No. 19-1054

In the Supreme Court of the United States

CHRISTA PIKE,
Petitioner,

v.

GLORIA GROSS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

RESTATEMENT OF THE QUESTIONS PRESENTED

I. Whether the Sixth Circuit correctly determined that the state court reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), when concluding that Pike failed to prove that trial counsel was ineffective during the sentencing phase of her capital trial.

II. Whether this Court should consider Pike's previously-unasserted claim that the Eighth and Fourteenth Amendments prohibit capital punishment for an offender who was eighteen years of age at the time of the offense.

RULE 15.2 STATEMENT OF PROCEDURAL HISTORY

Pike v. Tennessee, No. 98-8226, 526 U.S. 1147 (June 1, 1999) (denying certiorari in direct appeal)

Pike v. Tennessee, No. 11-9152, 568 U.S. 827 (Oct. 1, 2012) (denying certiorari in post-conviction appeal)

Pike v. Gross, 936 F.3d 372 (6th Cir. 2019) (appeal from denial of petition for writ of federal habeas corpus)

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The order of the United States Court of Appeals for the Sixth Circuit denying Pike's petition for rehearing en banc is not reported. *See* Pet. App. F at 257a. The opinion of the Sixth Circuit affirming the denial of habeas relief is published. *Pike v. Gross*, 936 F.3d 372 (6th Cir. 2019); Pet. App. A. The memorandum opinion of the United States District Court for the Eastern District of Tennessee denying habeas relief is not reported. *Pike v. Freeman*, No. 1:12-cv-35, 2016 WL 1050717 (E.D. Tenn. Mar. 11, 2016); Pet. App. B at 28a.

The order of the Tennessee Supreme Court denying Pike's application for permission to appeal the denial of post-conviction relief is not reported. *See* Pet. App. C. at 107a. The opinion of the Tennessee Court of Criminal Appeals affirming the denial of post-conviction relief is not reported. *Pike v. State*, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207 (Tenn. Crim. App. Apr. 25, 2011); Pet. App. D at 108a.

The opinion of the Tennessee Supreme Court remanding Pike's case to the trial court with instructions to reinstate her petition for post-conviction relief is published. *Pike v. State*, 164 S.W.3d 257 (Tenn. 2005). The opinion of the Tennessee Court of Criminal Appeals denying Pike's motion to reinstate her petition for post-conviction relief is not reported. *Pike v. State*, No. E2002-00766-CCA-R3-PD, 2004 WL 1580503 (Tenn. Crim. App. July 15, 2004).

The opinion of the Tennessee Supreme Court affirming Pike's conviction and sentence is reported. *State v. Pike*, 978 S.W.2d 904 (Tenn. 1998). The

opinion of the Tennessee Court of Criminal Appeals affirming Pike's conviction and sentence is not reported. *State v. Pike*, No. 03C01-9611-CR-00408 (Tenn. Crim. App. Nov. 26, 1997).

JURISDICTIONAL STATEMENT

The Sixth Circuit affirmed the denial of habeas relief on August 22, 2019. *Pike v. Gross*, 936 F.3d 372 (6th Cir. 2019); Pet. App. A at 1a. The court denied Pike's petition for rehearing en banc on September 26, 2019. Pet. App. F at 257a. On December 17, 2019, Justice Sotomayor extended the time for filing a petition for writ of certiorari until February 24, 2020. Pike filed her petition on February 21, 2020. She invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). Pet. 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 2241 provides in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> . . . .
>
>> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2253 provides in relevant part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
>> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254 provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or
> >
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

U.S. Const. amend VI provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend XIV provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. State Court Proceedings

On the night of January 12, 1995, Pike brutally murdered the victim, Colleen Slemmer. *Pike*, 978 S.W.2d at 907-911. The proof at trial showed that Pike, armed with a box cutter and a miniature meat cleaver, lured the victim to a remote area. *Id.* at 909. She threw the victim to the ground, punched and kicked her, slammed her head against the concrete, repeatedly slashed and stabbed her, and smashed her head with a rock—all while the victim was alive and pleading for her life. *Id.* at 909-10. Pike boasted about the killing to some of her classmates later that night and the next morning, and she showed classmates a piece of the victim's skull that she had kept as a souvenir. *Id.* at 908.

