No. _____

In the Supreme Court of the United States
October Term, 2010

STEPHEN MICHAEL WEST,
Petitioner,

v.

RICKY BELL,
Respondent.

APPLICATION FOR STAY OF EXECUTION
THIS IS A DEATH PENALTY CASE WITH AN EXECUTION SCHEDULED FOR NOVEMBER 30, 2010, AT 10 P.M. CENTRAL

TO: THE HONORABLE JUSTICE KEGAN

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REQUEST FOR STAY OF EXECUTION

Pursuant to SUP. CT. R. 22, Petitioner is before this Court seeking a stay of his execution currently scheduled to take place on November 30, 2010, at 10 p.m. Central Standard Time. To the extent that any court had jurisdiction to enter a stay in this case, to date all of Mr. West's requests have been denied.

INTRODUCTION

The background of this case demonstrates that, although the Tennessee courts limited proof during his post-conviction proceedings and unreasonably applied clearly established federal law to his ineffective assistance of counsel claims, Stephen West may be executed without his mitigating evidence ever being considered by a jury or reviewing court. The district court applied a procedural default to exclude much of West's mitigating evidence. Recent case law reveals that procedural ruling is now demonstrably wrong. Identical issues are now before this Court, but any vindication of West's rights will be meaningless if West is executed. A stay of execution is justified.

Petitioner Stephen West properly filed a Motion for Relief from Judgment under FED. R. CIV. P. 60(b) alleging recent case law demonstrates the district court erred by failing to consider compelling mitigating evidence offered in support of his petition for habeas corpus relief. The district court erroneously applied a procedural default that prevented consideration of this evidence because it was not presented to the state courts. Because later developments in the case and in habeas law have shown that the district court's procedural ruling was in error, and that it

affected the integrity of the federal process, West filed his 60(b) motion. The lower courts' decision to consider that motion as a successor habeas petition rather than a properly filed 60(b) motion calls for a grant of *certiorari* from this Court.

Further, this Court is already poised to give guidance on this important question at the heart of West's 60(b) motion. In *Cullen v. Pinholster*, No. 09-1088, this Court granted *certiorari* to address whether "Resolution of the § 2254(d)(1) 'reasonableness' question should precede any presentation of evidence in federal court." *See* order granting cert. on June 14, 2010, 130 S.Ct. 3410. *See* Petitioner's Brief, 2010 WL 3183845, p. 21-42 (U.S. Aug. 9, 2010). This Court's answer to that question would determine whether the district court and the court of appeals were both correct in concluding that they would not review evidence that was unexhausted before deciding whether the state court's resolution of the merits of the claims represented an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

Given the importance of the constitutional issues presented in this case, at a minimum, a stay of execution is justified while this Court is considering the petition for *writ of certiorari*, also filed on this day.

Procedural History

Evidence presented in support of Stephen West's federal habeas corpus petition showed that shortly before his birth, his mother, who had a history of mental illness including auditory hallucinations and delusions, tried to kill herself by gas inhalation. (R. 212-7, p. 5 of 10). Consequently, Stephen was born in a

psychiatric hospital. (R. 212-1, p. 9 of 12). Beyond doubt, Stephen came into this world with a genetic predisposition to mental illness. In addition, because his mother was severely mentally ill, she lacked the capacity to care for him. As an infant, Stephen suffered from emotional deprivation and was deprived of the opportunity for maternal bonding. Stephen's parents relentlessly abused him. As a very young child, Stephen was often confined to his room, hiding on a urine-soaked mattress. (R. 212-7, p. 4 of 10). He was subjected to constant beatings so that his older sisters recall that Stephen was so scared of his mother that he would flinch and start crying if his mother raised her arm toward him in any manner. (R. 212-7, p. 4 of 10). Stephen's aunt recalls his parents beat, kicked, and punched him. (R. 212-9, p. 7 of 17). Stephen's alcoholic father hit him with a belt, an electric cord, sticks, and a broom handle. (R. 212-9, p . 8 of 17). With no parental support or encouragement, Stephen dropped out of school when he was a junior in high school. (R. 212-8, p. 5 of 15). He began consuming alcohol and marijuana as a way to self-medicate for significant depression. (*Id.*) The abuse West suffered as a child caused him to become very passive and submissive as an adult, suffering from post-traumatic stress disorder. (R. 212-7, p. 9 of 10; R. 212-8, p. 14 of 5). Despite suffering innumerable acts of cruelty as a child, Stephen West reached adulthood, served three years in the Army, received an honorable discharge, fell in love, became married, and fathered a child. (R. 212-8, p. 6 of 15).

