No. _____

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

ROBERT J. VAN HOOK,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE — NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. For purposes of *Strickland v. Washington*, 466 U.S. 668 (1984), should defense counsel's performance be reviewed under professional standards that existed at the time of trial, as the majority of circuits require, rather than under the professional standards now in existence, as is the Sixth Circuit's practice?

2. Does the threshold for finding prejudice under *Strickland* vary depending on the number of statutory aggravating circumstances, as opposed to the weight of the aggravating evidence?

3. Did the Sixth Circuit err in granting the habeas writ on Respondent's ineffective assistance of counsel claim?

LIST OF PARTIES

The Petitioner is David Bobby, the Warden of the Ohio State Penitentiary. Bobby is substituted for his predecessor, Carl S. Anderson. See Fed. R. Civ. P. 25(d).

The Respondent is Robert J. Van Hook, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of David Bobby, the Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit panel's opinion, *Van Hook v. Anderson*, 560 F.3d 523 (6th Cir. 2009), is reproduced at App. 1a-15a. The panel's earlier opinions, *Van Hook v. Anderson*, 535 F.3d 458 (6th Cir. 2008), and *Van Hook v. Anderson*, 444 F.3d 830 (6th Cir. 2006), are reproduced at App. 20a-45a and App. 110a-122a. The Sixth Circuit's en banc opinion, *Van Hook v. Anderson*, 488 F.3d 411 (6th Cir. 2007), and en banc order vacating those earlier opinions are reproduced at App. 46a-109a and App. 18a-19a. The United States District Court for the Southern District of Ohio's opinions denying relief are reproduced at App. 123a-213a. The Ohio court of appeals' decision denying Van Hook's petition for post-conviction relief is reproduced at App. 214a-225a. The Ohio Supreme Court's opinion on direct appeal in *State v. Van Hook*, 530 N.E.2d 883 (Ohio 1988), is reproduced at App. 241a-286a.

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its opinion on March 6, 2009. Justice Stevens extended the time period to file a petition for writ of certiorari to August 3, 2009. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

INTRODUCTION

The Sixth Circuit in this case so mangled the analysis of Respondent Robert J. Van Hook's ineffective assistance of counsel claim that the circuit now stands alone on a question that commonly arises in capital cases. Specifically, in evaluating Van Hook's claim that his trial counsel's investigation of potential mitigating evidence in 1985 was constitutionally inadequate, the appeals court rigidly applied the professional guidelines issued by the American Bar Association in 2003—*eighteen years* after Van Hook's trial. That approach conflicts with numerous decisions from the other circuits—not to mention this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984)—which look to the professional standards in existence at the time of counsel's performance.

Then, on *Strickland*'s prejudice prong, the court committed a second fundamental error, stating that the "threshold for finding prejudice in this case is . . . lower" because Van Hook's murder implicated only one aggravating circumstance under Ohio law. App. 14a. The prejudice inquiry turns, however, not on the number of statutory aggravators, but on "the totality of the evidence" in aggravation and mitigation before the trier of fact. *Strickland*, 466 U.S. at 695. The Sixth Circuit's mechanical

application of the prejudice standard unfairly stacks the deck against the State in cases like Van Hook's (where only one statutory aggravator is at issue) and against the habeas petitioners in other cases (where multiple statutory aggravators are in play).

This is the third time the Sixth Circuit has granted the writ in this case, following two en banc actions. This Court should grant the Warden's petition and reverse the judgment below.

STATEMENT OF THE CASE

A. A three-judge panel convicted Van Hook of murder and sentenced him to death.

Late one night in February 1985, Robert J. Van Hook met David Self at a downtown Cincinnati bar. App. 241a-242a. The two men engaged in conversation and consumed alcohol for two to three hours. App. 242a. Van Hook then agreed to have sex with Self, and the men left for Self's apartment. *Id.*

Once in the apartment, Self began to perform oral sex on Van Hook. App. 276a. Van Hook grabbed Self's neck and strangled him into unconsciousness. App. 242a. He then took a paring knife from the kitchen and stabbed Self in the head behind his ear lobe. *Id.* He also stabbed Self in the neck in an effort to decapitate him. *Id.* He then stabbed Self in the stomach, making an incision from the abdomen up to and over the sternum. *Id.* With Self's body cavity now open, Van Hook stabbed upward a number of times, piercing the liver and the heart. *Id.* He then placed the knife, a cigarette butt, and a small bottle of amyl nitrate into Self's body

cavity in an effort to cover up any fingerprints. App. 242a, 285a.

Van Hook thereafter searched the apartment, including a chest of drawers and a jewelry box. App. 242a. He could not find any money, but found several gold chains and a leather jacket. App. 242a, 278a. Van Hook next went to the kitchen in search of food, but did not see anything of interest. App. 243a. He then smeared the bloody fingerprints in the apartment, turned up the volume on a stereo, and left the scene with the gold chains. App. 243a, 278a.

Van Hook went to the home of a family friend, Robert Hoy, under the guise of recovering from a fight. App. 243a. He ate a large meal, borrowed money, and departed for Florida. *Id.* He then stayed in Fort Lauderdale until his arrest more than a month later. *Id.* That evening, during an interview with two Cincinnati police detectives, Van Hook confessed to the murder. App. 272a-286a. The detectives then transported Van Hook back to Cincinnati.