Pike told police that, during the attack on the victim, Pike heard voices in her head telling her that she had do something to prevent the victim from telling on her and sending her to prison for attempted murder. *Id.* at 909. Pike also told police that as the victim begged for her life, Pike responded that she was not going to be "rotting in jail because of [the victim's] stupid ass." *Id.* at 918.

The person who discovered the victim's body said that the victim was so badly beaten that he initially

mistook the victim for the corpse of an animal. *Id.* The medical examiner determined that the victim's cause of death was blunt force injuries to the head and that the victim was likely alive and conscious when her injuries were inflicted. *Id.* at 911.

Clinical psychologist Dr. Eric Engum and forensic psychologist Dr. William Bernet testified for the defense during the guilt phase of trial. *Id.* at 912. Dr. Engum diagnosed Pike with severe borderline personality disorder and concluded that she had not acted with premeditation or deliberation in killing the victim. *Id.* Instead, she had acted in a manner consistent with the diagnosis of borderline personality disorder and had simply lost control. *Id.* Dr. Bernet indicated that the victim's murder was consistent with collective aggression, a phenomenon in which a group of people gather and become emotionally aroused, ultimately engaging in some kind of violent behavior. *Id.* The jury convicted Pike of first-degree premeditated murder and conspiracy to commit first-degree murder, and the trial proceeded to the sentencing phase. *Id.* at 912-13.

Prior to trial, trial counsel retained Dr. Dianna McCoy as a mitigation specialist. *Pike*, 2011 WL 1544207, at *32. Dr. McCoy prepared a social history of Pike, and trial counsel originally planned to call her to testify about Pike's social history and difficult upbringing. *Id.* at *33. However, trial counsel became uneasy about using Dr. McCoy and her report, and counsel ultimately decided to call Pike's aunt, father, and mother as mitigation witnesses. *Id.* All three

testified about Pike's challenging childhood and behavioral issues. *Pike*, 978 S.W.2d at 913.

Carrie Ross, Pike's aunt, testified that Pike was born prematurely and had not experienced any maternal bonding. *Id.* Ross said that Pike's family had a history of substance abuse. *Id.* Pike's maternal grandmother was an alcoholic who verbally abused her. *Id.* Ross testified that Pike was primarily raised by her paternal grandmother until her death in 1988. *Id.* The two were inseparable until that time. *Id.* After her grandmother died, Pike was shuffled between her mother and father. *Id.*

Ross described Pike's childhood home as constantly filthy, and she said that Pike's mother, Carissa Hansen, frequently failed to provide Pike with adequate food or clothing. *Pike*, 936 F.3d at 380. Hansen also failed to set any rules for Pike or impose any disciplinary measures. *Pike*, 978 S.W.3d at 978. Ross testified that Hansen did not play an active role in raising Pike because Hansen was either working or "out partying." *Pike*, 936 F.3d at 380. Ross recalled an incident where she and Hansen were at a bar when they received a phone call that Pike was having seizures. *Id.* at 380. While Ross wanted to return home to care for Pike, Hansen was unconcerned and wished to remain at the bar. *Id.* Hansen only left at Ross's insistence. *Id.* Ross said that whenever Hansen had to choose between herself and Pike, Hansen always put her own interests first. *Id.* at 381.

Pike's father, Glenn Pike, admitted that he rejected Pike on multiple occasions during her childhood. *Id.* at 380. He said that he sided with his new wife and other

children when a particular conflict arose between them and Pike, sending Pike away from his house. *Id.* On a second occasion, he kicked Pike out of the house because she was doing poorly in school. *Id.* Shortly before Pike's eighteenth birthday, Glenn rejected Pike a third time and signed adoption papers allowing for Pike to be adopted. *Id.*

