IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: STEPHEN MICHAEL WEST	)	**UNION COUNTY**
	)	**Supreme Court No. 3**
	)	**No. MI 987-0011 30-SC-DPE-DD**
	)	

RESPONSE TO THE ATTORNEY GENERAL'S MOTION TO SET AN EXECUTION DATE FOR STEPHEN WEST AND REQUEST FOR A CERTIFICATE OF COMMUTATION

Now comes Stephen Michael West, an inmate on Tennessee's death row, by and through counsel, pursuant to Tenn. S.Ct. Rule 12.4(A), and files this Response in Opposition to the Attorney General's Motion to Set Execution Date. Because imposition of the death penalty would be grossly unfair and disproportionate in this case and because the State of Tennessee recognizes that Mr. West suffers from severe mental illness, this Court should deny the Attorney General's Motion and instead commute Mr. West's death sentence to life. At the very least, this Court should issue a certificate of commutation. As will be demonstrated in this Response, "there are extenuating circumstances attending the case, and the punishment ought to be commuted." TENN. CODE ANN. § 40-27-106.

The extenuating circumstances in this case include the following: First, carrying out the death sentence in this case would be manifestly unfair where the actual killer of the two victims in this case received a life sentence. Second, no court has ever evaluated Mr. West's extensive mitigating evidence under the proper legal standard. And finally, no execution date should be set for a prisoner suffering from severe mental

illness. The combined weight of these extenuating circumstances must persuade this Court to deny the Attorney General's motion.

I. Where the actual killer of both victims received a life sentence, it is manifestly unfair to execute an accomplice who played a lesser role in the offense.

In the early hours of March 17, 1986, Stephen West and Ronald Martin left their work at a McDonald's in Lake City, Tennessee and, many hours later, arrived at and were admitted into the home of Wanda and Sheila Romines in Union County. Martin was an acquaintance of fifteen-year-old Sheila Romines. He had tried to date her, but was rejected and in fact, publicly humiliated by her. Sometime between the hours of 6 a.m. and 8:30 a.m., Sheila and her mother, Wanda, were stabbed to death. Sheila was raped before she was killed. *State v. West*, 767 S.W.2d 387, 389-90 (Tenn. 1989). Martin and West were arrested the next day. The trials were severed, and the trial against West proceeded first.

Although there is no question that Stephen West was present with co-defendant Ronnie Martin, at the time of this crime, the jury in his case never heard a tape recording of Martin admitting to being the actual killer of both victims. While Martin was in custody at the county jail, Martin discussed his involvement in the crimes with cellmate Steve Hunley. This conversation was captured on the tape:

Hunley: Hey, Ronnie.

Martin: Yeah?

Hunley: One more time before I go to bed to ease my mind, did Steve do that shit? Huh?

Martin: No.

Hunley: Okay, thank you.

Hunley: You guys back there don't believe in that you said Steve didn't kill them women. Will you tell them you didn't?

Martin: Who's back there?

Hunley: All of us.

Martin: Yeah, I did it.

Hunley: You killed both them women?

Martin: Yeah.

Hunley: Why?

Martin: I don't know. I don't want to talk about it.

(T.T. Vol. XV, p. 86, Exhibit 90).

Me: You don't think your crazy?

Ronnie: No

Ronnie: A little goofy at times, but I don't think I'm crazy.

Me: Yea, but you said Steve didn't kill those women, you did. Don't you think that's crazy?

Me: Huh

Ronnie: Huh

Me: You told me Steve didn't do that but you did, don't you think that's crazy?

Ronnie: I don't think it's crazy, no.

Me: Be honest with me, you going to go in that courtroom and tell them

you done that shit?

Ronnie: If its up to me I will.

(*Id.*). "A confession is like no other evidence ... [and may] have profound impact on the jury." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). West's jury never experienced the impact of hearing Martin's own voice confessing to killing both women. Although this Court has upheld the exclusion of that evidence at trial, *see West*, 767 S.W.2d at 387, it is now relevant to the Court's decision on the present motion. *See* Tenn. S.Ct. R. 12.4(A) ("Any response in opposition to the motion . . . shall assert any and all legal and/or factual grounds why the execution date should be delayed, why no execution date should be set, or why no execution should occur.").

