merits.

For the first time in this Court, the Respondent-Appellee argues that this case is subject to the AEDPA—that the denial of permission by the Indiana Court of Appeals to file a successive post-conviction petition was a decision on the merits subject to AEDPA deference. Br. of Appellee at 15-16; Doc. 22 at 19-20. *But*, in a footnote, the Appellee says: "Often the denial of a request for permission to file a successive post-conviction petition is an adequate and independent state procedural rule that does not operate as a merits determination, but here, given the procedural posture of this case, it was a merits determination." Br. of Appellee at 15 n.6; Doc. 22 at 19.

The Respondent never argued below that this as an AEDPA case. See Respondent's Return, D.E. 42 at 17-18. He only argued procedural default and failure on the merits. *Id*. (And it's not really clear there what the claimed procedural default was.) And the district court certainly did not see this as an AEDPA case: "Because the Indiana courts did not address this claim on the merits, the Court reviews it *de novo*. *See Pruitt*, 788 F.3d at 263 ('If no state court has squarely addressed the merits of a habeas claim, [the Court] review[s] the claim

de novo under the pre-AEDPA standard of 28 U.S.C. § 2243.')." Entry, D.E. 51 at 14-15; App. 15a-16a (referring to this Court's decision in *Pruitt v. Neal*, 788 F.3d 248, 263 (7th Cir. 2015)).

The Appellee provides no authority for the entirely new argument that this is an AEDPA case, saying only that Ben-Yisrayl should be treated differently because of his case's "procedural posture." The Appellee does not even say why the application of *Pruitt* is wrong or what it is about the case's procedural posture that calls for different treatment. The Court should find the argument that this is an AEDPA case forfeited.

.The Appellee makes no non-AEDPA argument other than the following: "Even if this claim were available for review at this stage of the proceeding, Ben-Yisrayl has not shown that he is entitled to relief." Br. of Appellee at 16; Doc. 22 at 20. It is absolutely true that Ben-Yisrayl has not shown that he is entitled to relief on his trial ineffective-assistance claim. That is because he cannot do that without an evidentiary hearing–and it is the evidentiary hearing that is "the relief" he is seeking in this Court. This case arrived in the district court just as though it were a motion under 28 U.S.C. § 2255 for collateral relief from a federal criminal conviction; and the district court decided the merits of the claim just as though it had arrived there as a direct criminal appeal.

As Ben-Yisrayl has repeatedly argued, so far to no avail, without an evidentiary hearing, there is no basis to decide the merits of Ben-

Yisrayl's trial ineffective-assistance claim. Perhaps if, given Ben-Yisrayl's factual allegations, there were no set of facts that could entitle him to relief on the merits of his trial ineffective-assistance claim, it might be proper to deny relief without an evidentiary hearing. But here, facing a sentencing at which Ben-Yisrayl was, in fact, sentenced effectively to life without parole, Ben-Yisrayl's lawyers failed even to argue the value of the mitigation evidence that Ben-Yisrayl's first trial lawyer had been found ineffective for failing to develop. If, as one state court already concluded, there was a reasonable probability that Ben-Yisrayl would not have been sentenced to death had his trial lawyer developed the available mitigating evidence, there might also be, one could suppose, a reasonable probability that Ben-Yisrayl would not have been sentenced to life without parole had that same evidence—already developed for them—been presented and argued at Ben-Yisrayl's resentencing. (For this reason alone, were this Court to conclude that this *is* an AEDPA case, any state-court decision with respect to prejudice could only be characterized as "unreasonable.")

There remains the possibility, of course, that the lawyers at Ben-Yisrayl's resentencing had a tactical or strategic reason for, in essence, repeating the mistake of Ben-Yisrayl's first lawyer, whose ineffectiveness resulted in a death sentence. But we won't know about that until Ben-Yisrayl gets an evidentiary hearing.

Conclusion

For the foregoing reasons, and for the reasons set out in his opening brief, the Petitioner respectfully requests that the Court: 1) reverse the judgment of the district court; and 2) remand the case for the district court to hear Ben-Yisrayl's trial ineffective-assistance claim arising out of his resentencing.

Respectfully submitted,

s/ Michael K. Ausbrook
Attorney No. 17223-53

P.O. Box 1554
Bloomington, IN 47402

812.322.3218
mausbrook@gmail.com

Counsel for Chijioke Bomani Ben-Yisrayl,
Petitioner-Appellant

Certificate of Service

I hereby certify that on March 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Michael K. Ausbrook
Attorney No. 17223-53

P.O. Box 1554
Bloomington, IN 47402

812.322.3218
mausbrook@gmail.com

Counsel for Chijioke Bomani Ben-Yisrayl,
Petitioner-Appellant