A grand jury indicted Van Hook for aggravated murder and aggravated robbery. App. 243a. The grand jury further included a death specification that Van Hook committed the murder during an aggravated robbery, and that he was the principal offender. *Id.* (citing Ohio Rev. Code § 2929.04(A)(7)). Van Hook pled not guilty and not guilty by reason of insanity, waived his right to jury trial, and elected to be tried by a three-judge panel. *Id.*

During the guilt phase of the trial, the defense did not contest that Van Hook killed Self. Van

Hook's only witness was a psychiatrist, Dr. Emmett Cooper. Dr. Cooper testified that Van Hook suffered from a borderline personality disorder characterized by impulsive behavior, mood swings, and gender identity problems. Sixth Circuit Joint Appendix ("J.A.") 4211. Although Van Hook suffered no mental illness or mental disease, J.A. 4217, Dr. Cooper testified that he experienced a "drug-induced" "acute break with reality and acute psychosis" at the time of the murder, "result[ing] in a misperception of reality," J.A. 4220. Therefore, Dr. Cooper said, Van Hook "ha[d] difficulty in distinguishing right from wrong." J.A 4224. In response, the State called two mental health experts, Dr. Nancy Schmidtgoessling and Dr. Teresito Alquizola, to attest that Van Hook did not suffer from any mental disease or defect. J.A. 4278-79, 4327-28.

The three-judge panel convicted Van Hook on both counts and the death specification. J.A. 4402-03. With the defense's acquiescence, the panel recessed the proceedings to allow the probation department to prepare a presentence report and to permit the court psychiatric clinic to evaluate Van Hook on issues relating to the penalty phase. J.A. 4404-05.

In her Mitigation Report to the court, Dr. Donna Winter, a clinical psychologist, concluded that "Van Hook was not suffering from any mental disease or defect." App. 377a. Rather, she said that Van Hook was "the product of an unstable, non-nurturant, violent, and chaotic background," and that "his early years were characterized by inadequate parental care," "exposure to physical or sexual violence," and "exposure to substance abuse." *Id.* His behavior was

also consistent with "a borderline personality disorder." App. 370a.

The three-judge panel then convened for the penalty phase. The defense recalled Dr. Cooper and Dr. Schmidtgoessling to testify that, in light of his personality disorder and his alcohol consumption, Van Hook's ability to appreciate the criminality of his conduct was substantially impaired at the time of the murder. J.A. 4440, 4459. The defense also called character witnesses, including Van Hook's father, mother, and aunt. All three testified in detail about Van Hook's childhood, discussing how Van Hook had witnessed physical beatings of his mother, how his father introduced him to drugs at a young age, how he was regularly neglected, and how he attempted suicide on several occasions. App. 307a-367a. The defense also called Dr. Robert Hoy, a family friend, to testify that he had a grandfather-like friendship with Van Hook, that Van Hook enjoyed music and theater, and that Van Hook was never violent with him. J.A. 4533-36.

At the close of the proceedings, the three-judge panel sentenced Van Hook to death. App. 387-306a. In a 29-page opinion, the court concluded that Van Hook's "intentions were crystal clear" on the night of the murder—"to rob the victim." App. 294a-295a. Further, the court noted that, "[s]ince the age of fifteen [Van Hook] had been accousting [sic] and robbing homosexuals and he was intending to do that same thing again." App. 395a. Finally, the court recounted Van Hook's "rational acts designed to avoid detection"—"smudging his bloody fingerprints," "stuffing the knife handle first into the stomach wound," and "his departure from the city." *Id.*

The court then said that this aggravating circumstance outweighed the mitigating factors. Van Hook had presented no credible evidence of mental disease or defect. App. 297a, 301a, 304a. The court "recognize[d] that all of the records in this case . . . indicate the defendant had a very tragic and unfortunate upbringing, with no love or parental guidance, with continual and excessive use of alcohol and other drugs and with constant negative reinforcement of his personality." App. 301a. But, the court said, the fact "that his earlier years were chaotic and he suffered from a significant degree of neglect and abuse . . . cannot excuse his conduct." App. 305a.

On direct review, the Ohio court of appeals and the Ohio Supreme Court affirmed Van Hook's conviction and sentence. See App. 244a, 260a. This Court denied his petition for writ of certiorari. See *Van Hook v. Ohio*, 489 U.S. 1100 (1989).

B. The state courts denied Van Hook's petition for post-conviction relief and the federal district court denied Van Hook's habeas petition.

Van Hook then filed a petition to vacate his sentence in the state common pleas court, asserting 44 different errors. J.A. 1461-1509. He specifically alleged that trial counsel's performance during the penalty phase was ineffective, J.A. 1494, and he offered affidavits from several family members attesting to facts about his troubled childhood, see App. 226a-240a. The court denied all relief, J.A. 2176-2203, and the Ohio court of appeals affirmed, App. 214a-225a. With respect to the ineffective assistance claim, the appellate court concluded that

Van Hook's affidavits were "merely cumulative" of trial counsel's penalty-phase presentation and that Van Hook had not demonstrated prejudice from counsel's purported deficiencies. App. 219a.

In 1995, Van Hook filed his federal habeas petition. J.A. 21-93. Applying the habeas standards that preceded the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1219, the district court denied relief on all claims. See App. 164a-213a (summary judgment); App. 123a-163a (merits).