In 1986, West and his co-defendant, Ronnie Martin, were charged with the murders of Sheila and Wanda Romines. *State v. West*, 767 S.W.2d 387 (Tenn.

1989). West was convicted of both murders. (*Id.*) His sentencing phase testimony was brief and consisted of character evidence offered by friends and family. The tragic circumstances of West's upbringing were not presented to the jury. West's mother, who had hired defense counsel, did not want defense counsel to offer proof of the abuse she inflicted on West; so he did not. (R. 212-5,¶ 5).[1] The jury imposed the death penalty. West's conviction and sentence were affirmed on direct appeal. *West, supra.*

In 1990, West filed a petition for post-conviction relief in state court, arguing his trial attorneys were ineffective for failing to investigate and present evidence of the tragic circumstances of his childhood. However, the proof was limited, because the trial court had only authorized $1200 to pay for expert psychological services. The state trial court denied relief.

West next filed a timely habeas petition. (R.111). In support of his petition, West filed several motions to expand the record with evidence that had never been presented to the state courts. (R.115, 129, 166). The district court granted all of the motions to expand. (R.145, 181). West then argued the evidence presented in post-conviction as well as the evidence which was admitted into the record pursuant to Habeas RULE 7, demonstrated he was prejudiced by counsel's deficient performance at sentencing. (R. 144, p. 54-70).

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[1]This evidence was corroborated by an affidavit from one of West's trial attorneys, Thomas McAlexander. Like the other evidence that is the subject of this motion, the district court refused to consider that affidavit in habeas.

Respondent filed multiple pleadings urging the district court not to consider the expanded evidence because it had not been presented to the state court. *See, e.g.*, Response to Petitioner's Motion to Expand the Record, R. 119, p. 6-7; Motion for Summary Judgment, R. 125, p.162. Respondent objected to consideration of this evidence because it made his case "significantly stronger." (R.125, Memo. of Law in Supp. of Resp. Motion to Dismiss Am. Pet., p.162).

The district court addressed West's ineffective assistance of counsel at sentencing claim using a two-step analysis. It first considered whether the expanded evidence could be considered pursuant to 28 U.S.C. § 2254(e)(2)(*See*, p. 83-88 of the district court's Memorandum Opinion, R. 188). Accepting Respondent's argument, the district court ruled it would not consider any of this evidence. (*Id.*, p. 88). The court reasoned that considering this evidence "would skew the determination to be made under AEDPA's standard of review because, logically, the state court could not have applied the law to facts that were not before it." (*Id.*) Thus, the district court amputated a significant portion of the proof offered in support of West's claims of ineffective assistance of counsel and dismissed the petition.

Mr. West appealed to the Sixth Circuit. The appeals court refused to consider the affidavits at issue, finding it could not consider this aspect of ineffectiveness because it "fundamentally altered the legal claim already considered by the state courts." *West v. Bell,* 550 F.3d 542, 551 (6th Cir. 2008) (quoting *Vasquez v. Hillery*, 474 U.S. 254 (1986). The appeals court nonetheless held that the state court rulings

were an unreasonable application of federal law: "Clearly, the Criminal Court for Union County stated the wrong standard for proving prejudice in a claim of ineffective assistance ... West is correct that his situation satisfies requirements of 28 U.S.C. §§ 2254[d] ... [W]e must deny West's petition for a grant of habeas corpus even though the state court decision was an unreasonable application of clearly established federal law." *West v. Bell*, 550 F.3d at 553-54. Even though it found that the state court decisions were unreasonable, the court failed to consider any evidence that had not been presented to the state courts.

