No. 18-5880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2018

VIRGINIA S. CAUDILL, PETITIONER

v.

JANET CONOVER, RESPONDENT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE

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CERTIFICATE OF SERVICE

THIS IS A CAPITAL CASE

I, Dennis J. Burke, a member of the Bar of this Court, hereby certifies that on this 19th day of November, 2018, the attached Petitioner's Reply to Respondent's Brief in Opposition was mailed, first class postage prepaid, to Hon. Matthew R. Krygiel, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601, Counsel for Respondent. All parties required to be served have been served.

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I. THE KENTUCKY TRIAL COURT FAILED TO PERFORM ITS PIVOTAL ROLE OF EVALUATING PETITIONER'S *BATSON v. KENTUCKY* CLAIMS.

Virginia Caudill consistently argued in the Kentucky Supreme Court[1] and in the federal courts below that by immediately and simultaneously denying Caudill's objections to the peremptory strikes of eight potential jurors by the prosecutor, the trial court failed to perform the required third step of the process demanded by this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986). Yet in the Brief in Opposition ("BIO"), Respondent spends the vast majority of his argument arguing that this Court has never required a trial court ruling upon a *Batson* claim to make explicit factual findings[2]. BIO 5-8. Respondent cites to six cases from five different federal circuits in support of his argument. BIO 5-8. All of those cases focus on whether the trial court must make specific factual findings at step three of the *Batson* process; none of those cases, or for that matter the BIO, addresses Caudill's claim that the trial court utterly failed to perform its pivotal role in the *Batson* process.

Respondent addresses Caudill's claim by observing, "the trial court unequivocally announced it was accepting the prosecutors articulated,

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[1] See Petitioner's brief to the Kentucky Supreme Court, 2000-SC-000296 at pp. 106-107 ("There must be a meaningful inquiry into whether counsel's neutral explanations should be believed.... A trial court's hasty dismissal of a *Batson* issue for an improper reason [that white males are not a protected class] does not satisfy this third step of the process. In Caudill's case, this third step of the *Batson* inquiry never occurred." (Citation omitted).

[2] See e.g. BIO 7 ("The record reflects that the trial court adequately and reasonably *conveyed its decision"*).

nondiscriminatory reasons for the strikes." BIO at 5. Respondent's argument entirely misses the point. In her *Batson* claim, Caudill does not take issue with what the trial judge ***said*** in ruling on the *Batson* objections, but rather, with what the trial judge ***did***. Caudill does not dispute that the trial judge unambiguously **stated** his rejection of the *Batson* challenge. Yet, his verbal rejection came so quickly (within a few seconds) prefaced by his opinion that equal protection of the law does not extend to white males[3], that it demonstrates the trial judge did not undertake any meaningful inquiry of the circumstances.

The premise of Caudill's legal argument is that *Batson* requires a trial court to undertake a substantive inquiry by consulting all of the circumstances bearing upon the issue of race [and in this case gender] discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005)). The record in this case demonstrates that no such substantive inquiry took place.

Respondent claims there was an "exhaustive review of the jury selection process" illustrating "no inkling of intent" to discriminate by the prosecutors. BIO 6. Respondent does not cite to the record in support of his claim, but the trial court record demonstrates that the trial court accepted the prosecutor's reasons for all eight challenged peremptory strikes at face value. It refutes any notion that the

[3] "If the appellate courts for whatever magical reason foresees white males to be a protected class, these are non-discriminatory reasons. I'll allow them to be struck." Trial Video A-4, 9:17:00.

trial court conducted any review, much less an "exhaustive review[4]." Furthermore, review on appeal was not exhaustive because the Kentucky Supreme Court accorded the trial court's decision great deference. *Caudill v. Commonwealth*, 120 S.W.3d 635, 657 (Ky. 2003) (citing *Hernandez v. New York*, 500 U.S. 352, 369 (1991). Review was limited to a search for clear error. *Id.* Respondent's argument is enlightening, however. It illustrates Kentucky's ongoing failure to understand the important role of the trial judge in the *Batson* process. "Evaluation of a prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province." *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (citation ommitted) and the trial court is obligated to consult "all of the circumstances that bear upon the issue of racial animosity" *before* deciding if the defendant has met the burden of persuasion. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (emphasis added). Despite the strong language from this Court regarding the importance of the trial court, Respondent joins the Sixth Circuit in concluding Caudill "overemphasiz[ed]" the language requiring that trial courts undertake a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available before deciding whether purposeful discrimination in jury selection was proven." See *Batson*, 476 U.S. at 93.

Respondent's BIO underscores why this Court should grant certiorari. In seeking to protect the "core guarantee of equal protection ensuring citizens their government will not discriminate based upon race [or gender]" *Batson*, 476 U.S. at

[4] See Caudill's Petition at 7 (citing to entirety of *Batson* colloquy between the attorneys for both parties and the trial judge in the state court record).

97, did this Court mean what it said, or was the "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" requirement mere surplus language?