Pike's mother, Hansen, testified that Pike spent most of her childhood with her paternal grandmother because Hansen and Glenn were frequently not at home. *Id.* Hansen said that while she was married to Glenn, Pike and Glenn did not have "much of a relationship." *Id.* Hansen also indicated that Pike spent much of her time with her paternal grandmother because Hansen was drinking heavily and abusing drugs. *Id.* Hansen admitted to smoking marijuana with Pike when Pike was in her teens. *Id.* Hansen said that Pike was "devastated" when her paternal grandmother died and that she attempted suicide. *Id.* Despite the suicide attempt, Hansen did not attempt to get regular psychological or psychiatric help for Pike. *Id.*

Hansen testified that, after she married Danny Thompson, Thompson said that she had to choose between him and Pike. *Id.* at 108. Hansen knew that Thompson and Pike did not get along and that Thompson was abusive to Pike. *Id.* But Hansen chose Thompson. *Id.* Hansen also testified that one of her later boyfriends whipped Pike with a belt. *Pike*, 978 S.W.3d at 913. Hansen admitted that Pike led a troubled life, but she said that Pike's issues were

Hansen's fault and that she blamed herself for Pike's behavior. *Pike*, 936 F.3d at 380.

Following this proof, the jury sentenced Pike to death, finding two aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical injury beyond that necessary to produce death; and (2) the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another.[1] *Pike*, 978 S.W.2d at 913 (citing Tenn. Code Ann. § 39-13-204(i)(5), (6)). The Tennessee Supreme Court affirmed Pike's sentence on appeal. *Id.* at 917-18.

Pike next sought post-conviction relief in state court. She asserted, *inter alia*, that trial counsel was ineffective by failing to present mitigation evidence in his possession and failing to discover and present further relevant mitigation evidence. *Pike*, 2011 WL 1544207, at *49-50. She also argued that she was ineligible for the death penalty under *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002), because she was an immature, mentally ill, brain-damaged eighteen-year-old at the time of the offense. *Id.* at *62.

At the post-conviction hearing, Pike presented testimony from numerous witnesses regarding her traumatic childhood and adolescence. *Id.* at *10-29. She also presented the testimony of two mental health

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[1] At sentencing, the State relied upon the evidence presented at the guilt phase in support of the aggravating factors. *Pike*, 978 S.W.2d at 913.

experts who had diagnosed her with organic brain damage, bipolar disorder, and post-traumatic stress disorder ("PTSD"). *Id.* at *15-18, 39-40. After the hearing, the trial court denied relief. *Id.* at *40.

The Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief. *Pike*, 2011 WL 1544207, at *1. The court found that the trial court properly determined that, to analyze a claim of ineffective assistance based on the failure to present mitigation evidence, the reviewing court must: (1) analyze the nature and extent of the available mitigation evidence not presented; (2) determine whether the jury heard substantially similar evidence during either the guilt or sentencing phase of trial; and (3) consider whether there was such strong evidence of the applicable aggravating factors that the mitigation evidence would not have affected the jury's determination. *Id.* at *50 (citing *Goad v. State*, 938 S.W.2d 363, 371 (Tenn. 1996)).

The Court of Criminal Appeals agreed with the trial court that none of these factors weighed in favor of a finding of prejudice. *Id.* at *51-52. Regarding the mitigation evidence not presented, the court concluded that trial counsel made a reasonable strategic decision not to call Dr. McCoy as a witness. *Id.* The court cited to trial counsel's testimony that he had never been completely comfortable with Dr. McCoy's mitigation materials because they included evidence that he did not want the jury to hear and that this discomfort, along with Dr. McCoy's announcement that she could not corroborate Dr. Engum's report, led him not to call her as a witness. *Id.* at *52. The court further agreed

that much of Pike's new mitigation evidence was presented in some form to the jury and that the evidence of the aggravating factors was so strong that additional mitigation evidence would not have affected the jury's verdict. *Id.* The court ultimately concluded that "[b]ased upon the clear finding by the [post-conviction] trial court that the mitigation evidence which was omitted would not have outweighed the aggravating factors, [Pike] is essentially precluded from establishing prejudice." *Id.* at *52.