Despite the fact that this confession could not technically exonerate West, it is compelling evidence that this Court must consider in determining whether the death sentence should actually be carried out. It is patently disproportionate and unfair to execute West for two murders that Ronnie Martin actually committed, and for which Martin received a life sentence. Where the actual killer is ineligible for the death penalty, it is simply wrong for a secondary actor to be put to death.

Credible psychological evidence also shows that West was not an actual killer, that he was a follower of the younger but more influential Martin, and that he was susceptible to a period of disassociation once he realized that Martin was going to kill the Romines women. This evidence demonstrates that Stephen West is submissive and operates at an emotional level of a thirteen to fifteen year-old, (PCT. 9/24/96, p. 96), that he rates very low on psychological dominance testing, (*Id.* p.97), supporting

the theory that he was dominated by his co-defendant and acting under duress at the time of the offense (*Id.*, p. 156). Testimony about these traits could have been used at trial to provide an explanation for how West could stand by passively as Martin stabbed both victims.[1] Thus, evidence could have been presented to show that while the crimes were being committed, West was "in an extreme situation, and he became essentially dysfunctional during that time." *Id.* at 114. West suffered from acute stress disorder which was triggered by the extreme traumatic stressor of Martin's stabbing of the Romines women. He was at high risk of developing acute stress disorder and being influenced by Martin due to problems with anxiety and passive dependence stemming from childhood trauma. (Dr. Coleman's report, Appendix A, p. 6).

> When SW [Stephen West] saw Ronnie Martin holding a knife to Mrs. Romines' neck, he responded with horror and a sense of helplessness, and that scene exacerbated the symptoms of his PTSD and/or precipitated a new PTSD.

(Dr. Dudley's report, Appendix B, p. 12).

When confronted with the circumstances at the Romines' house, West, early on, described experiencing intense fear, helplessness and horror. He told Dr. Bursten before his trial, that he felt dazed and detached from his body and felt as if the events were "unreal." (PCT. 9/24/96, p. 116; PCT. 10/22/96, p. 446-482)

> [West's] background of extreme trauma and anxiety during childhood set the stage for West's having an acute stress response and becoming emotionally overwhelmed by the situation, experiencing intense dissociative symptoms of depersonalization and derealization. Ronnie Martin's psychological history indicates that, although younger than

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[1]This Court identified the need for this explanation in its original opinion: "Defendant offered no explanation as to why he failed to try to get away, call for help, or attempt to overpower or get the drop on Martin." *State v. West*, 767 S.W.2d 387, 397 (Tenn. 1989).

> West, he was an angry individual who had a hostile, aggressive and manipulative personality features. It is my opinion that this more dominating and pathological personality style, in contrast to West's submissive and fearful personality traits, did serve to reinforce West's long-standing pattern of becoming passive and compliant when confronted with intense stress. It is my opinion that he had very limited psychological resources for proactive resistance due to the psychological trauma and anxiety reaction he was experiencing at that time. His lack of sleep and his intoxication at the time further depleted his ability to more effectively cope with the traumatic situation.

(Dr. Coleman's report, Appendix A, p. 7).

This information would have explained West's actions (or non-actions) during the crime. According to a legal expert who testified during post-conviction proceedings:

> [T]here is in this case a series of statements that Steve West gives that are reasonably incomprehensible unless you have the psychological background. His statement that a juvenile dominated him sounds on the surface incredible; his actions on that day of being dominated or not participating. Why didn't he run out the door? Why did he act the way he did? I'm sure that runs through jurors' minds. Is this person credible? Would a reasonable person act that way? You can't determine that in the abstract. If you know his psychological profile, his background as Dr. Engum spelled it out, there is a reason why he would have behaved that way.

(PCT. 10/22/96, p. 412-13).

The above-cited evidence provided an explanation for why and how West is morally less culpable than co-defendant Martin. Yet, because Martin was a juvenile at the time of the crime, Martin was not eligible for the death penalty. It is unconscionable to execute Stephen West for murders committed by Ronnie Martin simply because Martin was ineligible for the death penalty. It is manifestly unfair and disproportionate to execute the one who was dominated and who played the lesser role in the offense.

