No. 09-461

IN THE
Supreme Court of the United States

STEPHEN MICHAEL WEST,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEPHEN A. FERRELL
FEDERAL DEFENDER
SERVICES OF EASTERN
TENNESSEE, INC.
800 South Gay Street,
Suite 2400
Knoxville, TN 37929
(865) 637-7979

DAVID W. DEBRUIN
Counsel Of Record
ELAINE J. GOLDENBERG
SARAH A. MAGUIRE
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

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REPLY BRIEF

Respondent does not even attempt to justify the Sixth Circuit's ruling in this case that trial counsel's failure to present evidence of petitioner's childhood abuse was not mitigating because the jury might find that "violence begets violence," or to contest that this ruling demonstrates a serious and deepening rift in the lower courts on the question of how to treat potentially "double-edged" mitigation evidence in a *Strickland* prejudice analysis. Instead, the State tries to convince this Court that the instant case is not a proper vehicle for addressing that question, contending there is doubt about what evidence is properly before the Court and about the reliability of that evidence. There is no validity to these claims, and the State cannot deflect attention from the issue in this case. Indeed, in many respects respondent's assertions on this score can only be characterized as misleading. As petitioner made clear, *see* Pet. 17 n.6, he relies solely on the evidence that was presented to the state post-conviction court. And based on that evidence, there is no question that the sentencing jury could have been presented with a powerful mitigation case that told the story of the terrible abuse that West suffered as a child and its psychological consequences. Accordingly, this Court should address and resolve the question of whether such abuse could ever be considered aggravating as well as mitigating and, if so, whether the failure to present such evidence can be dismissed out of hand for that reason under *Strickland*.

ARGUMENT

1. Respondent contends that "Petitioner argues that certiorari review is warranted because the court of appeals failed to consider evidence – *presented for the first time in federal habeas proceedings* – showing that he suffered severe childhood abuse." Opp. 10 (emphasis added); *see also id.* at 10-11 & n.1. That claim is patently false, as the petition makes clear. Substantial evidence of West's childhood abuse was presented in the state habeas proceedings, and petitioner has not relied on a single piece of evidence of abuse that was not before the *state* post-conviction court. Although West attempted to amplify his claim in the federal habeas proceedings, none of that evidence is cited or mentioned in the petition – and petitioner most certainly does not contend that the federal courts' refusal to consider additional evidence is a "basis" for this Court's review. *Id.*; *see* Pet. 17 n.6 ("Although in petitioner's view this ruling [of the federal court not to consider the additional evidence] was in error, *petitioner does not rely on that contested evidence in this petition.*" (emphasis added)).

As the petition explains, the state post-conviction court heard substantial testimony from petitioner's sisters and an aunt about the terrifying abuse West's parents inflicted on him throughout his childhood. Pet. App. 86a-87a, 98a-100a. His sister Debra testified, for example, that West was born in a mental hospital after their mother attempted suicide, that he was hit so hard that he became cross-eyed, and that he reacted submissively to the abuse. Pet. App. 86a-87a. His sister Patricia testified their mother would beat her and petitioner

with a belt, resulting in "[b]ruises, black eyes, busted lips, pulled hair, [and] pinch marks." Pet. App. 98a. His aunt testified that his mother was "constantly" hitting him, that his mother threw him against walls, and that his mother said she would have killed "the little bastard" if she could get away with it. Pet App. 99a.

West also introduced evidence in the state post-conviction court that his trial counsel were aware of a number of red flags that would have led reasonable attorneys to conduct a more thorough investigation into his background and psychological makeup. West's counsel knew, for example, that he had virtually no memories of the first ten years of his life, 6th Cir. JA at 1857-58, and that he suffered from drug and alcohol problems, Post-Conviction Hr'g Tr. 408 (Oct. 22, 1996). Nevertheless, despite these and other indicators, West's trial counsel admitted at the state post-conviction proceedings that they did not conduct a probing investigation into West's background or childhood or obtain any school, employment, or medical records. 6th Cir. JA at 1969-70.

This record squarely raises the question presented in this case: whether counsel's failure to uncover and present evidence of severe childhood abuse can be dismissed on a theory that the jury might conclude that "violence begets violence," thereby foreclosing a conclusion that the defendant was prejudiced. It is true that in federal court West attempted to introduce a limited amount of additional evidence, including affidavits from experts that corroborated expert testimony presented in the

state court proceedings, a hospital record, West's military discharge form, and affidavits from West's ex-wife, father, former boss, and sister Debra.[1] But none of this additional evidence is necessary in the least to establish petitioner's *Strickland* claim, and the lower courts' possible additional error in excluding it therefore does not in any way counsel against a grant of certiorari.

2. Respondent's argument that the fact of West's childhood abuse is somehow in dispute is also misleading. At the state post-conviction hearings where the evidence of abuse was first presented, the State called no witnesses to contradict family members' testimony about the horrific abuse West suffered. Notably, the testimony of petitioner's aunt Ruby West, who witnessed West's mother throw him against a wall, stands utterly uncontradicted. Moreover, the state courts made no factual findings that witnesses to West's abuse were not credible.

