No. 09-144

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

ROBERT J. VAN HOOK,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF OF THE PETITIONER

Respondent Robert J. Van Hook makes numerous assertions that counsel's performance was inadequate—assertions that are belied by the record or that the en banc Sixth Circuit dismissed. But he does not respond to the central issue raised in the Warden's Petition: the Sixth Circuit's well-established rule of reviewing counsel's performance under American Bar Association standards developed years after the trial. That rule conflicts with decisions by this Court and at least four other circuits. Van Hook does not deny that the Sixth Circuit stands alone in its approach. The Court should grant review to resolve the division of authority and correct the Sixth Circuit's distortion of *Strickland v. Washington*, 466 U.S. 668 (1984).

A. The Sixth Circuit reviewed counsel's performance using professional standards developed eighteen years later, in conflict with the approach of other circuits.

1. Every other circuit to have considered the issue assesses attorney performance under prevailing professional norms.

Van Hook concedes that counsel's conduct should be reviewed under "the professional standards that prevailed in Ohio at the time of Van Hook's trial" in 1985. (Opp. 2). This is consistent with *Strickland*, which instructs courts to evaluate counsel's conduct "under prevailing professional norms." 466 U.S. at 688. When this Court has conducted a *Strickland* inquiry, it has been fastidious in applying the ABA standards in effect at the time of the challenged conduct. See *Rompilla v.*

Beard, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

The Sixth Circuit has taken a different approach. In *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), the court declared that the ABA standards "merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases." *Id.* at 487. It then applied the 2003 Guidelines to measure counsel's performance at a 1982 trial. *Id.* at 487-88.

The *Hamblin* rule is now entrenched in the Sixth Circuit's jurisprudence. See *Cornwell v. Bradshaw*, 559 F.3d 398, 407 (6th Cir. 2009); *Haliym v. Mitchell*, 492 F.3d 680, 716-17 (6th Cir. 2007); *Dickerson v. Bagley*, 453 F.3d 690, 693-94 (6th Cir. 2006). The decision here is just the latest example: The Sixth Circuit reviewed counsel's 1985 performance under the 2003 ABA Guidelines. App. 26a-28a.

This approach conflicts with the rule in other circuits. At least four other federal appeals courts identify the "clearly described" duties from "[t]he [ABA] standards in effect at the time of [the petitioner's] trial," and then evaluate defense counsel's performance by those lights. *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005) (en banc); *Hummel v. Rosemeyer*, 564 F.3d 290, 298 (3d Cir. 2009); accord *Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008); *Sonnier v. Quarterman*, 476 F.3d 349, 358 n.3 (5th Cir. 2007).

The problem with the Sixth Circuit's errant approach is that it eliminates any objective baseline by which to measure the adequacy of a defense lawyer's performance. In the words of *Strickland*, the *Hamblin* rule magnifies, rather than "eliminate[s,] the distorting effects of hindsight." 466 U.S. at 689.

This case provides a prime illustration. In 1985, the prevailing professional standards imposed a general duty on counsel "to explore all avenues leading to facts relevant to the merits of the case and the penalty." 1 ABA Standards for Criminal Justice 4-4.1, at p. 4-53 (2d ed. 1980). But the standards offered no guidance on how to approach a mitigation investigation or how to use penalty-phase experts. Yet the *Hamblin* rule has imposed a high burden on the Warden throughout this litigation to prove that counsel's 1985 mitigation investigation satisfied the 2003 ABA standards (which explicitly discuss those issues).

The Sixth Circuit stands alone in ignoring *Strickland*'s clear directive "to evaluate the conduct from counsel's perspective *at the time*," 466 U.S. at 689 (emphasis added). Van Hook does not deny this division of authority, nor does he defend the practice. The Warden therefore requests that the Court grant review to correct the Sixth Circuit's unfounded approach.

2. Counsel's preparation and penalty-phase performance were reasonable.

Disregarding the Warden's argument, Van Hook instead makes three factual allegations about his

counsel's performance. The record undermines all of them.

First, Van Hook inaccurately argues that counsel did not undertake a timely investigation of his background. (Opp. 3, 5). Billing records establish, however, that counsel's efforts began well in advance of trial. Counsel had frequent conversations with members of Van Hook's family, pursued Van Hook's military records, and consulted with court-appointed experts. App. 379a-387a.