The court also concluded that trial counsel was not ineffective by failing to discover and present evidence of Pike's brain damage, bipolar disorder, or to find numerous lay witnesses who could have testified in her defense. *Id.* at *52-54. The court agreed with the trial court that trial counsel reasonably relied on the expert opinion of Dr. Engum. *Id.* at *54. The court also observed that Pike's additional experts reached the same essential conclusion as Dr. Engum: Pike had not acted with premeditation. *Id.*

Finally, the Court of Criminal Appeals rejected Pike's claim that she was ineligible for the death penalty. *Id.* at *62-68. The court concluded that Pike had "failed to persuade this court that a new national consensus exists to extend the holding of *Roper* to persons over the age of [eighteen]." *Id.* at *67 (alteration in original). The court was unable "to discern that there is a national consensus to show that evolving standards of decency require a constitutional ban . . . on executing persons who were between the ages of eighteen and the early twentys at the time of the offense." *Id.* The court therefore declined "to

extend the holding of *Roper* to include such." *Id.* The Tennessee Supreme Court declined discretionary review. *See* Pet. App. C.

B. Federal Court Proceedings

After her state-court proceedings ended, Pike filed a petition for writ of habeas corpus in federal court. *Pike v. Freeman*, No. 1:12-cv-35, 2016 WL 1050717 (E.D. Tenn. Mar. 11, 2016). She raised claims that trial counsel was ineffective during the penalty phase by failing to present mitigation evidence uncovered during preparation for trial, failing to call mitigation specialist Dr. McCoy as a witness, and failing to discover compelling and relevant mitigation evidence. *Id.* at *11, 12, 15. She also asserted that her death sentence violated the Eighth Amendment because she was an immature, mentally ill, and brain-damaged eighteen-year-old at the time of the offense. *Id.* at *24.

The district court granted the Warden's motion for summary judgment and dismissed the habeas petition. *Id.* at *10-16, 24-25, 29-30. The district court declined to grant Pike a certificate of appealability ("COA") on any of her claims. *Id.* at *30.

The Sixth Circuit granted Pike a COA on her claim that trial counsel was ineffective by failing to present mitigation evidence through Dr. McCoy and by failing to discover and present additional mitigation evidence. *See* Resp. App. G. The court declined to grant Pike a COA on her remaining claims, including her claim that her sentence violated the Eighth Amendment. *Id.*

The Sixth Circuit affirmed the denial of habeas relief. *Pike*, 936 F.3d at 375. The court's analysis focused solely on the prejudice prong of *Strickland*. *Id.* at 379. The court observed that "'the failure to present additional mitigating evidence that is 'merely cumulative' of that already presented does not rise to the level of a constitutional violation.'" *Id.* (quoting *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006)). The court explained that "[t]he new evidence that a habeas petitioner presents must differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Id.* (Quotation and citations omitted).

The court found that Pike's ineffective-assistance claim presented two separate issues: (1) whether trial counsel was ineffective by failing to present the testimony of mitigation expert Dr. McCoy at her sentencing hearing; and (2) whether counsel was ineffective by failing to discover and present additional compelling mitigation evidence. *Id.* Turning first to Dr. McCoy, the court observed that her social history of Pike "laid out an upbringing of substantial difficulty and strife." *Id.* at 380. The court explained that "the jury already got much of the social history's general content during the penalty phase of the trial," citing to the testimony of Pike's mother, father, and aunt. *Id.* at 380-81. The court opined: "All in all, the jury heard a clear story: Pike's childhood and upbringing were very difficult and, in some ways, explained how she became a person capable of such a brutal murder." *Id.* at 381. The court concluded that "because the jury heard largely the same narrative as Pike now presents, the Tennessee Court of Criminal Appeals' conclusion that

Pike failed to establish prejudice from [trial counsel's] decision not to call Dr. McCoy at the penalty-phase hearing . . . was not an unreasonable application of federal law under" the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