Instead, the state courts held in a conclusory fashion that due to "conflicting evidence," West had "failed to meet his burden" of proof. Pet. App. 173a. Respondent uses that vague reference in an attempt to argue that the post-conviction witnesses were not believable. But, as the Sixth Circuit recognized, the state courts' conclusion was nothing more than an unreasonable application of law, reflecting the erroneous view that West was required to prove by a preponderance of the evidence that the outcome of his case would have been different, rather than

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[1] The District Court noted that the affidavit from Debra was substantially the same as her testimony in the state post-conviction court. Pet. App. 176a-177a.

simply showing a reasonable probability of a different outcome. Pet. App. 18a-20a. That certainly does not create a factual issue about the existence of the powerful mitigating evidence that could have been, but was not, presented to the sentencing jury in this case.

The Sixth Circuit never suggested otherwise. Indeed, respondent's assertion that the Sixth Circuit observed "that the proof presented in state proceedings raised serious questions as to whether any such abuse occurred at all," Opp. 8, is flatly untrue. The Sixth Circuit did note the existence of a factual dispute, but only one centered around whether trial counsel failed "to adequately investigate West's past abuse," not around whether the abuse ever occurred. Pet. App. 23a. Indeed, the Sixth Circuit accepted the fact of the abuse as a given.

The factual dispute that the Sixth Circuit actually mentioned relates only to whether counsel was *specifically told about the abuse prior to* West's sentencing. *See id.* (discussing whether West's sister "informed [trial counsel] about the abuse," whether the psychologist's report showed abuse, and whether West denied that he had been abused). But that dispute is itself irrelevant given the red flags in West's background that should have alerted counsel to investigate further – an obligation of which counsel was not relieved simply because the victim of the abuse did not remember it or was unwilling to admit to it. *See Rompilla v. Beard*, 545 U.S. 374, 389-90 (2005). There is no question that, despite the

existence of many red flags, counsel failed in their duties in a number of ways:

- Counsel failed to gather West's birth and medical records;
- Counsel sent out a subpoena for school records when it was too late for those records to arrive;
- Counsel investigated West's background by asking questions of the family while they were all in a group, a group that included the parents who had inflicted the abuse;
- Counsel never spoke with West's sister, Patricia, or with his aunt, Ruby West;
- Counsel's mental health expert who briefly examined West for competency and sanity never asked members of West's family about possible abuse because he felt it would be insulting to them;
- Counsel's investigator never looked into sentencing issues; and
- Counsel had no experience in sentencing phase litigation.

None of these facts presented in support of West's claims of ineffectiveness has ever been disputed by the State. In fact, much of this evidence was presented by the State's own witnesses.[2]

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[2] Trial counsel admitted, for example, that they did not gather records and that they interviewed family members as a group, and it is also undisputed that they never talked to Ruby West. 6th Cir. JA at 1969-71, 1991. The mental health expert, Dr.

Finally, respondent relies on the fact that the District Court complained about a lack of documentation to support West's allegations of abuse. Further records to substantiate West's allegations of abuse were simply unavailable to counsel at the time of the state post-conviction hearing. In response to the District Court's complaints about the lack of medical records to support petitioner's allegations, petitioner explained why such documentary evidence had not been presented to the state court, supplying the District Court with a letter from University Hospitals in Cleveland, dated October 12, 2001. Letter from Kathy Loflin, University Hospitals Health System, to Sharlott A. Swanger, Federal Defender Services of Eastern Tennessee, Inc. (Oct. 8, 2001) (attached to Pet'r's Mot. to Alter or Am. Mem. & Order & J. (Oct. 15, 2004)). The letter informed petitioner's counsel that "[y]our request for medical records from the 1960's for the above named patient is unable to be processed. Per University Hospitals of Cleveland policy, records are destroyed after 22 years of continuous inactivity." *Id.* These records might have been available at the time of petitioner's trial in 1987. They were not available at the time of his post-conviction hearing, or at the time his habeas petition was considered. Petitioner's inability to produce them does not detract in any way from the credibility of the witnesses who testified in the state post-conviction court.

Bursten, stated that he did not want to offend the family by asking them questions about abuse. Pet. App. 101a-102a.

For all these reasons, the record developed in this case simply does not support respondent's arguments that West's petition fails because of a lack of believable mitigation. This Court can and should consider the Sixth Circuit's decision on its own terms.

3. Respondent's attempt to muddy the waters on the issue of whether counsel's performance in this case was deficient also should be rejected out of hand. As noted above, respondent never contests the existence of numerous red flags of abuse of which trial counsel was aware; respondent also never suggests that counsel followed up on those warning signs in any way. Instead, respondent appears to argue that the mere existence of some amount of investigation at the sentencing phase of the case – such as group conversations with family members (albeit ones in which questions about abuse were not even asked) and a perfunctory competency evaluation by Dr. Bursten – is enough to preclude an ineffective assistance claim.

