No. 19-1054

IN THE

Supreme Court of the United States

CHRISTA PIKE,

Petitioner,

v.

GLORIA GROSS,
Warden,

Respondent.

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

REPLY BRIEF

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INTRODUCTION

The night before the penalty phase of the trial at which petitioner was sentenced to death, trial counsel abandoned petitioner's mitigation case after the defense's mitigation expert refused to lie under oath to conceal counsel's own failures. Not surprisingly, the impromptu and, at times, inaccurate presentation that counsel made the following day omitted a large volume of highly compelling and detailed mitigation evidence. Pet. 9-14.

The Sixth Circuit nevertheless concluded that there could be no prejudice under *Strickland* given that the omitted evidence related to subject matter that was touched on at the trial. That rule directly conflicts with the approach taken by a number of other circuits, which recognize that counsel's failure to "present[] evidence of an entirely different weight and quality" can establish prejudice "even where that evidence supports the same mitigating factor pursued at trial." *Abdul-Salaam* v. *Sec'y of Pennsylvania Dep't of Corr.*, 895 F.3d 254, 269 (3d Cir. 2018).

Respondent's efforts to deny the existence of that split are unavailing. The fact that the circuits agree on what *Strickland* says does not erase their stark disagreement on how to analyze prejudice in the circumstance presented here, which arises frequently. And, contrary to respondent's contention, the rule applied by the Sixth Circuit in this case is the law of that circuit; no subsequent Sixth Circuit decision has cast any doubt on it. This case is therefore an excellent vehicle for resolving the disagreement among the courts of appeals on a critically important issue of law that the Sixth Circuit (like several other circuits) has gotten wrong. Notably, respondent does not defend the Sixth

Circuit's approach on the merits, instead pointing to AEDPA deference principles that are inapplicable.

In addition, this Court should grant review to resolve whether the Eighth Amendment prohibits the execution of a defendant who committed her offense at age 18. That issue is also deeply important, and—despite respondent's protestations—there is no procedural barrier to the Court's review of it here.

ARGUMENT

I. Review Of The *Strickland* Prejudice Issue Is Warranted

A. The Circuits Are Squarely Divided On How To Conduct The Prejudice Analysis

1. As the petition explains, there is a meaningful and entrenched 4-3 circuit split on whether a defendant who asserts that trial counsel failed to present key evidence is precluded from showing prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984), unless the evidence omitted at trial differs substantially in subject matter from the evidence actually presented. Pet. 19-25.

In the Sixth Circuit, as in the Fifth, Eighth, and Eleventh Circuits, evidence omitted at trial is cumulative as a matter of law, and therefore cannot establish prejudice, if it concerns the same subject matter as evidence actually presented to the jury during the penalty phase. That is true regardless of whether the omitted evidence is of a stronger quality—more detailed, more powerful, more persuasive to a jury—than the penalty-phase evidence the jury actually heard. Pet. 19-22. The Third, Seventh, and Ninth Circuits have adopted a contrary approach, holding that omitted mitigation evidence can establish prejudice if it is

stronger than penalty-phase evidence, even where all of the evidence concerns the same subject matter. Pet. 22-25.

2. a. Respondent barely contests the existence of that split. Instead, respondent frames the inquiry at an extraordinarily high level of generality, noting that all of the cases to which petitioner points recite the *Strickland* prejudice test and generally agree that assessing prejudice requires weighing mitigating and aggravating evidence. Opp. 18 (quoting *Williams* v. *Taylor*, 529 U.S. 362, 397-398 (2000)).

That high-level agreement does nothing to obviate the specific split in authority presented by this case. Different circuits take different legal approaches to the weighing of mitigating against aggravating evidence depending on whether omitted mitigation evidence differs in subject matter from evidence presented during the penalty phase. That means that, with respect to an aspect of prejudice analysis that arises frequently and is often (as here) case-dispositive, the outcome of the analysis depends solely on an accident of geography. Having set forth the basic prejudice standard that the circuits are addressing, this Court should step in to restore uniformity to the law by deciding "*how* that standard applies" in the recurring circumstance presented here. *Sears* v. *Upton*, 561 U.S. 945, 952 (2010) (emphasis added).