II. No court has evaluated the mitigating impact of Stephen West's background of horrific abuse under the correct legal standard. Had the courts considered this evidence properly, West would have obtained sentencing relief.

Stephen West was sentenced to death despite the fact that the jury in his case was left uninformed about his background and childhood. *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988) (requiring an individualized sentencing determination). Although jurors knew that West had no criminal record at the time of his arrest in this case, they were completely unaware of his history of extreme childhood abuse. This is because West's attorneys never investigated these issues and never discovered the compelling mitigating evidence that was available. Post-trial courts' failure to adequately consider that evidence and to give it the heavy mitigating weight it deserves compounds the injustice. Before this Court decides to set an execution date for Mr. West, it must evaluate this evidence and the impact it would have had on West's jury. This Court must also further reconsider the fairness of imposing the death sentence where no reviewing court has correctly evaluated the mitigating impact of the evidence.

A. West's Childhood

Stephen West's mother gave birth to him in a mental institution; she had been placed there after she tried to commit suicide. PCT. 9/24/96, p. 163-64. She had a history of mental illness, including auditory hallucinations. (Dr. Coleman's report, Appendix A, p. 3). His father was a lifelong alcoholic and a violent man who openly questioned West's paternity. *West v. State*, 1998 Tenn.Crim.App. LEXIS 636 *5 (Tenn.Ct.Crim.App. 1998). Under the care of these parents, West's childhood was

cruel and traumatizing. Both his mother and his father brutalized him from the time he was a baby. PCT. 10/22/96, p. 370-71. His mother would beat him mercilessly by "[s]winging a belt so long and so hard that it would wear her out." *Id.* at 371. She hit him with shoes and struck him so hard that he became cross-eyed. The beatings left West with "[b]ruises, black eyes, busted lips, pulled hair, pinch marks." *Id.* They were never predictable and occurred without reason. *Id.*

West's aunt, who lived in an apartment above West's family, witnessed some of this horrible abuse. Specifically, she recalled that West's mother swore at him, beat him, threw him against the wall by his feet, and would leave him in a cold room on a mattress wet with urine. His aunt explained: "She was always hitting him. He had bruises on him; pinching him; sling him back in that room if he came out." PCT. 10/22/96, p. 383.

She also vividly described one example of the kind of abuse that West regularly suffered:

> I came down. Patty [West's sister] came out to get some food for Steve and she [West's mother] started swearing at them and she ran in there and just slung Steve up against the wall; grabbed him by his feet. There was blood and he started throwing up. And she said, "I feel like killing the little bastard." She walked out. I cleaned them up and took them to the hospital. His nose was bleeding and his mouth was bleeding.

Id. 382-83.

West's oldest sister, Debra, remembers him being slapped in the head and hit with shoes throughout his childhood. *West v. State*, 1998 Tenn.Crim.App. LEXIS 636 *5. She portrayed him as the family scapegoat: "If my other brother did something wrong, Steve got beat for it. My sister and I would try to get between them, and we

would get beat, and then his beating was finished, and this was not just one or two times. This was from the time I can remember Steve coming home from the hospital." PCT. 9/24/96, p. 166. Debra described their father as an alcoholic who was violent when sober and even more violent when drinking. *Id.* at 166-67. Like West's aunt, Debra remembered at least one occasion when West's mother threw him against a wall to punish him. *West v. State*, 1998 Tenn.Crim.App. LEXIS 636 *5.

The abuse was so merciless that neither West nor his sister, Patricia, has any recollection of the first decade of their lives. West's mother eventually told him that during that period his ankles were broken at least seven times and he also suffered broken toes and a fractured elbow. (Dr. Coleman's report, Appendix A, p. 3). In response to this abuse, West never became violent or fought back. Debra explained that West would "duck" when either of his parents raised a hand near him. PCT. 10/22/96, p. 167. His aunt said:

> He was very timid. He never said anything. He would just cry. If he saw her coming towards him he'd scream out and start crying and just stand there and let her beat him. A few occasions I asked her, "Please why are you doing this?" She said, "If I could kill him and get away with it I would."

PCT. 10/22/96, p. 383.

This evidence of childhood abuse adds up to a compelling mitigation case. However, West's counsel never investigated these issues prior to sentencing, and the jury that sentenced West to death never heard any of this evidence.