The decision not to consider this evidence was significant because the court was deeply divided over whether West had established prejudice. Two judges found he had not established prejudice and voted to deny relief. (*Id.* at 550). The dissenting judge found Mr. West established he was prejudiced, as contemplated in *Strickland v. Washington*, 466 U.S. 668 (1984), and would have ordered a new sentencing hearing. *West*, 550 F.3d at 568. The dissenting judge considered the evidence that was defaulted. (*Id.*)

Mr. West timely sought a writ of *certiorari* from this Court, which was denied on March 1, 2010. *West v. Bell*, 2010 U.S. LEXIS 2142 (U.S., Mar. 1, 2010).

On June 14, 2010, this Court granted *certiorari* to address whether "Resolution of the 2254(d)(1) 'reasonableness' question should precede any presentation of evidence in federal court.'" *Cullen v. Pinholster*, No. 09-1088, 130 S.Ct. 3410; *see Petitioner's Brief, 2010 WL 3183845 p. 21-42 (U.S. Aug. 9, 2010).* The answer to this question would directly affect the validity of the legal reasoning

applied in West's case by the courts below.

On August 20, 2010, the Ninth Circuit Court of Appeals held that "when a state court adjudication is based on an antecedent unreasonable determination of fact, the requirement set forth in 2254(d) is satisfied and we may proceed to consider the petitioner's claim *de novo*." *Detrick v. Ryan*, 2010 WL 3274500 *18 (9th Cir. Aug. 20, 2010). In West's case, this reasoning would have compelled the Sixth Circuit to consider all of the evidence offered in support of West's claims of ineffective assistance of counsel.

After the grant of *certiorari* in *Pinholster,* and noticing the trend on this issue among the circuits, Mr. West filed a Motion for Relief from Judgment pursuant to FED. R. CIV.P. 60(b)(6), (R. 212), alleging that the clarification of the interaction between 28 U.S.C. §§ 2254 (d) and (e)(2) qualified as an extraordinary circumstance warranting reopening of his habeas case. (R. 212).

On October 27, 2010, the district court entered an order denying the 60(b) motion and also transferring the case to the court of appeals for authorization to file a successor petition. (R. 216, 217). On October 29, 2010, the district court denied Mr. West's certificate of appealability. (R. 221).

On November 4, 2010, the Sixth Circuit entered an order dismissing West's case, concluding it was a second or successive habeas petition.

Reasons for Staying Mr. West's Execution

A stay of execution is an equitable remedy and is analyzed under the following test:

> 1) whether there is a likelihood [Mr. West] will succeed on the merits of the appeal; 2) whether there is a likelihood he will suffer irreparable harm absent a stay; 3) whether the stay will cause substantial harm to others; and 4) whether the injunction would serve the public interest.

Hill v. McDonough, 547 U.S. 573, 584 (2006); These four factors "are factors to be balanced, not prerequisites that must be met." *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000). As will be explained in more detail below, Mr. West easily meets this test.

1. The Execution Should be Stayed Because Mr. West Will Likely Succeed On the Merits in this Matter.

To satisfy the first factor, Mr. West must show a "significant possibility of success on the merits." *Hill*, 547 U.S. at 584. Significantly, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). The facts of this case and the law argued in West's Petition for Certiorari demonstrate West's likelihood of prevailing on his claims.

West's 60(b) motion is not a successor petition because it attacks the process the lower courts employed to exclude much of the evidence offered in habeas to support his claims of ineffectiveness. A proper 60(b) motion attacks, not the substance of a federal court's resolution of a claim on the merits, but rather, some defect in the integrity of the process. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). In his motion, West is not attacking the merits of the earlier rulings, but rather, the

decision to exclude essential evidence when deciding the merits of the claim. This is entirely consistent with *Gonzalez.* It is a proper 60(b) motion because it raises procedural error in the previous federal court process. A simple review of West's arguments demonstrates that.