C. After lengthy appellate proceedings, the Sixth Circuit reversed the district court and vacated Van Hook's sentence.

On appeal, the Sixth Circuit reversed the district court and granted full habeas relief. The panel held that Van Hook's confession should have been suppressed under *Miranda v. Arizona*, 384 U.S. 436 (1966). App. 120a. The Sixth Circuit, sitting en banc, vacated the panel's decision. It concluded that no *Miranda* violation had occurred and returned the case to the panel for consideration of Van Hook's other claims. App. 80a-81a. This Court denied review. See *Van Hook v. Hudson*, 128 S. Ct. 614 (2007).

The Sixth Circuit panel then reversed the district court again, finding that trial counsel's performance during the penalty phase was constitutionally ineffective for three reasons: counsel's mitigation investigation was deficient, counsel erred by failing to secure an independent mental health expert, and counsel improperly requested the preparation of a presentence report.

App. 26a-40a. The panel then directed the district court to issue a conditional writ and vacate Van Hook's death sentence. App. 45a.

The Sixth Circuit, sitting en banc, vacated the panel's second opinion. App. 18a. While the parties were preparing their supplemental briefs, a majority of judges on the en banc court voted sua sponte to return the case to the panel. App. 16a-17a. The majority requested that the panel "delete[] its discussion of counsel's failure to seek an independent mental health expert and the failure of counsel to object to the Presentence Report." App. 2a.

The panel thereafter issued a third opinion, granting habeas relief solely on counsel's allegedly deficient mitigation investigation. It determined that trial counsel failed to uncover "the most important details" of Van Hook's childhood—that he was beaten by his father, that he once witnessed an attempt by his father to kill his mother, and that his mother was committed to a psychiatric hospital when he was four years old. App. 9a. The panel next determined that the "threshold for finding prejudice in this case is . . . lower" because Van Hook's murder implicated only one aggravating circumstance under Ohio law. App. 14a. Therefore, it stated that "the introduction of more available mitigating evidence could certainly have tipped the scales in favor of his life." App. 13a-14a.

REASONS FOR GRANTING THE WRIT

The Court should grant the Warden's petition and reverse the Sixth Circuit's grant of the writ—the third such grant in this case—for two reasons. First, as it has done in prior cases, the Sixth Circuit

reviewed counsel's performance in 1985 under professional standards issued by the American Bar Association nearly twenty years later, in 2003. The court's reliance on later-developed ABA guidelines ignores this Court's instruction "to evaluate the conduct from counsel's perspective at the time," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and it creates a division of authority with other federal appellate courts, which consider only those ABA guidelines in effect at the time of counsel's representation.

Second, the Sixth Circuit held that the threshold for finding *Strickland* prejudice in this case was lower because Van Hook's murder implicated only one statutory aggravating circumstance. In Ohio, however, the sentencing decision is guided by the weight of the aggravating evidence, not the number of statutory aggravating circumstances. The *Strickland* prejudice inquiry likewise focuses on the evidence in aggravation, reweighing it against the evidence in mitigation. *Id.* at 695. By suggesting that the threshold for prejudice waxes and wanes with the number of statutory aggravators, the Sixth Circuit has skewed its inquiry in favor of petitioners like Van Hook who are convicted on one aggravator, and against other petitioners who are convicted of multiple aggravators.

A. The Sixth Circuit misapplied settled law when it evaluated counsel's performance at a 1985 trial under professional standards developed in 2003.

A claim of ineffective assistance is reviewed under the familiar framework of *Strickland v.*

Washington. The petitioner must show that counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. The standard of "reasonableness," however, is measured "under *prevailing* professional norms." *Id.* (emphasis added). "[T]o eliminate the distorting effects of hindsight," the habeas court must conduct its inquiry "from counsel's perspective at the time." *Id.* at 689.

Instead of reviewing counsel's performance under the prevailing professional norms in 1985, the Sixth Circuit followed its own precedent and reviewed counsel's performance under 2003 ABA Guidelines. This approach ignores *Strickland*, defies clear pronouncements from this Court, and conflicts with decisions from the other federal appellate courts. When the proper inquiry is taken and the appropriate deference is given to the factual findings of the Ohio post-conviction courts, it is clear that trial counsel's penalty-phase performance was constitutionally adequate. This Court should grant review to correct the Sixth Circuit's hindsighted approach to reviewing Sixth Amendment claims.

1. Counsel's performance must be assessed under professional norms that prevailed at the time of trial.

The Sixth Circuit began its analysis with the proposition that "counsel in death cases should follow closely the ABA standards." App. 6a. The court further stated that this Court has "incorporat[ed] the American Bar Association Guidelines . . . as the professional standard of performance." App. 4a (citing *Wiggins v. Smith*, 539 U.S. 510 (2003)).

The Sixth Circuit then invoked the 2003 ABA Guidelines to review the adequacy of counsel's performance in 1985. For instance, the court said that counsel must "'locate and interview the client's family members . . . and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others.'" App. 8a (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, cmt. (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 1024 (2003)). The court cited to other ABA commentary calling for an "'unparalleled investigation into [the defendant's] personal and family history,' as well as school, medical and psychological records." App. 9a (quoting ABA Guidelines 10.7, cmt.).[1] But these guidelines did not exist in 1985. In fact, the ABA did not issue its standards for death-penalty representation until 1989—four years after the trial in this case.