II. CAUDILL'S REPRESENTATION IN THE PENALTY PHASE OF HER CAPITAL TRIAL WAS INEFFECTIVE.

Respondent recited the applicable legal standard issue as follow: "Is there any reasonable argument that counsel satisfied *Strickland*..." BIO at 9 citing *Harrington v. Richter*, 562 U.S. 86 (2011). The merits of Caudill's argument become clear when this standard is applied to the facts of this case. The Court may ask: Is there any reasonable argument that counsel satisfied *Strickland* when they met with their mitigation witnesses for the first time at the courthouse during a recess in the proceedings for ten to fifteen minutes on the day that the witnesses were to testify? Is there any reasonable argument that counsel satisfied *Strickland* when they made the decision not to call a critical expert witness without having met with or spoken to that expert? Is there any reasonable argument that counsel satisfied *Strickland* when they engaged an expert witness to diagnose Caudill's condition without furnishing medical records to the expert? The answer to these questions is apparent from a review of the record. As noted by Judge Moore in her dissent, "the facts reveal a mitigation effort that was so cursory that there is no reasonable argument that counsel satisfied *Strickland's* deferential standard." *Caudill v. Conover*, 881 F.3d 454, 472-473 (6th Cir. 2018).

A majority off the Sixth Circuit panel concluded that the Kentucky Supreme

Court's decision denying Caudill relief on her claim of ineffective assistance of counsel at the penalty phase of trial was based upon an unreasonable application of clearly established federal law. *Caudill*, 818 F.3d at 462-63.

Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). In this case, Respondent implicitly acknowledges that the mitigation defense was haphazard and flung together at the last minute[5]. BIO 12. Nevertheless, Respondent blames the defense mitigation specialist and Caudill herself for counsel's failure to interview and present numerous mitigation witnesses at trial. BIO 12. As outlined in Caudill's petition, the blame for deficient performance lies squarely with defense counsel. The record reveals that the testimony of the five mitigation witnesses who did testify at trial was woefully underdeveloped. For example, counsel developed only "a brief and sanitized version of Caudill's father's dramatic abuse—qualified, bafflingly, with discussion of his later repentance—from Caudill's mother, Mary Caudill." *Caudill,* 881 F.3d at 473 (citation omitted). Yet the post-conviction investigation revealed a much more violent reality. Caudill's father repeatedly attempted to kill Mary and repeatedly threatened her with knives and guns in front of the children. *Id*.

The mitigation evidence presented through Mary Caudill was underdeveloped because counsel failed to prepare Mary to testify until the day she testified, and even

[5] See description of the Caudill mitigation investigation and preparation at *Caudill v. Conover*, 881 F.3d 454, 468-471 (6th Cir. 2018) (Moore, J. dissenting).

then, he spent all of fifteen minutes preparing her to testify. *Id*. The testimony of Caudill's siblings, Craig and Rhonda at trial reveals more evidence of counsel's deficient performance. Neither witness had spoken to Caudill's counsel more than a few minutes before they testified, which explains their exceptionally brief and perfunctory testimony at trial. With adequate preparation by counsel, the jury would have learned in detail of the violence inflicted by Caudill's father upon his children. See Caudill's petition at 27.

"In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith,* 539 U.S. 510, 521 (2003). The testimony at trial reveals that while counsel was aware of Caudill's traumatic childhood, his investigation had barely scratched the surface. A reasonable attorney representing a client facing the death penalty would have continued investigating.

Respondent's makes a blanket statement that the mitigation evidence presented at trial illustrated a full and complete investigation by defense counsel. BIO 15. However, in *Rompilla v. Beard*, 545 U.S. 374 (2005) this Court granted relief even though Rompilla's trial attorneys likely conducted a more thorough mitigation investigation than what occurred in this case. Attorneys for Rompilla spoke with five family members in a "detailed manner" attempting to unearth mitigating information and three mental health experts who assessed him at the time of his trial. *Rompilla*, 545 U.S. at 381. In contrast, Caudill spoke with five family members briefly, failed

to meet or prepare them to testify until the day of their testimony and as a result presented perfunctory underdeveloped mitigation testimony. Counsel spoke with a single expert witness, a forensic psychologist, but he failed to supply the expert witness with necessary documents including Caudill's medical records and the life history compiled by the mitigation specialist.

Respondent claims at BIO 14, that evidence presented in state post-conviction was cumulative because "Caudill's defense put forth a vivid picture" of her abusive childhood, and long history of domestic abuse by former boyfriends. The record refutes that claim. At trial, the jury learned only of Caudill's self-reported claims of abuse by numerous men through a forensic psychologist. Post-trial evidence of domestic violence came from numerous witnesses including one of the men who abused her, and a legal advocate at the YWCA Spouse Abuse Center. Medical records not collected or introduced at trial by defense counsel corroborate the testimony of abuse. Emergency room records from three different hospitals document various abuses on different occasions, including an assault when she was four months' pregnant. Other abuses include a jaw fracture, a broken nose, a lacerated lip, rib bruising, a fractured wrist, and various other abrasions. Mitigation evidence coming from more disinterested witnesses even if similar to evidence adduced through the defendant is likely not cumulative. *Skipper v. South Carolina*, 478 U.S. 1, 8 (1986).