b. Respondent also asserts in passing that "[e]ach of the cases that [petitioner] cites in her petition turn on differences in the facts." Opp. 20. But respondent offers no support for that assertion—and it is plainly belied by the cases themselves. Those cases adopt significantly different rules: some use a hard-and-fast rule under which prejudice cannot exist where omitted

evidence relates to the same subject matter as presented evidence, and others eschew any such bar. Compare, *e.g.*, *Holsey* v. *Warden*, 694 F.3d 1230, 1263 (11th Cir. 2012) (holding that postconviction evidence was cumulative because it "concerned the same 'subject matter [as] the evidence actually presented at sentencing'") (quoting *Beuke* v. *Houk*, 537 F.3d 618, 645 (6th Cir. 2008)), with *Abdul-Salaam* v. *Sec'y of Pa. Dep't of Corr.*, 895 F.3d 254, 269, 272 (3d Cir. 2018) (stating that "'evidence of an entirely different weight and quality'" is not cumulative "even where that evidence supports the same mitigating factor pursued at trial," and finding prejudice where "extensive and detailed" evidence presented "a far stronger mitigation case" than "minimal" evidence that the jury heard on the same topic) (quoting *Jermyn* v. *Horn*, 266 F.3d 257, 310 (3d Cir. 2001)). It is readily apparent that the same set of facts could give rise to a different outcome in circuits applying the prejudice-barring rule than in circuits that take a different approach.

c. In addition, respondent contends that "the Sixth Circuit does not have a rule—nor did it hold in [petitioner'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." Opp. 20. In respondent's telling, the Sixth Circuit requires only that the omitted evidence differ in strength *or* subject matter from the evidence actually presented at sentencing. Opp. 21.

Respondent is wrong. The rule that governs in the Sixth Circuit is that "the 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." Pet. App. 12a (quoting *Clark* v. *Mitchell*, 425 F.3d 270, 286 (6th Cir.

2005)) (emphasis added). That rule was first adopted by the Sixth Circuit in *Hill* v. *Mitchell*, 400 F.3d 308 (6th Cir. 2005), and that court has since applied the *Hill* rule in many decisions. See, *e.g.*, *Caudill* v. *Conover*, 881 F.3d 454, 464 (6th Cir. 2018) (citing *Hill* and holding that omitted mitigation evidence did not differ in subject matter where it "merely elaborate[d]" on evidence presented to the jury); *Loza* v. *Mitchell*, 766 F.3d 466, 490 (6th Cir. 2014) ("Here, as in *Hill*, the evidence [defendant] contends should have been presented 'resembles the evidence the jury did have before it in weighing the aggravating and mitigating factors.'") (quoting *Hill*, 400 F.3d at 308).

Notably, respondent's own briefing in the Sixth Circuit in this case took the *Hill* rule as a given. Based on that rule, respondent argued that the omitted mitigation evidence failed to establish prejudice because it did not differ in subject matter from the evidence the jury actually heard. See Docket No. 25, at 32 (6th Cir. No. 16-5854) (citing a decision that ultimately relies on *Hill* and arguing that petitioner could not establish prejudice even though the omitted mitigation evidence was more "detail[ed]" and "comprehensive" than evidence presented at trial). In other words, based on binding Sixth Circuit precedent, respondent encouraged the Sixth Circuit to rule exactly as it did. Pet. App. 12a.

Respondent has now identified an outlier Sixth Circuit decision from 2011. Opp. 21. Then-Chief Judge Batchelder dissented in that case on the ground that the majority improperly disregarded *Hill*. See *Foust* v. *Houk*, 655 F.3d 524, 547 (6th Cir. 2011) (Batchelder, C.J., dissenting) (discussing *Hill* and explaining that the defendant was not entitled to relief because "[a]lthough [he] now presents more *detailed* (and

therefore arguably stronger) mitigation evidence, most of his evidence simply does not differ in *subject matter* from that which the sentencing panel heard in the first instance"). But the existence of a panel decision issued *after Hill* (which cannot be overruled by a later panel, see *Salmi* v. *Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)) and *before* the decision below (which, along with several other post-2011 Sixth Circuit decisions, shows that the *Hill* rule is very much alive and well in that court) says nothing to undercut the need for this Court's review. This is not a case in which a relevant circuit has abandoned a prior holding. Rather, petitioner has identified a real and abiding circuit split on an issue of exceptional importance—one that, in this case, is quite literally an issue of life or death.