That is not the law. This Court's decisions in *Wiggins v. Smith*, 539 U.S. 510 (2003) – a case that respondent never mentions – and *Rompilla v. Beard*, 545 U.S. 374 (2005), establish that counsel's obligation is to conduct a reasonable investigation, and that the relevant question is "whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. The question is not, as the Sixth Circuit erroneously claimed, whether the quantum of investigation is

large enough.[3] Pet. App. 23a (stating that counsel were not deficient because they "did a fair amount of investigation"). Counsel also may not simply rely on what the defendant or his family reports. *See Rompilla*, 545 U.S. at 389-90; *compare* Opp. 13-15.

In addition, the State fails to acknowledge that the Sixth Circuit's trivialization of the abuse evidence was integral to its conclusion that counsel were not deficient in failing to investigate and present that evidence. In other words, because the Sixth Circuit believed that evidence of childhood abuse could have caused the jury to "despise" West "with greater zeal," Pet. App. 26a, the court did not view the failure of trial counsel to investigate that evidence thoroughly as particularly important. It is that issue – whether the Sixth Circuit's view of the significance of the mitigation evidence is a permissible one – that is central to the petition and that the State simply does not confront.

4. On the key question of prejudice, as to which the lower courts are at odds and this Court's guidance is necessary, the State is almost entirely silent. In passing, it suggests that the Sixth Circuit's dismissal of childhood abuse on the ground that "violence begets violence" was dicta and that its prejudice analysis actually turned on some

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[3] The Sixth Circuit stated that West's trial counsel consulted "numerous historical records." Pet. App. 23a. It is undisputed that counsel did not consult essential records such as West's birth and medical records, his school records, or any other records that might have illuminated his family history. 6th Cir. JA at 1969-71.

independent assessment of the mitigation evidence as weak. That is simply not so.

As the petition discusses at length, there is no question that when the Sixth Circuit stated that the mitigating evidence here was "weak" it was referring to its conclusion that the evidence was aggravating because it could have caused the jury to "despise" West for what his parents did to him. That conclusion is inexplicable and inconsistent with this Court's precedents on the nature of mitigation evidence. Moreover, even assuming that it were true that the evidence at issue somehow could be considered to be aggravating, the Sixth Circuit's determination that it could discount the evidence on that basis deepens a split among the lower courts on the consequence of counsel's failure to investigate and present possibly "double-edged" mitigation evidence.

The Court of Appeals never characterized the mitigating evidence as "weak" in any other respect. Nor could it have. The evidence of the abuse that petitioner suffered as a child was shocking and disturbing, and similar to the evidence that this Court found clearly prejudicial in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins*, and *Rompilla*. It is impossible to imagine that this evidence – which was not only mitigating because it would have elicited understanding and compassion, but also because it was consistent with West's otherwise inexplicable behavior during the crime – would not have caused at least one juror to change his or her mind. *See Wiggins*, 539 U.S. at 537-38; *see also Porter v. McCollum*, 130 S. Ct. 447, 448 (2009) ("we are

persuaded that it was objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented").

Respondent also points out in a footnote that "[t]his Court has itself recognized that certain mitigating evidence has the potential to act as a two-edged sword in a jury's sentencing deliberations." Opp. 16 n.3.[4] Respondent's point is correct – and unremarkable. While this Court has recognized that mitigation evidence may in some circumstances have an aggravating edge, it has not addressed whether a failure to present mitigating evidence can be summarily dismissed on that basis in a *Strickland* prejudice analysis, as the Sixth Circuit did here. As the petition discusses more fully, the Fourth, Fifth, and Sixth Circuits and the Supreme Court of Florida have ruled that it may be,[5] and the Third, Eighth, Ninth, and Tenth Circuits and the Supreme Court of Georgia have ruled that it may not. If West's case had been heard in one of the courts that give due

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[4] In support, Respondent points to *Brewer v. Quarterman*, 550 U.S. 286 (2007), and *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002). Opp. 16 n.3. Neither of these decisions addresses the significance of counsel's failure to investigate and introduce mitigation evidence in connection with an ineffective assistance of counsel claim.

[5] In addition to the citations in the petition, see also *Porter*, 130 S. Ct. at 455 (observing that "the Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service").

weight to even double-edged mitigation evidence, the outcome would very likely have been different. *See Porter*, 130 S. Ct. at 455 (concluding that it was "unreasonable to conclude that Porter's military service would be reduced to 'inconsequential proportions' simply because the jury would also have learned that Porter went AWOL on more than one occasion." (citation omitted)). The disagreement in the lower courts on this recurring issue calls out for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN A. FERRELL
FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC.
The Plaza Tower, Suite 2400
800 South Gay Street
Knoxville, TN 37929
(865) 637-7979

DAVID W. DEBRUIN
Counsel of Record
ELAINE J. GOLDENBERG
SARAH A. MAGUIRE
JENNER & BLOCK LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001
(202) 639-6000