This approach—applying later-developed ABA standards to evaluate the adequacy of counsel's performance—is established practice in the Sixth Circuit. In *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), the court granted habeas relief after concluding that counsel's performance at a 1984 murder trial was deficient under the 1989 and 2003 ABA Guidelines. The court explained that, "[a]lthough the instant case was tried before the 1989 ABA edition of the standards was published,

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[1] The Sixth Circuit's opinion did not identify the edition of the ABA Guidelines, but an examination of the different versions establishes that the court's quoted passages were taken from the 2003 Guidelines.

the standards merely represent a codification of longstanding common-sense principles of representation understood by diligent, competent counsel in death penalty cases." *Id.* at 487. And the 2003 Guidelines were also applicable to the case, the court said, because they "simply explain[ed] in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence." *Id.*

The Sixth Circuit has applied *Hamblin* to its later habeas cases, including to those cases governed by AEDPA. See, e.g., *Haliym v. Mitchell*, 492 F.3d 680, 716-17 & n.28 (6th Cir. 2007); *Dickerson v. Bagley*, 453 F.3d 690, 693-94 (6th Cir. 2006); see also *Cone v. Bell*, 359 F.3d 785, 804 n.2 (6th Cir. 2004) (Merritt, J., concurring) ("Although the above quotation is a recent statement not published at the time of Cone's trial, I use it because it is an articulation of long-established 'fundamental' duties of trial counsel.").

The Sixth Circuit's framework for identifying the "prevailing professional norms" of representation departs from this Court's clear teachings. *Strickland,* 466 U.S. at 688. When judging ineffective assistance claims, the Court has looked to the ABA standards in effect at the time of the challenged conduct. First, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Court cited to the 1980 ABA standards in finding that counsel's mitigation efforts in 1986 were deficient. *Id.* at 396. Then, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court reviewed the adequacy of counsel's mitigation investigation in 1989 under the 1989 ABA Guidelines. *Id.* at 524. Finally, in *Rompilla v. Beard*, 545 U.S. 374 (2005),

the Court assessed counsel's performance in 1988 under "the American Bar Association Standards for Criminal Justice in circulation"—specifically, standards from 1982. *Id.* at 387. Although *Rompilla* referenced the ABA's 1989 and 2003 guidelines in footnotes, it did so simply to point out that the professional standards at issue in that case had not changed over the years. *Id.* at 387 n.6 & n.7.

The other federal appellate courts likewise have understood that only those ABA standards and guidelines in existence "[a]t the time at issue" are relevant to the *Strickland* inquiry. *Hummel v. Rosenmeyer*, 564 F.3d 290, 298 (3d Cir. 2009); accord *Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008); *Sonnier v. Quarterman*, 476 F.3d 349, 358 n.3 (5th Cir. 2007). Under that straightforward approach, the habeas court identifies the "clearly described" duties from the "[ABA] standards in effect at the time of [the petitioner's] trial," and then evaluates defense counsel's performance using those metrics. *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005) (en banc); see also *Brown v. Uttecht*, 530 F.3d 1031, 1040 (9th Cir. 2008) (Reinhardt, J., dissenting) (assessing counsel's penalty-phase performance under "the ABA Guidelines at the time of trial"). No other circuit has adopted the Sixth Circuit's practice of using later-developed ABA guidelines to judge the propriety of counsel's representation.

The Sixth Circuit's misapplication of the *Strickland* inquiry is all the more troubling given its lofty treatment of the ABA Guidelines. Time and again, this Court has emphasized that the Guidelines "are only guides" "to determining what is reasonable." *Strickland*, 466 U.S. at 688; accord

Wiggins, 539 U.S. at 524. Yet the Sixth Circuit consistently elevates the Guidelines to the status of constitutional requirements: "'Our Court has made clear that . . . counsel for defendants in capital cases must fully comply with [the ABA Guidelines].'" App. 6a-7a (quoting *Dickerson*, 453 F.3d at 693) (alterations in original); accord *Cornwell v. Bradshaw*, 559 F.3d 398, 407 (6th Cir. 2009); *Hamblin*, 354 F.3d at 486 ("[T]he ABA standards for counsel . . . provide the guiding rules and standards . . . .").

Trial counsel's performance is now scrutinized in the Sixth Circuit to the letter of the current ABA standards, even if, as here, the standards were issued decades after the disputed criminal proceedings. Such an approach amplifies, rather than "eliminate[s,] the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. After all, the 2003 ABA Guidelines on death-penalty representation include detailed instruction, commentary, and citations to authority—none of which was available in 1985. Given the many developments in the law and the profession over the past two decades, reviewing the performance of counsel at a 1985 trial under modern-day standards may throw into question the effectiveness of many performances that were perfectly reasonable at the time.

The Warden therefore asks that the Court accept review and restore the *Strickland* inquiry to its proper form: "the reasonableness of counsel's challenged conduct" is to be judged "as of the time of counsel's conduct." *Id.* at 690.

2. Counsel's mitigation investigation and presentation were reasonable under *Strickland*.

On the merits of Van Hook's ineffective assistance claim, the question is whether "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." 466 U.S. at 688. Like all attorneys, Van Hook's trial counsel "ha[d] a duty to make reasonable investigations" into the facts and circumstances of the case, *id.* at 691, but that duty is not unlimited. Counsel "may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 545 U.S. at 382. And there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Furthermore, at the time of Van Hook's trial in 1985, the ABA had not yet developed detailed guidelines for representation in capital cases. And the ABA's criminal justice standards were broad and nondescript. Defense attorneys had a general duty "to explore all avenues leading to facts relevant to the merits of the case and the penalty." 1 ABA Standards for Criminal Justice 4-4.1, at p. 4-53 (2d ed. 1980). The standards further stated that "[i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant." *Id.* at p. 4-55. They offered no guidance, direction, or strategy for collecting, and then presenting, mitigating evidence to the factfinder in a capital case.