Second, Van Hook claims that counsel called experts during the penalty phase who "contradicted [their] mitigation theory" (Opp. 4), but the record demonstrates otherwise. Counsel argued that, because of his personality disorder, Van Hook lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. J.A. 4562-67. Both experts advanced that theory.[1] Dr. Cooper testified that Van Hook "did not accurately perceive right from wrong because he had a perceptional distortion" at the time of the murder due to "the use of a variety of drugs and alcohol superimposed on [his] personality disorder." J.A. 4439. Dr. Schmidtgoessling testified that Van Hook "was substantially impaired at the time of this offense" due to his "borderline personality . . . and the influences of the substances." J.A. 4459.

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[1] Van Hook further alleges that "[n]either doctor had a complete set of relevant records or Van Hook's complete psycho-social history" (Opp. 4), but he makes no attempt to identify those records.

Third, Van Hook contends that "defense counsel did not obtain Van Hook's military records or records regarding Van Hook's hospitalizations." (Opp. 4). To the contrary, the record establishes that counsel *did* obtain these records. Counsel reviewed Van Hook's military records on May 13, 1985, App. 380a, and the Veterans Administration sent counsel copies of the hospitalization records on July 1, 1985. J.A. 532.

Moreover, Van Hook's social history was well documented. Van Hook's father testified that his son started abusing alcohol and amphetamines at age 11 or 12, turning later to marijuana. App. 312a, 324a. Van Hook's mother described her son's desires to enlist in the Green Berets and the French Foreign Legion and his suicide attempts. App. 346a-353a. She also discussed Van Hook's sexual relationship with his uncle. App. 350a. Dr. Cooper observed that Van Hook had "an extensive drug history having abused alcohol, marijuana, PCP, LSD and a variety of pills." J.A. 2039. Dr. Winter discussed Van Hook's "early and continuing attachment to fantasies about war and the military," App. 371a-372a, and indicated that he "began sneaking sips from his parents drinks before he was three years old," App. 373a. She also documented his sexual-orientation confusion. App. 374a-376a.

In all, Van Hook complains that his counsel "failed to obtain and introduce . . . a wealth of mitigating evidence," (Opp. 4), but he has failed to identify a single document that counsel failed to uncover or a theme that went unmentioned.

3. Van Hook's remaining allegations of deficient performance have already been rejected by the Sixth Circuit en banc court.

Van Hook reargues a number of claims that were previously rejected in en banc proceedings. These allegations merit little attention.

First, Van Hook asserts that counsel were ineffective because they did not hire an independent mental health expert. (Opp. 5-7). He complains that his court-appointed examiners were non-party witnesses; they had no duty "to speak to defense counsel, explain their reports to defense counsel, or in any other way assist the defense." (Opp. 6). The Sixth Circuit panel granted relief on this claim, App. 31a-37a, but the en banc court reversed, returning the case to the panel with instructions to "delet[e] its discussion of counsel's failure to seek an independent mental health expert." App. 2a.

The en banc court took this action because Van Hook's claim has no merit. Under the Constitution, the State need only ensure "that a competent expert be made available." *Lundgren v. Mitchell*, 440 F.3d 754, 772 (6th Cir. 2006) (citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)). The defendant has no right "to retain the expert of his choosing." *Id.* The Ohio Supreme Court has likewise stated that defendants have no right to retain an independent psychiatrist or psychologist. Although the trial court may approve funding for such an expert under Ohio Rev. Code § 2929.024, that decision rests "within its sound discretion." *State v. Esparza*, 529 N.E.2d 192, 196 (Ohio 1988). Given the lack of a constitutional or statutory right, counsel were not deficient in failing

to ask the trial court for a discretionary appointment here. After all, the court had already appointed three experts to "evaluat[e] . . . the defendant's mental condition at the time of the commission of the offense," Ohio Rev. Code § 2945.39(A) (1981), and it had just approved counsel's request for extra funding to allow depositions of Florida law enforcement officials in connection with Van Hook's *Miranda* claim, J.A. 376, 378.