B. The Sixth Circuit's Prejudice Rule Is Wrong

1. Having persuaded the Sixth Circuit to apply its special prejudice rule, respondent does not even attempt to defend that rule here. Opp. 22-24. The absence of any such defense starkly highlights the need for this Court's review. The Sixth Circuit analyzed *Strickland* prejudice incorrectly in petitioner's case and—unless this Court grants review—will continue to do so in future cases. That analysis is irreconcilable with this Court's decisions, which make clear that the assessment of whether a defendant was prejudiced by trial counsel's failure to present evidence must be "probing and fact-specific"—regardless of "how much or how little mitigation evidence was presented during the initial penalty phase." *Sears*, 561 U.S. at 955-956; see Pet. 26-28.

2. Rather than defending the approach the Sixth Circuit actually took, respondent tries to rewrite the

Sixth Circuit's decision. According to respondent, the Sixth Circuit "performed the same prejudice analysis as the state court," Opp. 24, determining in doing so that the state court's analysis was not unreasonable and was therefore entitled to AEDPA deference.

That argument blinks reality. As explained above, while the Sixth Circuit did recite the basic test for ineffective assistance of counsel as set forth in *Strickland*, it went on to apply its own special prejudice rule barring any relief based on omitted evidence covering the same subject matter as evidence actually presented at the penalty phase of the trial. See pp. 2-6, *supra*. The state court did not apply that special rule. Accordingly, it is plain that the Sixth Circuit substituted its own rationale for the state court's "equally—but differently—flawed analysis." Pet. 29.

Under those circumstances, Section 2254(d)(1) has no application. Pet. 29. Respondent elides that the deference afforded under Section 2254(d)(1) attends "the specific reasons given by the state court"—*not* the overall denial of a constitutional claim. *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1192 (2018) (collecting cases); see *Brumfield* v. *Cain*, 135 S. Ct. 2269, 2276 (2015) (same). When the Sixth Circuit supplanted the rationale given by the Tennessee Court of Criminal Appeals, it could not simultaneously have been deferring to the reasons the state court gave for finding that prejudice did not exist here.

3. Even if respondent were somehow correct that the Sixth Circuit had deferred to the prejudice analysis carried out by the Tennessee state court, that analysis was itself "contrary to"—or at least "involved an unreasonable application of"—this Court's decisions. 28 U.S.C. 2254(d)(1); see Pet. 26-30 & n.6.

The state appellate court held that petitioner was "essentially precluded from establishing prejudice" as a result of the state trial court's determination that the "the mitigation evidence which was omitted would not have outweighed the aggravating factors." Pet. App. 216a. That abdication to the trial court contravenes this Court's holdings that "[i]neffectiveness is not a question of 'basic, primary, or historical fac[t],'" but rather "a mixed question of law and fact," *Strickland*, 466 U.S. at 698 (citation omitted)—and that the ultimate "prejudice determination" is "legal," *Williams*, 529 U.S. at 398.

The state appellate court's other effort to justify its prejudice determination was to note briefly trial counsel's self-serving remark that "he was not sure" that calling other witnesses would have made a difference. Pet. App. 216a. But that remark is obviously far from dispositive of the prejudice analysis. The court simply "ignored or overlooked" all of the crucial mitigating evidence that trial counsel had failed to present to the jury, *Williams*, 529 U.S. at 373 n.5—evidence that likely would have made a difference to the outcome, because the jury that heard some generalized testimony that petitioner's childhood was difficult would have been far more likely to have been swayed by detailed accounts of her two contemporaneously reported rapes, the beatings and abuse inflicted on her by her father and other men, and her brain damage and mental illness. The court accordingly failed to conduct the "probing and fact-specific" review required by this Court's precedents. *Sears*, 561 U.S. at 955.

II. Review Is Warranted To Decide Whether Executing A Defendant For A Crime Committed At Age Eighteen Violates the Eighth Amendment

1. Respondent's objections to this Court's consideration of whether execution of a defendant for a crime committed at age eighteen violates the Eighth Amendment (Opp. 24-26) lack merit.