West's trial attorneys, McConnell and McAlexander, readily admitted that prior to West's sentencing they did not conduct a probing investigation into West's background or into any issues of abuse within his family. McConnell testified that

family members failed to come forward on the issue of abuse. McAlexander was not "entirely sure about [any allegations of] physical abuse, but if they were mentioned, there was nothing that created any kind of red flag in my mind about that being a factor that should have been inquired into." PCT. 9/24/96, p. 198. McConnell believed such an investigation "would have been chasing down blind alleys." PCT. 10/22/96, p. 267. With respect to conducting separate interviews of siblings and other family members outside the presence of West's parents in order to explore mitigation themes, counsel "certainly wouldn't have wasted time on that." *Id.* at 371, 266. Trial counsel also did not obtain West's school, employment, or medical records. *Id.* at 265-66. Counsel agreed, however, that if they had an "inkling that there may have been a childhood problem" or mental problem, they "would have been obligated to present that information at sentencing." *Id.* at 267, 279-80.

Instead of investigating West's background for possible abuse, West's attorneys laid the burden of bringing up this sensitive subject on West and his family: "Mr. West never raised any physical . . . or sexual abuse or anything of this nature." *Id.* at 267. But the evidence was readily available if counsel had sought it out. West's sister Patricia testified during the post-conviction proceeding that she did not tell the attorneys about West's background of abuse because "[n]obody asked and I didn't think it would matter." *Id.* at 373. And his sister Debra testified that she informed McConnell about West's history of abuse and that McConnell told her it was not relevant and that because West's parents were paying his fee, he would not raise it.

PCT. 9/24/96, p. 168.[2] Other potential witnesses, including West's aunt, were simply never contacted. PCT. 10/22/96, p. 384.

In the post-conviction proceeding, West presented testimony from Dr. Eric Engum, a clinical psychologist who concluded that West suffered from a severe mixed personality disorder. According to Dr. Engum, West is submissive and operates at the emotional level of a thirteen- to fifteen-year-old. PCT. 9/24/96, p. 96. The results of West's testing were consistent with those of an individual who had suffered from severe childhood abuse.

This information would have explained West's actions during the crime. It would have connected West's abusive background and his failure to act against Martin. It would have provided some explanation, other than sheer cowardice,[3] for why West stood by and did nothing during the murders. Mental health experts were able to link the abuse West received as a child with his response to Ronnie Martin's actions. It could have been used as compelling mitigating evidence.

B. Post-Conviction Courts Failed to Consider West's Mitigating Evidence under the Proper Standards of Review.

Although this previously undiscovered evidence constituted a compelling case for a jury to spare West's life, the post-conviction trial court denied relief. The state courts recognized counsel's failure to investigate any issues of childhood abuse, explicitly finding that "[n]one [of West's family members] w[as] questioned concerning possible

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[2] McConnell denied the conversation. PCT. 10/22/96, p. 301.

[3] On direct appeal, this Court represented West's actions as "cowardly" and "cowardice." *State v. West*, 767 S.W.2d 387, 390, 391 (Tenn. 1989).

abuse." *West v. State*, 1998 Tenn.Crim.App. LEXIS 636 *21. But the post-conviction trial court denied relief on the ground that West had failed to prove *by a preponderance of the evidence* that the result of his trial would have been different had the newly discovered mitigating evidence been presented to the jury. Add. 23, p.274-75. That burden of proof is incorrect – indeed, it is the very same burden that the United States Supreme Court would eventually identify as "contrary to" *Strickland*. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) ("If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature' and 'mutually opposed' to our clearly established precedent."). The Court of Criminal Appeals failed to correct the misstated burden of proof – indeed, that court failed even to apply *Strickland*'s two-part test for evaluating ineffective assistance claims. *West v. State*, 1998 Tenn.Crim.App. LEXIS 636 *20-24. Neither of these state courts applied the proper constitutional standard when they denied relief.