Second, Van Hook declares that counsel were ineffective because they acceded to the preparation of a presentence report. The Sixth Circuit panel granted habeas relief on this claim, App. 37a-40a, but the en banc court reversed, ordering the panel to "delet[e] its discussion of . . . the failure of counsel to object to the Presentence Report." App. 2a.

It is easy to see why. Under Ohio Rev. Code § 2929.03(D)(1), defense counsel has the option of requesting a presentence report. Because the report is distributed to both parties, the decision entails risks and benefits. In this case, the report helpfully relayed Van Hook's suicide attempts and his early introduction to alcohol, J.A. 5563-64, but it also contained an inadmissible victim impact statement, J.A. 5567-68.[2] In any event, the Sixth Circuit had already acknowledged that the decision to request a report, and the accompanying cost-benefit calculus, is vested with trial counsel. See *Keith v. Mitchell*, 455 F.3d 662, 671 (6th Cir. 2006).

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[2] Because Van Hook was tried before a three-judge panel and not a jury, there is a presumption that the inclusion of such statements was harmless. See *State v. Post*, 513 N.E.2d 754, 759 (Ohio 1987).

Third, Van Hook complains that counsel was ineffective for agreeing to a mental evaluation by Dr. Winters. (Opp. 10). Just as above, this decision is vested with trial counsel. And counsel's decision here was reasonable. Dr. Winter documented Van Hook's horrific childhood, his father's violent acts and alcohol abuse, his own substance abuse and fascination with the military, and his attempts at suicide and self-mutilation. App. 369a-374a. All these findings advanced counsel's mitigation presentation.

Counsel had a mere three months between the indictment and the trial. They obtained Van Hook's military records, they interviewed family members, they consulted with the court-appointed experts, and they presented an accurate picture of Van Hook's childhood and psychological profile. Under the professional standards at the time of trial, this performance was reasonable.

B. The Sixth Circuit mangled the *Strickland* prejudice inquiry.

1. The court erroneously relaxed the prejudice standard.

The Sixth Circuit did further violence to *Strickland* by conducting an artificial prejudice inquiry. The court identified three pieces of evidence that counsel purportedly failed to present; it announced that "[t]he threshold for finding prejudice in this case is . . . lower" because the murder implicated only one statutory aggravating circumstance; and it then held that "there [was] a reasonable probability that the result of his

sentencing proceeding would have been different." App. 13a-14a.

This number-of-aggravators analysis bears no resemblance to a proper prejudice inquiry, which "*reweigh[s]* the evidence in aggravating against the totality of available mitigation evidence." *Wiggins*, 539 U.S. at 534 (emphasis added).

The Sixth Circuit did not even mention the strong aggravating circumstance in this case—Van Hook's luring of the victim under the pretenses of sex in order to rob him. Moreover, under Ohio law, the sentencer "'may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.'" *State v. Hancock*, 840 N.E.2d 1032, 1054 (Ohio 2006) (citation omitted). Yet the Sixth Circuit's analysis makes no reference to the heinous nature of the offense. Van Hook invited the victim to perform oral sex on him, and then he strangled, decapitated, and mutilated the victim.

By disregarding the aggravating facts, the Sixth Circuit transformed the *Strickland* prejudice inquiry into a superficial hurdle. If the murder implicates only one statutory aggravating circumstance, the petitioner need only identify some piece of unpresented evidence to show prejudice. The Warden requests that the Court accept review and restore the standard to its proper form.

2. Van Hook has not established prejudice from his counsel's presentation of his childhood history.

Van Hook provides a list of facts that were purportedly unknown to the three-judge panel. (Opp. 12-13). The record shows otherwise:

- Van Hook's mother testified that she was treated for depression and suicidal thoughts. App. 340a.
- Dr. Winter indicated that Van Hook was exposed to his parents' sexual violence. App. 371a.
- Van Hook's father testified that he and his son abused drugs and alcohol. App. 312a. This was documented by Dr. Cooper and Dr. Winter. App. 373a; J.A. 2039.
- Both of Van Hook's parents admitted to their drug and alcohol addictions, App. 310a, 340a, which Van Hook's aunt confirmed, App. 358a.
- Van Hook's father admitted to one occasion where he "slapped the hell" out of his son, App. 321a; his mother testified that she received weekly beatings, App. 338a; and his aunt testified that both parents fought constantly, App. 358a-362a. Dr. Winter described Van Hook's childhood as a "combat zone." App. 371a.
- Van Hook's father admitted that he took Van Hook as a child, staying out until 3 a.m. App. 311a-312a.