The court next turned to Pike's claim regarding the failure to discover and present additional mitigation evidence of Pike's diagnoses of bipolar disorder, organic brain damage, and PTSD—along with additional evidence of her traumatic childhood. *Id.* at 381-82. The court noted that, through Dr. Engum's testimony, "the jury was already well aware" of the expert opinion that Pike's "moral reasoning and impulse control were not present during the murder" of the victim. *Id.* at 382. The court doubted "that the substitution of bipolar disorder, PTSD, and organic brain damage for borderline personality disorder would have affected the jury's deliberations on this point." *Id.* (Citation omitted). The court further stated that Pike had failed to show that the new evidence from additional lay witnesses "would have been significantly different in strength or subject matter from the testimony of Pike's mother, father, and aunt." *Id.* (Citation omitted). The court concluded that "[i]n sum, none of the evidence Pike now points to substantially differs from the mitigation case that was presented to the jury." *Id.*

The court explained that its conclusion was "bolstered by the aggravating evidence before the jury." *Id.* at 382-83. The brutal nature of the murder met the definition of especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. *Id.* (citing

Tenn. Code Ann. § 39-13-204(i)(5)). The court noted that Pike's confession that she heard voices telling her that she had to do something to prevent the victim from telling on her and sending her to prison, which Pike did not refute, showed that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful prosecution of the defendant or another. *Id.* at 383 n.1 (citing Tenn. Code Ann. 39-13-204(i)(6)). "The prejudice prong is satisfied if 'there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 383. The court explained that "a fairminded jurist could conclude that there is no such probability here, where Pike's desired evidence was mostly cumulative and insufficient to overcome the heinous nature of her crime." *Id.* The court determined that even if the jury heard all of the mitigation evidence "Pike now wishes had been presented, a fairminded jurist could conclude that the sheer weight and degree of aggravation evidence before the jury outweighs the mitigation evidence raised on appeal." *Id.* The court therefore held that "the state court's conclusion that Pike could not establish *Strickland* prejudice . . . was not an unreasonable application of federal law." *Id.*

Concurring in the judgment but writing separately—and addressing an issue neither briefed by the parties nor included in the COA—Judge Stranch opined that "society's evolving standards of decency likely do not permit the execution of individuals who were under 21 at the time of their offense." *Id.* at 385. However, Judge Stranch acknowledged that AEDPA allowed relief only if the state court's decision was (1) contrary to or unreasonably applied Supreme Court

precedent, or (2) resulted in a decision that was based on an unreasonable determination of the facts. *Id.* (quoting 28 U.S.C. § 2254(d)). Since this Court has not extended *Roper* to eighteen-year-olds, Judge Stranch agreed that the state court did not unreasonably apply *Strickland*'s prejudice prong. *Id.*

REASONS FOR DENYING THE WRIT

This Court should deny the writ because, despite Pike's argument to the contrary, there is no circuit split to resolve regarding the application of *Strickland*'s prejudice prong to mitigation evidence not presented at sentencing. The Sixth Circuit properly analyzed Pike's claim and correctly concluded that the Tennessee Court of Criminal Appeals reasonably rejected the claim. Pike is not entitled to relief on her *Roper* claim because this Court has not extended *Roper* to defendants who were eighteen years old at the time of the offense.

I. Pike Attempts to Manufacture a Circuit Split Where None Exists.

Pike asserts that there is a "circuit conflict on when evidence is cumulative for purposes of a prejudice analysis" under *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. 25. She claims that the Sixth Circuit—along with the Fifth, Eighth, and Eleventh Circuits—applies a rule that omitted mitigation evidence is *per se* cumulative if it concerns the same subject matter as the proof presented at sentencing, regardless of the quality of the omitted evidence. Pet. 19, 20-22. She says that this analysis conflicts with the Third, Seventh, and Ninth Circuits, which take the opposite approach and hold that omitted evidence is

not cumulative if it is of greater quality. *Id.* at 19, 22-25. But this argument relies on a non-existent circuit split and misstates the position of the Sixth Circuit.

Circuit courts do not disagree on how to analyze *Strickland* prejudice when a petitioner faults trial counsel for failing to present available mitigation evidence. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A court analyzing the failure to present additional mitigation evidence must "evaluate the totality of the mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). And presenting additional mitigation evidence that is "merely cumulative" of the proof presented at sentencing weighs against a finding of prejudice. *Wong v. Belmontes*, 558 U.S. 15, 22 (2009).