C. Federal Habeas Courts Failed to Give Mitigating Effect To West's Evidence of Severe Childhood Abuse.

When the federal district court dismissed West's habeas petition, the court declined to consider certain evidence that West had submitted – consisting primarily of additional, corroborating expert opinions – on the ground that West had failed to present that mitigation evidence to the state post-conviction court. *See* 28 U.S.C. § 2254(e)(2); (District Court opinion, p.83-84, Appendix E). This ruling ignored the fact

that West was not at fault in failing to present this evidence to the state courts. *See Williams v. Taylor*, 529 U.S. 420, 432 (2000) (in order for habeas court to exclude evidence never presented in state court, petitioner must be "at fault" for not presenting it). Rather, West had received only very limited funding during state post-conviction proceedings and was unable to hire experts to corroborate and expand upon Dr. Engum's findings. These reports are attached to this Response so that this Court may fully consider West's mental health evidence. (Appendices A-D).

West appealed the dismissal of his habeas petition to the Sixth Circuit Court of Appeals. In affirming the decision of the district court, the court of appeals found that the post-conviction decisions applied an incorrect burden of proof under the federal standards enunciated in *Strickland v. Washington,* 466 U.S. 668 (1984), and therefore was contrary to clearly established federal law. *West v. Bell*, 550 F.3d 542, 552 (6th Cir. 2008). Thus, the federal court recognized that West's mitigation evidence was never considered under the proper standards. Nevertheless, the court of appeals held, in a 2-1 decision, that the state court had been correct in denying relief.

The Sixth Circuit ruled that even if West could prove that his counsel's representation was deficient, he had not shown prejudice. The panel inexplicably determined – without citation of any authority or support – that evidence of the severe abuse West had suffered as a child might have been considered to be aggravating rather than mitigating, as the jury "might have believed that violence begets violence" and "might have despised West and sentenced him to death with greater zeal." *West v. Bell*, 550 F.3d at 556. On the basis of these "might haves," the court said that it

could only "speculate" that the jury would have viewed the evidence as mitigating rather than aggravating. *Id.* The court concluded: "There must be 'a reasonable probability' that the proceeding would have been different. Given the strength of the evidence against West presented at trial and the weakness of the mitigating evidence that West presented during the post-conviction proceedings, we cannot conclude that there was a reasonable probability that the jury would have chosen to spare West's life." *Id.*[4]

Judge Karen Nelson Moore dissented, explaining that the majority applied an outdated standard for assessing whether counsel was ineffective. *West*, 550 F.3d at 567. In Judge Moore's view, under *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), West had established that his counsel were deficient in ignoring "key pieces of evidence" of childhood abuse that "would have led a reasonable attorney to investigate further." *West*, 550 F.3d at 568. Judge Moore also found that West was prejudiced by this deficiency, concluding that it was "extremely likely" that based on the undiscovered evidence at least one juror would have found the death penalty unwarranted. *Id.* Judge Moore explained that the majority's holding that this evidence could have been aggravating and did not undermine confidence in the reliability of West's sentencing simply "flies in the face" of the Supreme Court's decision in *Rompilla*. *Id.* at 569. Judge Moore would have granted a conditional writ of habeas corpus with respect to the penalty phase. *Id.* at 570.

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[4] The court did not explain its reference to the "weakness" of the mitigating evidence, but this statement followed immediately from its assertion that the jury might have "despised" West on the ground that "violence begets violence" and the court could only "speculate" whether the evidence of childhood abuse would have had a mitigating effect on the jury.

The Sixth Circuit correctly identified the errors made by the Tennessee courts in considering Stephen West's case in mitigation. Because the Tennessee courts did not apply the correct standards for granting relief, this Court can have no confidence that West's mitigating evidence received proper consideration in this state's post-conviction process. However, the same Sixth Circuit applied a flawed view of mitigating evidence. That court held that evidence long-recognized as mitigating was actually aggravating – it could be a reason for a jury to sentence a defendant to death "with greater zeal." This created a situation where West's mitigation case has never been properly considered by any reviewing court, state or federal.

Without this proper consideration of West's mitigation case, this Court can have no confidence that the death penalty has been justly and fairly applied to Stephen West. The United States Supreme Court has made clear that the presentation of mitigating evidence during a capital sentencing proceeding is absolutely essential to ensure that a defendant's sentence is adequately reliable – which is of particular concern where the sentence is death. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). Indeed, the Court has explained that it is because of "the need for reliability in the determination that death is the appropriate punishment" that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *see also Roberts v. Louisiana*, 431 U.S. 633, 637 (1977); *Jurek*

v. Texas, 428 U.S. 262, 271-74 (1976); *Gregg v. Georgia*, 428 U.S. 153, 189-90 & n.38 (1976).