First, respondent contends that the Eighth Amendment "issue * * * was not before the Sixth Circuit" and that Judge Stranch "raised it *sua sponte* in a concurring opinion." Opp. 24-25. That is flatly incorrect. Petitioner properly raised and preserved the Eighth Amendment issue by asking the Sixth Circuit for a certificate of appealability (COA).[1] The court denied a COA on that issue, stating that petitioner "ha[d] failed to make a substantial showing of the denial of a constitutional right," Pet. App. 106a—and necessarily considered the merits of the issue in making that determination.

Second, respondent asserts that "even if the [Eighth Amendment] claim is properly presented, this Court lacks jurisdiction to reach the merits of the claim." Opp. 25. That, too, is incorrect. This Court undisputedly has jurisdiction over the denial of a COA. Pet. 30 n.7; Opp. 25. When the Court exercises that jurisdiction, the statute governing certificates of appealability "does not limit the scope of [this Court's]

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[1] Petitioner did not, as respondent suggests, raise the Eighth Amendment issue only in a "motion to expand the COA." Opp. 25. Rather, she briefed that issue in her original COA application (and in her habeas petition). See Docket No. 8, at 90-98 (No. 16-5854).

consideration of the underlying merits." *Buck* v. *Davis*, 137 S. Ct. 759, 775 (2017). Indeed, to determine "whether the Court of Appeals erred" in denying a COA, the Court has repeatedly resolved "broader legal issue[s]." *Welch* v. *United States*, 136 S. Ct. 1257, 1264 (2016); see, *e.g.*, *ibid.* (deciding retroactivity of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), in reversing denial of COA); *Tennard* v. *Dretke*, 542 U.S. 274, 284 (2004) (similar); *Penry* v. *Johnson*, 532 U.S. 782, 791, 804 (2001) (similar). The same approach is appropriate here.

2. Respondent's contentions that petitioner's Eighth Amendment claim fails on the merits are likewise wrong. Respondent ignores the advances in neuroscience and adolescent psychology revealing that 18-year-olds exhibit the same immaturity and susceptibility to peer influence that make juveniles "categorically less culpable." *Roper* v. *Simmons*, 543 U.S. 551, 567 (2005) (citation omitted); compare Pet. 31-32 and Nat'l Ass'n for Public Defense Amicus Br. 6-9 (Amicus Br.) with Opp. 24-28. Respondent also disregards the statistics showing that death sentences for 18- to 20-year-old offenders have become increasingly rare. Pet. 32-33. And although respondent does note that no State has eliminated the death penalty specifically for 18- to 20-year-olds, Opp. 27, this Court has explained that such a blinkered focus on specific legislation is "incomplete and unavailing." *Graham* v. *Florida*, 560 U.S. 48, 62 (2010). Rather, the Court repeatedly has relied on other objective indicia, such as "actual sentencing practices," in determining the existence of a national consensus. *Ibid.*; see *Roper*, 543 U.S. at 564 (observing that executions of juvenile offenders oc-

curred "infrequent[ly]" in "States without a formal prohibition"); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (same, for executing the intellectually disabled).

Rather than confronting the Eighth Amendment question head on, respondent argues that Section 2254(d) forecloses any extension of *Roper* in this habeas case. Opp. 17, 26-28. That argument simply ignores the petition's detailed explanation of why Section 2254(d) presents no obstacle here. Pet. 30 n.7. As the petition notes, in *Greene* v. *Fisher*, 565 U.S. 34 (2011), this Court reserved the question whether Section 2254(d) bars the Court from affording relief based on a decision that sets forth a "substantive rule" within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989), but comes "after the last state-court adjudication on the merits." 565 U.S. at 39 n*. But *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), resolved that question. *Montgomery* held that *Teague*'s conclusion that substantive rules apply retroactively "rest[s] upon constitutional premises" and accordingly "is * * * binding on state courts," *id.* at 729—and that logic extends to federal courts as well, since they are equally bound by constitutional commands, see *id.* at 741 (Scalia, J., dissenting); see also *McQuiggin* v. *Perkins*, 569 U.S. 383, 397 (2013) (statutes do not displace principles of habeas law "absent the clearest command"). Accordingly, Section 2254(d)(1) does not bar this Court from affording relief based on a decision that sets forth a substantive rule under *Teague*. And a ruling that the Eighth Amendment forbids the execution of a defendant based on her age at the time of the offense would undeniably be substantive in just that way. See *Montgomery*, 136 S. Ct. at 723 (rules "prohibiting a certain category of punishment for a class of defendants because of their status" are substantive) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 18, 2020