In this case, the Sixth Circuit found that "counsel's investigation into and presentation of mitigating evidence was deficient" for three reasons: (1) counsel failed to uncover and present "many of the most important details" of Van Hook's "traumatic childhood experience"; (2) counsel waited until "after the guilt phase" to "start[] a last minute investigation for the mitigation hearing"; and (3) counsel failed to contact and interview other family members who "could have helped . . . counsel narrate the true story of Van Hook's childhood experiences." App. 9a, 10a, 11a. A review of the trial record shows the opposite: counsel's penalty-phase investigation and performance were consistent with the professional norms of the day.

a. Counsel presented a full picture of Van Hook's childhood at trial.

With respect to the first alleged deficiency, the Sixth Circuit concluded that Van Hook's attorneys uncovered and presented "little information about [Van Hook's] traumatic childhood." App. 9a. To the contrary, counsel presented extensive details on this subject.

Van Hook's father, Robert Van Hook, Sr., testified that he "was always fighting" with his wife, physically and verbally, in front of Van Hook. App. 309a. He said that he came home drunk "[a]bout every night of the week" when Van Hook was a toddler, App. 311a; that he frequently "took [Van Hook] to bars" until "3 o'clock, 4 o'clock in the morning" beginning at age nine, App. 311a-312a; and that he introduced his son to amphetamines at age eleven, App. 312a. Van Hook, Sr. also reported that his son had no stable home or living situation, App.

314a-315a, and that he had trouble in school, App. 316a. Van Hook, Sr. admitted that, when his son was fifteen, he "accused him of going to bed with my girlfriend." App. 318a. At this point, Van Hook ran away, living on the streets for several months. *Id.* Finally, Van Hook, Sr. referenced an incident where he "slapped the hell out of" his son, App. 321a, and described an occasion where his son attempted suicide by cutting his arm, App. 327a.

Van Hook's mother, Joyce Lavern Lauttrell, testified that Van Hook's father beat her "[e]very week almost," App. 338a, and that Van Hook often watched, App. 339a. Lauttrell stated that she was a heavy drinker during Van Hook's childhood, App. 339a, 341a; that she had been divorced three times, App. 340a; that Van Hook never attended a school for longer than a year, App. 342a-343a; and that Van Hook used drugs with his father, App. 343a. Lauttrell noted that Van Hook had joined the military at age 17. App. 344a. He thereafter attempted suicide, and was ultimately discharged due to his drug and alcohol addictions. App. 346a-347a. After describing Van Hook's several other attempts at suicide, App. 351a-353a, Lauttrell broke down, lamenting that "his father and I ought to be on trial with him." App. 353a. She said, "So many things I wish I could do over again, but I can't, and I feel just as much to blame for what happened." *Id.*

One of Van Hook's aunts, Marilyn Johnson, confirmed that Van Hook's childhood was "a bad one, one that kids should never have." App. 358a. Johnson stated that Van Hook's mother and father "fought an awful lot" and "drank an awful lot," *id.*, and that Van Hook and his mother would often stay

with her after the fights, App. 360a. Johnson also reported that Van Hook lived with her for a year when he was eleven due to his parents' "fighting," "drinking," and "partying." App. 362a. And, Johnson said, Van Hook was "like [her] oldest son" when he was with her family, but he became a "different boy" after being with his father. App. 362a-363a.

These fact witnesses were buttressed by the testimony of medical experts. Dr. Schmidtgoessling testified that Van Hook "had one of the most unfortunate histories one could have." J.A. 4274. She noted that "[b]oth parents were substance abusers," that "the father was quite violent," and that the family unit was "a most unstable situation." *Id.* Dr. Alquizola recounted a similar childhood of "a lot of fights, a lot of violence, and no stability." J.A. 4332. And Dr. Winter described Van Hook's childhood as "very much like a 'combat zone.'" App. 371a. His father was "abusive" and "a drug user," his mother drank "heavily," and Van Hook "observed numerous episodes of violence," including "sexual violence," during his childhood. App. 370a-371a. Dr. Winter indicated that Van Hook's father would "grab [his mother] by her hair and swing her around the room, hold her at gun point, [and] hold her at knife point." App. 371a.

Even with this presentation, the Sixth Circuit inexplicably found that counsel failed to uncover and present "the most important details" of Van Hook's childhood. App. 9a. Referencing an affidavit by Van Hook's stepsister, Tanna Waller, the court said that "counsel's investigation failed to reveal that Van Hook's parents repeatedly beat him" and that Van

Hook "had witnessed his father attempt to kill his mother several times." *Id.* (citing App. 232a). The trial transcript contradicts that statement. As discussed above, Van Hook, Sr.'s violent behavior toward his family was well documented at the penalty phase. And Van Hook's mother testified that her son regularly watched her being beaten, see App. 338a-339a—a statement corroborated by Dr. Winter's report, see App. 371a.

The court also criticized counsel for failing to learn that Van Hook's "mother was committed to a psychiatric hospital when [Van Hook] was between four and five years old." App. 9a (citing App. 227a). Again, the record shows otherwise.[2] Van Hook's counsel were aware of Joyce Lauttrell's psychiatric history. Her psychiatrist had contacted counsel by letter, see App. 230a, and Lauttrell testified that she had been "under psychiatric care" at one point during Van Hook's childhood, App. 340a. Moreover, counsel cannot be faulted for not focusing their presentation on this topic. There was no credible evidence that Van Hook himself suffered from a mental disease or defect, and there is no evidence in the record to explain how Lauttrell's psychiatric hospitalization affected Van Hook's childhood, if at all.