Such evidence is relevant because it explains the defendant and his actions for the jury – it creates a complete picture of a flawed and complicated human being, to which the jury, in all of its complex humanity, can react. Thus, deeply embedded in death penalty jurisprudence is the principle that "punishment should be directly related to the personal culpability of the criminal defendant" and that "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *see also, e.g.*, *Lockett*, 438 U.S. at 604 (explaining that mitigation evidence is any evidence that might serve "as a basis for a sentence less than death"). Any other process necessarily "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass." *Woodson*, 428 U.S. at 304.

The prejudice analysis mandated by the Supreme Court reflects this understanding of the nature and purpose of mitigation evidence, and gives force to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). The Supreme Court has long held that evidence showing

that the defendant was subject to severe abuse as a child is indisputably mitigating, and that counsel's failure to introduce it at sentencing has a prejudicial effect by decreasing the reliability of the sentencing proceeding. *See Strickland*, 428 U.S. at 305 (explaining that counsel's assistance is ineffective where it deprives the defendant of "a trial whose result is reliable"). Such evidence humanizes and gives context – it shows that the person whom the jury already has decided is a killer is less blameworthy for his actions because of what others did to him when he was innocent and vulnerable.

In a series of cases highly relevant to this Court's decision on setting an execution date, the Supreme Court found prejudice under the *Strickland* test where the mitigating evidence not presented was evidence that the defendant was abused as a child. In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court vacated the death sentence where trial counsel failed to uncover and present to the sentencing jury the "graphic description of Williams' childhood, filled with abuse and privation" as well as evidence of defendant's borderline mental retardation. *Id.* at 398. Such evidence "might well have influenced the jury's appraisal of his moral culpability." *Id.* In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court also vacated the death sentence, explaining that "*Wiggins* experienced severe privation and abuse in the first six years of his life" and "has the kind of troubled history [that the Court has] declared relevant to assessing a defendant's moral culpability" – so that if this evidence had been placed "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 535, 537. In *Rompilla v. Beard*, 545

U.S. 374 (2005), the defendant suffered abuse as a child, was isolated and "lived in terror," and witnessed violence between his parents; the Court found that "[t]his evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and **although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test.** It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Rompilla's] culpability." 545 U.S. at 393 (internal quotation marks omitted; second bracket in original; emphasis added). Just as in these cases, West's evidence of severe childhood abuse should have been considered mitigating.

Like the state post-conviction court's erroneous application of a preponderance of the evidence standard to the prejudice analysis, the Sixth Circuit's reasoning in this case cannot be squared with the Supreme Court's decisions concerning the relevance and importance of mitigating evidence, and particularly evidence concerning a defendant's abusive or deprived childhood. Here, and in every capital case, the jury did not even reach the question of sentencing until it had found that the defendant was guilty of a murder for which a sentence of death was potentially appropriate. The issue at sentencing was not whether West had played some role in these violent offenses, but why he had done so, why he had not stopped the codefendant or run away, and whether there was any evidence that might have influenced the jury's appraisal of his moral culpability.

The evidence of the severe depredations West suffered in his abusive and

unhappy childhood is the epitome of mitigating evidence under Supreme Court precedent. As in *Williams*, *Wiggins*, and *Rompilla*, its presentation would have allowed the jury to give force to our society's belief that West was "less culpable" for the crimes because his acts were attributable not to some inherent wickedness but rather to his "disadvantaged background" and his resulting "emotional and mental problems." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring).

The Sixth Circuit's dismissal of the significance of this mitigating evidence is flatly wrong for at least two reasons. First, there is simply no basis for the court's conjectures that the jury "might have" found West's victimization as a child at the hands of his parents to be aggravating on a theory that "violence begets violence" or that, because of this evidence, the jury "might have despised West and sentenced him to death with greater zeal." *West*, 550 F.3d at 556. It simply defies logic and comprehension that any juror would have "despised" West with "greater zeal" because he was thrown against a wall by his mother when he was blameless and unable to defend himself. These "might have" conjectures of the Sixth Circuit are irreconcilable with everything the Supreme Court has written about the significance of mitigation evidence of this sort.