The appeals court erred by barring Mr. West's 60(b)(6) motion for the simple reason that despite his best efforts, no court has ever reviewed the full merits of this penalty phase ineffectiveness claims. West's 60(b) motion seeks to have compelling defaulted evidence reviewed and considered. No court has ever reviewed whether counsel was ineffective for failing to present the above-mentioned evidence and whether there is a reasonable probability that the consideration of this evidence could have caused at least one juror to return a verdict of less than death.

The consideration of some aspects of the ineffectiveness claim in the initial petition does not prohibit later consideration of whether earlier proceedings were defective for failure to fully review the claim due to a procedural default. Review under RULE 60(b) is the most logical vehicle for plenary review because a 60(b) is proper when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error–for example, a denial for such reasons as failure to exhaust, procedural default, or statute of limitations bar." *Gonzalez v. Crosby,* 545 U.S.at 532 n. 4. That consideration, plenary review of the claim whose evidentiary support was procedurally defaulted, is exactly what Mr. West is asking for in his Petition for Certiorari.

While some aspects of Mr. West's ineffective assistance of counsel claim have

been reviewed, important and compelling aspects have not. This case illustrates that ineffective assistance of counsel claims may be complex and multi-faceted. Such claims need to be reviewed with consideration of all of the evidence that the jury could have considered. *Porter v. McCollum*, 130 S.Ct. 447, 453 (2009). Plenary review has never been done in this case due to a defect in the federal proceedings. West's current 60(b) motion that focuses on that defect should be fully considered.

The Sixth Circuit's erroneous reading of *Gonzalez* speaks of default as if it only applies to the default of an entire claim. However, this Court's opinion in that case shows that its logic applies to all erroneous findings of procedural default that preclude plenary merits review. This Court specified that a proper RULE 60(b) motion may "assert[] that a previous ruling which precluded a merits determination was in error–for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Gonzalez,* 545 U.S. at 532, n. 4. West's Rule 60(b) motion is entirely consistent with this since it deals with the district court's erroneous decision to apply a default to much of West's evidence.

As this Court emphasized in *Gonzalez*, "whether a Rule 60(b) motion may proceed in the habeas context depends on the nature of the relief the motion seeks." (*Id.* at 539)(Stevens, J., dissenting). A thorough review of the relief sought in West's motion shows that he is seeking relief due to a failure to consider the full merits of his claims due to an erroneous application of procedural default. That relief is consistent with 60(b) and shows that West will likely prevail if this Court stays his execution and gives full consideration to his petition for *certiorari.*

2. **Stephen West Will Suffer Irreparable Harm.**

Unless this Court grants a stay of execution, Mr. West stands to lose his life without a full merits review of whether death is the appropriate punishment and without the "fair shot" this Court found to be so important in *Gonzalez*. Indeed, the courts have recognized in capital habeas cases that the petitioner's right to life carries substantial – if not controlling – weight when a court exercises its equitable powers. *See e.g., Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001) (using equitable powers to allow consideration of petition because "[i]n a capital case such as this, the consequences of error are terminal. ... We will therefore exercise leniency under the facts of this capital case."); *Calderon v. United States District Court*, 128 F.3d 1283, 1288 n.4 (9th Cir. 1997) ("'[O]ccasional' injustices ... are decidedly not an acceptable cost of doing business in death penalty cases.").

3. **The Equities Favor Mr. West.**

Because West has diligently sought review of all of his evidence in support of his claims in this case, the equities favor granting a stay of execution. Mr. West's 60(b) motion was dismissed as a successive petition pursuant to 28 U.S.C. § 2244(b)(1). Section 2244(b) is a codification of the abuse of the writ doctrine. *Slack v. McDaniel*, 429 U.S. 473, 486-87 (2000); *see also Felker v. Turpin*, 518 U.S. 651, 664 (1996) (Section 2244's restrictions are "well within the compass" of the evolution of the abuse of the writ doctrine). *McKleskey v. Zant*, 499 U.S. 467 (1991), is this Court's lead case on the subject of "abuse of the writ." (*Id. at 477).* In that case, this Court noted the abuse of the writ "refers to a complex and evolving body of equitable

principles ...." (*Id.* at 489). This Court further held "equity recognizes that 'a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" (*Id. at* 490) (internal citations omitted). The Petitioner "must conduct a reasonably diligent investigation aimed at including all relevant claims and grounds for relief." *Cress v. Palmer*, 484 F.3d 844, 852 (6th Cir. 2007). Under *McKleskey*, therefore, any analysis of whether section 2244 applies must necessarily look at the equity of its application.