Finally, Respondent urges that despite de novo review by the habeas court, the aggravating evidence of Caudill's robbery and murder of a single person was

"overwhelming." BIO 16. While the circumstances of robbery and burglary in the course of the murder of Lonetta White are necessarily aggravating, powerful aggravating circumstances do not preclude a finding of prejudice. In the Sixth Circuit alone, numerous defendants were prejudiced by ineffective assistance of counsel despite equally or more aggravating circumstances. See e.g *Foust v. Houk*, 655 F.3d 524, 527-28 (6th Cir. 2011) (finding prejudice despite AEDPA deference to state court and even though habeas petitioner broke into a home, murdered a man, repeatedly raped his daughter, kidnapped her, and set the house on fire); *Mason v. Mitchell*, 543 F.3d 766, 769 (6th Cir. 2008) (finding prejudice even though habeas petitioner raped a woman and used a board with protruding nails to beat her to death); *Jells v. Mitchell*, 538 F.3d 478, 484-85 (6th Cir. 2008) (finding prejudice even though habeas petitioner kidnapped a woman and her four year old child, murdered the woman in front of the child and dumped the body in a junkyard and abandoned the child in a junkyard).

In a crowning display of cynicism, Respondent places the blame on Virginia Caudill for the fact that abusive boyfriends repeatedly beat her, causing her to suffer brain damage:

> ...noting that her cerebral dysfunction was probably caused by...a traumatic brain injury – as opposed to something she was born with – ***situations over which Caudill had some degree of control (who she dated***...) BIO at 15 (***emphasis added***).

The undersigned unequivocally reject Respondent's suggestion that any victim of domestic violence "controls" an act of abuse, or bears responsibility for the resulting

injuries, or that capital jurors would give less consideration to mitigating evidence of brain injury caused by a domestic abuser because the defendant brought the brain injury on herself. This Court should also reject the regressive view of punishment reflected in the respondent's argument.

III. THE COMMONWEALTH'S FAILURE TO DISCLOSE AN OFF-THE-RECORD, ORAL PROMISE OF A BENEFIT TO A JAILHOUSE INFORMANT WITNESS CONSTITUTES A *BRADY v. MARYLAND* VIOLATION.

In its BIO, Respondent has sharpened the legal question at issue.

The respondent concedes that the prosecution "simply agreed to indicate at her sentencing that Ellis cooperated on two cases." BIO at 18. Thus, there is no dispute that the prosecution offered Ellis something in return for her testimony.

Respondent also does not contest that the promise by the Commonwealth was made orally, omitted from the plea agreement and from all relevant entries in Ellis' case. The Commonwealth offers no other fact that might explain how a persistent felony offender such as Ellis received only probation on a theft charge.[6] It is also undisputed that in cross-examination at trial, Ellis denied having received any benefit in consideration for her testimony.

Thus, Respondent quite overtly takes the position that it may avoid any obligation to disclose a plea deal under *Brady* if the plea deal is made orally, kept out

[6] Respondent erroneously claims that "the defense was aware of the agreement." BIO at 18. Respondent offers no citation to the record to support this assertion. Needless to say, Caudill disagrees. Having raised this matter as a *Brady* claim in her RCr 11.42 Petition, the foundation of Caudill's claim is the fact that the defense was unaware of the prosecutor's off the record promise to Ellis.

of the written docket in the case, and is agreed upon with a sufficient lack of detail.

This Court should grant certiorari on this claim because jurists of reason could disagree with Kentucky's interpretation of the law clearly established in *Brady* and its progeny. Moreover, this Court should not countenance such a cynical interpretation of *Brady*. To do so would harm not just defendants such as Caudill, in whose cases such a witness might testify. Harm would also be done to witnesses who legitimately wish to cooperate with law enforcement, but who are heretofore denied the certainty of an enforceable written plea agreement made in the public record. If this Court does not reject Respondent's reading of *Brady*, prosecutors elsewhere will take note, and will modify their practice accordingly.

It is also notable that Respondent has relied upon the uncorroborated testimony of its jailhouse informant witnesses to shore up its position in other areas. For example, in the BIO, Respondent asserts that Caudill is unable to show prejudice in her IAC claim because "evidence showed she not only lacked remorse, but outwardly mocked Mrs. White as she begged for her life." BIO at 17. Thus, the Commonwealth's *Brady* violations have given it broad license to bootstrap this highly unreliable evidence into all areas of its legal arguments.

This Court should grant Certiorari and order the issuance of a Certificate of Appealability so that the question may be briefed and addressed by the Court of Appeals.

CONCLUSION

For these additional reasons, this court should grant certiorari.

Respectfully submitted,

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