Second, the Sixth Circuit misapplied precedents regarding the evaluation of prejudice resulting from counsel's failure to present mitigating evidence. Although the Court of Appeals explicitly recognized that "[t]he jury might have believed that the abuse made West the kind of person who was psychologically unable to confront or disobey strong, threatening people such as Martin" and "might have pitied West and

chosen to spare his life," *Id.*, it found that this was not enough, solely because the court could conjure other conclusions that the jury "might have" reached. Rather, a defendant only need show "a reasonable probability" that the outcome would have been different, which is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. As the Court held in *Rompilla*, "it is possible that a jury could have heard it all and still have decided on the death penalty," but "that is not the test." *Rompilla v. Beard*, 545 U.S. at 393. And yet that is precisely the basis on which the Sixth Circuit rejected West's claim. Because it hypothesized that the jury "might have" found the evidence to be aggravating and still sentenced West to death, it held that West had not established prejudice. *West*, 550 F.3d at 556.

Courts have recognized that, by its nature, mitigation evidence often is double-edged, and that this is precisely the point of the evidence - it may explain why a defendant engaged in the violent act the jury already has found, or show that the defendant is a troubled or disturbed person, rather than a cold-blooded killer. Thus, by definition, the evidence may suggest that the defendant could engage in a violent act or fail to prevent one from occurring. The Tennessee Court of Criminal Appeals, in an opinion by Justice Wade, has even recognized the fact that "violence begets violence" is mitigating and is a compelling reason to spare a defendant's life. *Adkins v. State*, 911 S.W.2d 334 (Tenn. Ct. Crim. App. 1995).

In *Adkins*, the court vacated the death sentence on counsel's failure to present mitigating evidence of childhood abuse that was very similar to that which could have been presented in West's case. Adkins's expert psychiatrist testified that "what we

know from studies that have been done, from the clinical experiences is that children who grow up in families where there is a tremendous amount of parental violence have a much greater likelihood of themselves being violent." *Id.* at 355. The *Adkins* court recognized the mitigating nature of evidence that showed "that the petitioner's violent nature was due to his social background." *Id.* Relief was granted because Adkins had "shown ample evidence concerning [his] childhood, background, psychiatric and psychological examination results, all of which a jury could have considered in mitigation of the death penalty." *Id.* at 356.

The *Adkins* court literally concluded that a jury's finding that "violence begets violence" constitutes mitigating evidence of such weight as to undermine confidence in a death sentence. The evidence is all the more significant in West's case because the psychological evidence shows that West had become a passive follower as a result of his childhood abuse.

Other courts have reached similar conclusions. For example, in *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004), the Tenth Circuit found prejudice resulting from counsel's failure to present mitigation evidence and held that the district court's refusal to give weight to "double-edged" evidence of brain damage and an abusive childhood – on the ground that it suggested the defendant was "an unstable individual with very little control" over his actions – "reveal[ed] a fundamental misunderstanding of the purpose for which such mitigation evidence would have been presented." *Id.* at 943. As the court explained, "[t]he jury already had evidence of Mr. Smith's impulsiveness and lack of emotional control. What the jury wholly lacked was an explanation of how

Mr. Smith's organic brain damage caused these outbursts of violence and caused this 'kind hearted' person to commit such a shocking crime." *Id.* (footnote omitted).

Similarly, in *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002), the Eighth Circuit rejected an argument that counsel's failure to present evidence of the abuse the defendant had suffered as a child was not prejudicial because the evidence could have an aggravating effect, reasoning that "[b]y the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. . . . The jury had already convicted Simmons of murdering McClendon, and we fail to see how disclosures of childhood transgressions would have caused any significant harm." *Id.* at 938-39 & n.6.