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[2] Van Hook's affidavits are inconsistent on when Joyce Lauttrell was hospitalized. Van Hook's uncle stated that Lauttrell was committed when Van Hook was four or five years old, see App. App. 227a, but Van Hook's aunt stated that Lauttrell was committed before Van Hook was even born, see App. 239a.

b. Counsel's mitigation investigation began well in advance of trial.

With respect to the second alleged deficiency, the Sixth Circuit questioned the timing of counsel's mitigation efforts. See App. 10a. The court stated that Van Hook's attorneys waited "until four days before the mitigation hearing to begin the[ir] investigation." App. 12a. That assertion has no support. The Sixth Circuit's one citation to the record, App. 10a (citing J.A. 4400-04), contains no information about counsel's investigation. Rather, it is an excerpt from the trial transcript where the three-judge panel reads its guilt-phase verdict and defense counsel then agrees to the preparation of a presentence report and mental-status evaluation.

Billing records establish that counsel's penalty-phase preparations began much earlier. Van Hook was indicted on April 18, 1985, and the case went to trial on July 15, 1985. J.A. 357, 567. Van Hook's attorneys had numerous conversations with Joyce Lauttrell starting in late April. App. 380a, 385a. Counsel reviewed Van Hook's military records on May 13, 1985, App. 380a, and they met with the Veterans Administration on May 28, 1985, about Van Hook's medical records, App. 381a, 386a. One of the attorneys placed a call on June 7, 1985, to a "mitigation expert." App. 386a. And both attorneys had meetings with Van Hook's penalty-phase witnesses—his parents, Marilyn Johnson, and Robert Hoy—in early July. App. 381a-382a, 386a-387a. In light of these billing notations, the Sixth Circuit was wrong to characterize counsel's investigation as "last minute," beginning only "after the guilt phase" had ended. App. 10a.

c. Van Hook's affidavits are cumulative of the penalty-phase evidence.

With respect to the third alleged deficiency, the Sixth Circuit found that counsel were ineffective because they failed to interview "Van Hook's step-sister, his paternal uncle, two of his paternal aunts, his maternal uncle, and the psychiatrist who treated his mother." App. 11a. "Considering the information that they had already learned," the court stated that Van Hook's attorneys "had reason to suspect that much worse details existed," and that these individuals could "narrate the true story of Van Hook's childhood." *Id.*

The Ohio court of appeals examined the affidavits from these family members and found that they were "merely cumulative" of the trial testimony. App. 219a. A review of these documents validates the state court's assessment. Three affidavits contain little to no facts pertaining to Van Hook's childhood. See App. 229a-230a (Warren Richards); App. 233a-234a (Billy Van Hook); App. 238a-240a (Frieda Roll). The other affidavits contain short, nondescript statements. For instance, an uncle, Robert Leon Salyers, stated that Van Hook's parents "argued a lot," that "Joyce [Lauttrell] was always spanking" Van Hook, and that Van Hook, Sr. "was hard" on his son. App. 227a-228a. Van Hook's stepsister, Tanna Waller, stated that Van Hook's parents "would drink heavily" and get into "loud arguments and physical fights." App. 231a. She further attested that Van Hook, Sr. "on different times tried to kill Mom," and that "[h]e would hit [Van Hook] with his hand or fist on the head"

beginning at age three. App. 232a. And an aunt, Darlene Van Hook Whitson, reported that Van Hook's parents "would whip him" if he cried, that "they did not want to be bothered by the children," and that they got into "many verbal fights." App. 236a. She also said that Van Hook "began skipping school in the first grade." *Id.* The same or substantially similar information was presented during the penalty phase; as explained above, the three-judge panel was well aware of Van Hook's turbulent upbringing, his parents' addictions, and his father's penchant for violence.

The Sixth Circuit's analysis is all the more problematic given the standard of review. Even before AEDPA, factual determinations made by a state court were presumed correct on federal habeas review. See *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999). In this case, the Ohio court of appeals reviewed the record and concluded that Van Hook's affidavits were cumulative of the trial evidence. The Sixth Circuit should have deferred to that reasonable assessment.

Both the state court and the district court found that counsel's mitigation investigation and presentation was constitutionally adequate. Only by measuring counsel's performance under ABA guidelines adopted eighteen years later and misreading the relevant facts in the trial record, could the Sixth Circuit say otherwise.

B. The Sixth Circuit erred by holding that the threshold for prejudice under *Strickland* is lower when the murder implicates one statutory aggravating circumstance.

Even if trial counsel's penalty-phase investigation and performance were deficient, Van Hook must still show prejudice—that is, he must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The Sixth Circuit's prejudice analysis is rife with error. The court incorrectly held that, as a legal matter, the standard for prejudice under *Strickland* is lower when the murder implicates only one statutory aggravating circumstance. And when conducting its analysis, the court failed even to mention, much less weigh, the strength of the aggravating evidence in this case. Instead, it granted relief based on six untested affidavits that were either irrelevant to or cumulative of the mitigation evidence presented at the trial.