When conducting a prejudice analysis, the Fifth, Eighth, and Eleventh Circuit cases Pike cites in her petition each compared the newly presented mitigation evidence against the evidence presented at sentencing. After making this comparison, the courts determined that the petitioner had failed to establish prejudice. *See, e.g., Busby v. Davis*, 925 F.3d 699, 723-24 (5th Cir. 2019) (stating that the district court "carefully considered all of the evidence presented at trial, both mitigating and aggravating evidence" and "then

considered evidence that Busby says should have been presented" and agreeing "with the conclusions that the district court reached regarding the weight of the aggravating evidence as measured against the 'new' mitigating evidence"); *Anderson v. Kelley*, 938 F.3d 949, 958 (8th Cir. 2019) (stating that, when analyzing prejudice, the court "must consider the 'totality of the evidence before the . . . jury'" and proceeding to weigh Anderson's newly-presented evidence against the proof he presented at sentencing) (quoting *Strickland*, 466 U.S. at 694); *Tanzi v. Sec'y, Florida Dept. of Corr.*, 772 F.3d 644, 660 (11th Cir. 2014) ("We have compared the mitigation evidence presented at the state postconviction hearing to that presented during the penalty phase."); *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1260 (11th Cir. 2012) ("To determine whether the Georgia Supreme Court's 'largely cumulative' determination was an unreasonable one, we compare the trial evidence with the evidence presented during the state postconviction proceedings.").

And this is precisely the same analysis applied by the Third, Seventh, and Ninth Circuits in the cases Pike cites as supposed evidence of a circuit split. Pet. 22-25. For example, in *Abdul-Salaam v. Sec'y of Penn. Dept. of Corr.*, 895 F.3d 254, 269 (3d Cir. 2018), the Third Circuit explained that "[t]o determine whether there is a reasonable probability that the uninvestigated mitigation evidence would have changed one juror's mind, we must 'evaluate the totality of the mitigation evidence—both that adduced at trial, and the evidence adduced in [a later proceeding] in reweighing it against the evidence in

aggravation.'" (quoting *Williams*, 529 U.S. at 397-98). In *Pruitt v. Neal*, 788 F.3d 248, 273 (7th Cir. 2015), and *Griffin v. Pierce*, 622 F.3d 831, 844 (7th Cir. 2010), the Seventh Circuit opined that courts assess *Strickland* prejudice "by evaluating 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding'-and reweighing it against the evidence in aggravation'" (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams*, 529 U.S. at 397-98))). And in *Kayer v. Ryan*, 923 F.3d 692, 718-23 (9th Cir. 2019), the Ninth Circuit concluded that Kayer had established prejudice after comparing the omitted mitigation evidence from the proof presented at sentencing.

Each of the cases that Pike cites in her petition turn on differences in the facts of each case rather than a dispute of law. The courts properly weighed the omitted mitigation evidence against the proof of mitigating and aggravating circumstances presented at sentencing. The fact that courts reached different conclusions on whether the petitioner had established prejudice indicates merely that the omitted mitigation evidence differed in amount and substance from the proof presented at sentencing. It does not indicate that the circuits are at all divided or split on how to analyze prejudice.

Contrary to Pike's assertion, the Sixth Circuit does not have a rule—nor did it hold in Pike's case—that omitted mitigation evidence is *per se* cumulative and cannot establish prejudice if it addresses the same subject matter as the proof presented at sentencing. After correctly identifying and citing the *Strickland*

prejudice standard, *Pike*, 936 F.3d at 379, the court explained that, to meet this burden, "[t]he new evidence that a habeas petitioner presents must *differ in a substantial way*—in strength and subject matter—from the evidence actually presented at sentencing." *Id.* (Emphasis added). To determine if evidence differs in a substantial way, a court must necessarily address the quality and quantity of the evidence. Indeed, the Sixth Circuit has previously "found prejudice because the new mitigating evidence is 'different from and much stronger than the evidence presented on direct appeal,' 'much more extensive, powerful, and corroborated, and 'sufficiently different and weighty.'" *Foust v. Houk*, 655 F.3d 524, 539 (6th Cir. 2011) (quoting *Goodwin v. Johnson*, 632 F.3d 301, 328, 331 (6th Cir. 2011)). The Sixth Circuit has also based its "assessment on 'the volume and compelling nature of th[e new] evidence.'" *Foust*, 655 F.3d at 539 (quoting *Morales v. Mitchell*, 507 F.3d 916, 935 (6th Cir. 2007)).