- Van Hook's parents and Dr. Winter discussed Van Hook's suicide attempts and acts of self-mutilation. App. 325a-327a, 351a-353a, 369a-370a.
- Dr. Winter found that Van Hook was "the product of an unstable, non-nurturant, violent, and chaotic background . . . characterized by inadequate parental care due to absence and/or unavailability of the mother because of drinking, repeated abandonment by her, exposure to physical and sexual violence, and exposure to substance abuse." App. 377a. Those factors, she concluded "preclude[d] the development of a healthy, normal personality." *Id.*

Given this record, Van Hook cannot substantiate his claim that "the most important details" of his childhood were "never presented to the sentencer." (Opp. 13). Although Van Hook mentions affidavits from his aunts, uncles, and stepsister, he has not explained how their statements "differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005). Rather, as the Ohio court of appeals found, the statements are cumulative of the penalty-phase evidence and, therefore, insufficient to establish prejudice. App. 218a-219a.

3. Van Hook has not shown prejudice from his counsel's presentation of the psychological evidence.

As discussed above, Dr. Cooper and Dr. Schmidtgoessling testified that Van Hook's

borderline personality disorder, combined with drugs and alcohol, impaired Van Hook's judgment on the night of the murders. Dr. Winter reached the same diagnosis. App. 377a. Nevertheless, all three experts testified that a borderline personality was not a "mental disease or defect." App. 377a; J.A. 4444, 4459.

Van Hook claims prejudice in three respects. First, he notes that the experts' testimony precluded any mitigation argument under Ohio Rev. Code § 2929.04(B)(3) (1981) ("Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."). A reasonable attorney, Van Hook contends, "would have been in a position to show the sentencer that [he] did have a mental disease." (Opp. 15).

This argument is without merit. Even if another attorney could have elicited such testimony, there is not a reasonable likelihood that the three-judge panel would have accepted that view. The Ohio Supreme Court has determined that "personality disorder[s] do[] not constitute a 'mental disease or defect' within the meaning of R.C. 2929.04(B)(3)." *State v. Seiber*, 564 N.E.2d 408, 415 (Ohio 1990); accord *State v. Scott*, 800 N.E.2d 1133, 1150-51 (Ohio 2004).

Second, Van Hook argues that a reasonable attorney would have pursued a mitigation argument of "homophobic panic." (Opp. 7, 15). To the contrary, the court-appointed experts documented this condition. Dr. Schmidtgoessling listed "homosexual panic" as one of her two possible diagnoses. J.A.

5555. Dr. Winter reached a similar conclusion: "[T]he client found himself interested in, and tempted to have a sexual relationship with Mr. Self." App. 376a. According to Dr. Winter, "[t]his may have precipitated a homosexual panic, together with an enraged and murderous response to having these 'disgraceful' feelings arise in him." *Id.* Put simply, this theory was presented to the three-judge panel without success. Van Hook has not demonstrated that a different psychiatrist's testimony would have yielded a different result.

Finally, Van Hook suggests that a competent attorney would have argued that "his personality disorder could still be considered under Ohio's 'catch-all' category of mitigation" in Ohio Rev. Code § 2929.04(B)(7). (Opp. 15). This argument, too, is unpersuasive. The Ohio Supreme Court has stated that "[p]ersonality disorders are often accorded little weight because they are so common in murder cases." *State v. Wilson*, 659 N.E.2d 292, 310 (Ohio 1996); accord *State v. Taylor*, 676 N.E.2d 82, 98 (Ohio 1997). Van Hook has not explained why his condition was deserving of exceptional weight under Ohio law.

In all, counsel painted a complete picture of Van Hook's childhood and his personality disorder. Van Hook has demonstrated only that counsel could have presented more evidence, not different or better evidence. This is not "sufficient" under *Strickland* "to undermine confidence in the outcome." 466 U.S. at 694.

CONCLUSION

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

Respectfully submitted,

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