1. The *Strickland* prejudice standard does not vary with the number of aggravating circumstances.

When outlining the framework of its prejudice inquiry, the Sixth Circuit focused on the fact that Van Hook's murder "only qualified for one of Ohio's statutory aggravating circumstances"—that he committed the murder during an aggravated robbery and that he was the principal offender. App. 13a (citing Ohio Rev. Code § 2929.04(A)(7)). And because Van Hook was convicted of only one aggravating

circumstance, the court concluded, "[t]he threshold for finding prejudice . . . is lower." App. 14a.

The Sixth Circuit was wrong to suggest that the number of aggravating circumstances affects the *Strickland* prejudice inquiry. Under Ohio's death-penalty statute, the State must present its aggravating evidence in certain statutorily defined categories. See Ohio Rev. Code § 2929.04(A)(1)-(8) (1981). The sentencer then weighs those aggravating circumstances against the mitigating evidence to determine whether the death penalty is appropriate. See Ohio Rev. Code § 2929.04(B) (1981); *State v. Penix*, 513 N.E.2d 744, 746 (Ohio 1987). It is the *weight* of the aggravating circumstance (or circumstances), not their *number*, that guides the ultimate decision. See Ohio Rev. Code § 2929.03(D)(2) & (D)(3) (1981) (directing the jury or three-judge panel to impose a death sentence if it "unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances . . . outweigh the mitigating factors"); see also *Penix*, 513 N.E.2d at 746 ("This weighing process is designed to guide the sentencing authority's discretion by focusing on the 'circumstances of the capital offense and the individual offender.'") (citation omitted).

This Court has also recognized the distinction. In *Brown v. Sanders*, 546 U.S. 212, 214 (2006), a jury sentenced the defendant to death after finding four aggravating circumstances. On appeal, the California courts declared two of the circumstances invalid, but nevertheless affirmed the death sentence. *Id.* at 214-15. On habeas review, the Ninth Circuit vacated the death sentence, but this Court reversed. The jury's consideration of two

invalid aggravating factors did not give rise to a constitutional defect, the Court said, because "[a]ll of the aggravating facts and circumstances that the invalidated [aggravating] factor permitted the jury to consider were also open to their proper consideration under one of the other [aggravating] factors." *Id.* at 223. Or stated differently, the fact that the jury was allowed to consider two invalid aggravating factors was harmless; "the universe of aggravating *facts*" in the case would have been the same regardless of the number of aggravating *factors*. *Id.* at 222 (emphasis added).

The *Strickland* prejudice inquiry fully incorporates this focus on aggravating evidence, as opposed to aggravating factors. The habeas court looks to "the totality of the evidence" that would have been before the judge or jury but for counsel's errors. *Strickland*, 466 U.S. at 695. It then "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence" to determine whether the petitioner was prejudiced. *Wiggins*, 539 U.S. at 534.

The Sixth Circuit's belief that "[t]he threshold for finding prejudice" depends on the number of statutory aggravating circumstances in a case is not only wrong, but it mangles the *Strickland* inquiry. In some cases, including this one, the Sixth Circuit's number-of-aggravators analysis will tilt unfairly against the State. Here, for instance, because Van Hook's "conviction only qualified for one of Ohio's statutory aggravating circumstances," the Sixth Circuit found that "the introduction of more available mitigating evidence could certainly have tipped the scales in favor of his life." App. 13a-14a.

In other habeas cases, however, the Sixth Circuit's rule will unfairly tilt the scales against the petitioner, for a court might think that the prejudice hurdle is more rigorous if the crime implicated several aggravating circumstances. But there is only one prejudice standard, and it applies equally to all habeas petitioners.

2. Van Hook has not shown prejudice from his counsel's failure to interview the six disputed witnesses.

Under a straightforward application of *Strickland*, Van Hook has not established "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. The Sixth Circuit's contrary determination ignored the State's strong evidence in aggravation and recited untested affidavit evidence that was either irrelevant to or cumulative of the mitigation evidence at trial.

Although the prejudice inquiry directs courts to "reweigh" the aggravating and mitigating evidence, *Wiggins*, 539 U.S. at 534, the Sixth Circuit failed to mention, much less reweigh, the aggravating evidence here. This occurrence is not uncommon; the Sixth Circuit often finds prejudice without any consideration of whether, in light of the aggravating evidence, the petitioner's mitigation arguments had a reasonable chance at success. See, e.g., *Mason v. Mitchell*, 543 F.3d 766, 780-81 (6th Cir. 2008), *petition for cert filed* (U.S. July 20, 2009) (No. 09-74); *Spisak v. Mitchell*, 465 F.3d 684, 706 (6th Cir. 2006), *cert granted*, 129 S. Ct. 1319 (2009); *Dickerson*, 453 F.3d at 699; *Hamblin*, 354 F.3d at 493.

To that question, the factfinder must consider "any evidence raised at trial that is relevant to the aggravating circumstances"—specifically, Van Hook's aggravated robbery of David Self. Ohio Rev. Code § 2929.03(D)(1) (1981). And here, the State had a strong case. As recounted above, Van Hook lured David Self to an apartment with the specific intent of robbing him. Once there, Van Hook waited until Self was in a vulnerable position, choked him into unconsciousness, and killed him. Van Hook then searched the apartment for valuables, smudged his fingerprints, and placed the knife in Self's body cavity in an effort to conceal his identity. Furthermore, the trial evidence established that Van Hook had a long history of luring gay men under the pretenses of sex, assaulting them, and then robbing them. See, e.g., App. 374a; J.A. 4276-77, 4334. Van Hook also admitted that he continued this behavior in the weeks after the murder: "I been goin' down to the main strip an' bout once uh week I'd go down there an' lure uh homosexual to the room an' . . . I uh assulted [*sic*] uh couple guys, took their money." App. 279a. As the three-judge trial panel found when reviewing the aggravating evidence, Van Hook's "modus operandi was clear." App. 295a.