Beyond doubt, West has diligently sought review of these claims and has not abused the writ. He presented all of his evidence in support of these claims in his initial petition. (R.40, p. 19-28 of 49, R. 111, p. 39-66). He appealed the denial of review of these claims and this evidence. Proof Brief of Appellant, Sixth Circuit Court of Appeals, Jan. 17, 2007, p. 15-50. Once the law demonstrating his entitlement to review of these claims emerged, he promptly filed a Motion for Relief from Judgment. (R. 212). His diligence must inform this Court's analysis of the equities involved in any claim of abuse of the writ. Here, those equities demonstrate that West has in no way abused the process.

When this case was initially before the district court, Respondent vigorously urged that court to not review the merits of the sentencing claim. *See e.g.,* Response to Petitioner's Motion to Expand Record ("the merits of his ineffective assistance of counsel claim, of which a substantial portion is procedurally defaulted for purposes of federal habeas review") R.119, p. 6-7; Motion for summary judgment (urging denial of relief on basis of ineffective assistance as sentencing because "he has not

exhausted his state remedies") R.125, p. 162. The district court accepted Respondent's arguments and refused to review the claims. That same Respondent has now been arguing that all issues have been reviewed.

The Sixth Circuit's analysis of West's penalty phase ineffectiveness claim amply illustrates the "Catch-22" West has found himself in. That court excluded the evidence in question because it may have "fundamentally altered" the state court claim. *West v. Bell*, 550 F.3d 542 at 551, *quoting Vasquez v. Hillery*, 474 U.S. 254 (1986). The court categorically refused to consider this evidence: "We will consider only the evidence presented before the state court during the post-conviction proceedings." (*Id.*) Thus, there can be no denying that the court refused to consider a significant portion of the evidence that supported West's arguments that his trial counsel was ineffective.

Yet, when it came to consideration of West's 60(b) motion, the same court dismissed, concluding that West was abusing the writ. The court now held that West's 60(b) presented "the very same claim that we previously considered." (R. 222, p. 4 of 7). This is an inherent contradiction. None of the aspects of the claim and none of the evidence advanced in the 60(b) had ever been considered by any reviewing court. And, this failure to review occurred in the same court that declared West's state post-conviction review unreasonable. Accordingly, the appeals court's conclusion that these claims could not be reviewed because they altered the claim, and cannot be reviewed now because they have already been reviewed on the merits, is simply illogical.

These claims have not, in fact, been reviewed on the merits. It is the erroneous denial of merits review that is the basis for West's Motion for Relief. The equities in this case demonstrate that West deserves a stay of execution so that his Petition for Certiorari may be fully considered.

4. The Public Interest Lies With Granting A Stay Of Execution.

Of course, the public interest is served *a fortiori* upon these circumstances. *In re: Holladay*, 331 F.3d 1169, 1176-77 (11th Cir. 2003)(granting stay of execution); *In re: Morris*, 328 F.3d 739, 741 (5th Cir. 2003)(same). Additionally, in considering the public interest, the fact cannot be ignored that one federal court jurist would have granted West penalty phase relief on the claims already considered by this Court. *West v. Bell*, 550 F.3d 542, 568 (6th Cir. 2008)(Moore, J. dissenting). This underscores the importance of a careful, unhurried review of West's case. An order staying Mr. West's execution should enter because approving his execution "before his appeal is decided on the merits would clearly be improper." *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983). Too much evidence remains unconsidered before the public can have confidence that West's execution comports with the constitution.

For all of these reasons, an order staying West's execution is justified.

CONCLUSION

For all these reasons, Stephen West prays this Honorable Court to enter an order staying his execution pending resolution of his petition for writ of *certiorari*.

Respectfully submitted,

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