In Pike's case, the Sixth Circuit carefully considered the new mitigation evidence she presented in her post-conviction proceedings. *Pike*, 936 F.3d at 379-82. The court observed that Dr. McCoy's "'social history' document was certainly thorough, and we will assume for the sake of argument that Dr. McCoy would have been able to testify consistently with the evidence she accumulated and compiled therein;" it cited to Dr. Jonathan Pincus's diagnoses of organic brain damage, bipolar disorder, and PTSD; and it identified lay witnesses Pike said should have testified. *Id.* at 380, 381, 382. When the court weighed this evidence against the proof of mitigating and aggravating factors

introduced at sentencing, it concluded that Pike had not established prejudice. *Id.* at 379-83. This analysis is wholly consistent with *Strickland* and with other circuits that have addressed *Strickland* prejudice in a similar context. Since there is no split of authority for this Court to resolve, this Court should deny the petition for writ of certiorari.

II. Pike Has Not Shown That Trial Counsel's Failure to Present Additional Mitigation Evidence Caused Her Prejudice.

This Court should also deny certiorari because the state court's rejection of Pike's claim of prejudice was not unreasonable. Pike argues that the Sixth Circuit's decision is wrong because her newly presented mitigation evidence was far more compelling than the evidence presented at her sentencing hearing. Pet. 26-28. She also asserts that the Sixth Circuit failed to examine the reasoning of the relevant state court and that the state court decision itself is incorrect. *Id.* at 29. Neither argument entitles her to relief.

The Tennessee Court of Criminal Appeals correctly identified and applied *Strickland* to analyze Pike's claims. *Pike*, 2011 WL 1544207, at *44-45, 50-54. The court weighed the omitted evidence against the proof that was presented at sentencing and concluded that the omitted evidence was substantially similar to the proof presented at sentencing and that the evidence of the aggravating factors was overwhelming. *Id.* The court therefore determined that Pike had failed to establish prejudice and was not entitled to relief. *Id.*

On habeas review, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. And the burden of "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult" because both standards are "highly deferential."

Pike falls well short of meeting this burden. In arguing that the state court's decision was unreasonable, Pike only makes general assertions that the state court "'mischaracterized at best the appropriate rule' under *Strickland*, 'ignored or overlooked' important mitigation evidence, and provided contradictory reasons for rejecting [her] ineffective-assistance claim." Pet. at 29-30 n.6 (quoting *Williams*, 529 U.S. at 373 n.5, 397). She does not identify any portion of the state court opinion that is incorrect, nor does she provide any explanation as to why the court erred. Since she wholly fails to engage with the reasoning of the state court, she fails to show that the state court's decision was erroneous. Her disagreements with the Sixth Circuit's decision similarly miss the mark.

The Sixth Circuit properly applied AEDPA deference to review the state court decision and concluded that Pike failed to establish prejudice. Contrary to Pike's assertion, the Sixth Circuit did not apply an erroneous prejudice standard that led it to

discount Pike's newly presented mitigation evidence. Pet. 26-28. Instead, the court performed the same prejudice analysis as the state court: it weighed the omitted mitigation evidence against the proof of mitigation and aggravating factors presented at sentencing. *Compare Pike*, 936 F.3d at 379-83 *with Pike*, 2011 WL 2011 1544207, at *51-52. After conducting this analysis, the court concluded that "[e]ven were the jury to hear everything that Pike now wishes had been presented, a fairminded jurist could conclude that the sheer weight and degree of aggravation evidence before the jury outweighs the mitigation evidence raised on appeal." *Pike*, 936 F.3d at 383.