As to the mitigation side of the inquiry, the Sixth Circuit stated that "[c]ounsel's deficient performance prevented the three-judge panel from learning fully about the two statutory mitigating factors that were the strongest in his case—his traumatic family background and his mental illness." App. 13a. This holding is erroneous for three reasons.

First, the Sixth Circuit had no evidentiary basis for characterizing Van Hook's mental-illness arguments as strong. Although multiple experts testified that Van Hook had a borderline personality disorder, not one concluded that Van Hook suffered from a mental disease or defect that impaired his capacity to appreciate the criminality of his conduct, J.A. 4439, 4459—a finding that Dr. Winter reached as well, see App. 377a. The most they could say is that Van Hook had impaired judgment on the night of the murder due to a confluence of drugs, alcohol, and his personality disorder, J.A. 4439—a theory that the three-judge panel reasonably chose not to credit in mitigation, App. 301a-304a; see generally *State v. Johnson*, 723 N.E.2d 1054, 1078 (Ohio 2000) (observing that defendant's "personality disorder and drug dependence[] are entitled to some, but very little, weight in mitigation").

Van Hook's affidavits provide no new support for his claims of mental illness. Dr. Warren Richards stated that he treated Joyce Lauttrell in 1972 for depression and suicidal feelings. App. 229a. Dr. Richards speculated that psychological disorders run in the Van Hook family, but he offered no information or diagnosis about Van Hook's mental state (since he never treated him). App. 230a. And the affidavits from Van Hook's family members are devoid of any suggestion that Van Hook suffered from, or was treated for, mental illness during his childhood.

Second, the Sixth Circuit mistakenly stated that, but for counsel's deficiencies, the three-judge panel would have learned certain facts about Van Hook's childhood—that he was physically abused,

that he watched his father try to kill his mother on several occasions, and that his mother was once committed to a psychiatric hospital. But all these facts were presented at trial through the penalty-phase testimony and Dr. Winter's report. As discussed above, the three-judge panel was well aware that Van Hook's "earlier years were chaotic" and that "[Van Hook] suffered from a significant degree of neglect and abuse." App. 305a.

Van Hook's cursory affidavits add little insight into his childhood. One of Van Hook's uncles attested that "Joyce was always spanking [him]," and "[his father] was hard on him." App. 227a-228a. One of Van Hook's aunts stated that Van Hook's parents "would whip him" if he cried and "would unexpectedly leave [Van Hook] at the Bar." App. 236a. And Van Hook's stepsister said that she saw Van Hook's father "hit [him] with his hand or fist on the head . . . for trivial things." App. 232a. The two other affidavits are silent about Van Hook's childhood, offering only generalized descriptions of the family's history. The Ohio court of appeals correctly determined that these "evidentiary documents" did not "demonstrat[e] prejudice." App. 219a. Nothing in these cursory statements "alter[ed] the entire evidentiary picture" of Van Hook's childhood painted at trial in such a way as to undermine the three-judge panel's sentencing decision. *Strickland*, 466 U.S. at 696.

Third, the Sixth Circuit reasoned that, had Van Hook's attorneys sought out these additional family members, the three-judge panel "would have heard additional 'first-hand accounts from those who knew Van Hook best.'" App. 13a (citation and alteration

omitted). This assertion blindly assumes that these individuals would have testified at trial if asked. But unlike their fellow family members, two of the affiants—Billy Van Hook and Darlene Van Hook Whitson—did not state that they would have testified at Van Hook's trial if asked. App. 234a, 237a. And a third affiant, Robert Leon Salyers, said that Van Hook "was a hot head" with "a very bad temper." App. 228a. Given that statement, a defense attorney might not have wanted Salyers as a mitigation witness.

But even if these individuals would have testified at trial, they would have provided not different, but "*additional* 'first-hand accounts'" of Van Hook's childhood. App. 13a (emphasis added). This is insufficient to show prejudice under *Strickland*, as "the new evidence . . . must *differ* in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) (emphasis added).

As a final matter, even if the affidavits contain sufficient facts to "entitle [Van Hook] to federal habeas relief" on his ineffective assistance claim (and they did not), the proper remedy is a remand to the district court with instructions "to grant an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). The state courts and the district court summarily dismissed Van Hook's requests for post-conviction relief on this ground. Therefore, his affidavits have never been subjected to adversarial testing. Instead of ordering an evidentiary hearing, however, the Sixth Circuit took the dramatic step of

granting habeas relief on the basis of unproven facts in those affidavits.

The Warden is aware of no authority countenancing the issuance of the writ before the petitioner has established the facts essential to his claim. Then again, the Warden has located no support for the Sixth Circuit's novel approach to assessing the adequacy of trial counsel's performance or the likelihood of prejudice in this case. Simply put, every aspect of the Sixth Circuit's analysis contradicts the well-established standards announced in *Strickland*. The ruling below should be corrected, lest it be applied to the multitude of penalty-phase ineffective assistance claims now pending before the Sixth Circuit.

CONCLUSION

For the above reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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