Both the state court and the Sixth Circuit properly analyzed Pike's claims under *Strickland*. And the Sixth Circuit correctly determined that the state court's rejection of the claim was not unreasonable under the doubly deferential lens of *Strickland* and AEDPA. Pike has failed to show that she is entitled to habeas relief on her *Strickland* claim, and this Court should deny her petition for writ of certiorari.

III. This Court Should Decline to Review Pike's Claim That the Death Penalty Should Not Be Imposed On a Defendant Who Was Eighteen Years Old at the Time of the Criminal Offense.

As an initial matter, this case is an improper vehicle to address Pike's second question presented because it raises an issue that was not before the Sixth Circuit. The Sixth Circuit denied Pike a COA on her claim that the Eighth Amendment prohibits the execution of an

individual who was eighteen years old at the time of the criminal offense. The parties did not brief the claim, nor did the majority opinion consider the claim on the merits. In fact, the issue did not arise until Judge Stranch raised it *sua sponte* in a concurring opinion. Since this claim was not ultimately one that the Sixth Circuit considered, it should not provide the basis for granting a writ of certiorari.

But even if the claim is properly presented, this Court lacks jurisdiction to reach the merits of the claim. Pike notes that this Court has jurisdiction over the denial of a COA and indicates that because she included the claim in her motion to expand the COA, this Court has jurisdiction to hear it. Pet. 30 n.7 (citing *Ayestas v. Davis*, 138 S. Ct. 1080, 1089 n.1 (2018)). But, this Court's jurisdiction extends only to the consideration of whether a COA should issue on the claim. "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—the final order in a habeas proceeding in which the detention complained of arises out of processes issued by a State court." 28 U.S.C. § 2253(c)(1)(A). The "plain terms" of § 2253(c)(1) "establish that 'until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.'" *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). Since the Sixth Circuit declined to issue Pike a COA on this claim, this Court only has jurisdiction to consider whether the denial of the COA was proper. And Pike cannot show that a COA is warranted for this claim.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this burden, an applicant must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented 'were adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (2000)). Pike cannot make this showing because reasonable jurists would not debate whether the district court erred in rejecting Pike's claim.

Federal habeas relief is available only if the state-court decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). Only the decisions of this Court, and not lower courts, constitute "clearly established federal law." *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014); *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012). And "clearly established federal law" includes only Supreme Court precedent at the time the state court adjudicated the issue. *Greene v. Fisher*, 565 U.S. 34, 38 (2011).

In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), this Court held that imposing a death sentence on an offender who was under the age of eighteen at the time of the offense violated the Eighth Amendment. This Court recognized that "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules." *Id.* at 574. However, this

Court explained that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood" and concluded that 18 is "the age at which the line for death eligibility ought to rest." *Id.*

The Tennessee Court of Criminal Appeals engaged in an extensive examination of *Roper* when addressing Pike's claim and concluded that there was not a national consensus to extend *Roper* to offenders over the age of eighteen or to show that evolving standards of decency required a categorical ban on the execution of individuals between the ages of eighteen and the early twenties at the time of the offense. *Pike*, 2011 WL 1544207, at *62-67. In arguing for the expansion of *Roper*, Pike now cites to research in neuroscience and developmental psychology and states that the number of eighteen-to-twenty-year-olds receiving the death penalty has declined since *Roper*. Pet. 31-33. But this falls well short of constituting a "national consensus" and "evolving standards of decency" that were critical to this Court's holding in *Roper*. Indeed, Pike cannot point to a single State that has eliminated the death penalty for a defendant who is between the ages of eighteen and twenty-one at the time of the crime. *Cf. Roper*, 543 U.S. at 568 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."); *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002) (observing that "the large number of States prohibiting the execution of mentally retarded persons" demonstrated the "national consensus" against executing such offenders).

Since this Court has never held that *Roper* applies to offenders who were eighteen years of age or older at the time of the offense, Pike has not shown that the state court's denial of her claim was an unreasonable application of *Roper*. She therefore has not shown that reasonable jurists could disagree with the district court's rejection of her claim. Accordingly, she has not carried her burden of demonstrating that she is entitled to a COA on this claim, and this Court should deny her petition for writ of certiorari.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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