Many other courts have reached similar conclusions, all directly contrary to the analysis that the Sixth Circuit applied to West. *See, e.g., Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir.) ("Boyde's history of suffering violent physical abuse, as well as the family history of sexual abuse he had known about growing up, is the sort of evidence that could persuade a jury to be lenient."), *amended on reh'g*, 421 F.3d 1154 (9th Cir. 2005); *Outten v. Kearney*, 464 F.3d 401, 423 (3d Cir. 2006) (disapproving a state court's conclusion that the defendant "could not establish prejudice because [his] records contained some harmful information" and because the "mitigating and aggravating information . . . cancel[ed] each other out" (internal quotation marks omitted)); *Turpin v. Lipham*, 510 S.E.2d 32, 39, 42-44 (Ga. 1998) (upholding a finding of prejudice because the defendant's "mental disorders and the abuse, neglect and

isolation he experienced as a child were not adequately presented to the jurors," even though trial counsel characterized the evidence as "a loaded gun" that could cause the jury to view Lipham as either a "poor, institutionalized soul from a neglected background or . . . an outright sociopath who only did things for his immediate gratification").

The divergent appellate review received by West has extremely serious implications for the fair and uniform administration of justice. Many other courts would have granted relief under the very same facts. It is clear that even if the evidence of West's terror-filled childhood somehow were viewed as aggravating because "violence begets violence," a weighing of all of the evidence – including the mitigating value of this same evidence – would have provided a sufficient basis for relief in many other courts. In fact, as already noted above, the Tennessee Court of Criminal Appeals ordered relief in another case on the very theory that a violent childhood led to violence as an adult and constituted compelling mitigating evidence. *Adkins*, 911 S.W.2d 334 at 355-57. To set an execution date for Stephen West after the Sixth Circuit denied relief for a reason expressly rejected by Tennessee courts and the Supreme Court would be the ultimate in capricious and arbitrary imposition of the death penalty.

III. Because The State Of Tennessee Recognizes That Stephen West Suffers From Severe Mental Illness, The Attorney General's Motion To Set An Execution Date Should Be Denied.

Throughout the post-conviction and federal habeas proceedings in West's case, West has sought to show that his history of childhood abuse caused him mental disturbances that affected his actions at the time of the offense. West has presented

testimony and affidavits to prove that severe mental illness contributed to his actions in the present case. (*See* Appendices A-D). West has now spent 23 years on death row. During the past ten years, mental health professionals working for the prison have been treating West for severe mental illness with powerful anti-psychotic drugs. This treatment supports West's evidence that mental illness makes him less morally culpable for the crimes he was convicted of committing. Furthermore, executing inmates who are indisputably severely mentally ill violates this state's and this country's evolving standards of decency. Because of this, the execution of Stephen West would violate the Eighth Amendment to the United States Constitution as well as Article I, Section 16 of the Tennessee constitution.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In deciding whether a punishment is cruel and unusual, courts must look beyond historical conceptions to "'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy* v. *Louisiana*, 554 U. S. ___, ___ (2008) (slip op., at 8) (quoting *Furman* v. *Georgia*, 408 U. S. 238, 382 (1972) (Burger, C. J., dissenting)). Here, this Court must refuse to set an execution date for Stephen West or must recommend a Certificate of Commutation because he is severely mentally ill

and the execution of one so mentally ill offends current standards of decency.

Dr. William Kenner, an expert psychiatrist, recently examined Stephen West's medical records kept by Tennessee prison officials at Riverbend Maximum Security Institution where he is being held on death row. *See* Dr. Kenner's Affidavit, Appendix D). Those records show that for nearly ten years now, state officials have recognized that West suffers from severe mental illnesses that include psychosis and delusions. *Id.* According to those records, West has been diagnosed with major depressive disorder with psychotic features, chronic paranoid schizophrenia, and schizoaffective disorder. *Id.* According to Dr. Kenner, these diagnoses are severe mental illnesses. *Id.*

Major depressive disorder with psychotic features, as diagnosed by Dr. O' Toole in 2001, is characterized by a disturbance of mood and loss of interest or pleasure in everyday activities. Symptoms may also include weight loss or gain, sleep disturbance, fatigue, inability to concentrate, feelings of worthlessness, thoughts or attempts of suicide. This disorder is not directly caused by a general medical condition or the use of substances, including prescription medications. The severity of these symptoms can range from mild to severe, with Mr. West experiencing moderate to severe symptoms. *Id.*

Chronic paranoid schizophrenia, as diagnosed by Dr. Sarasti in 2006, is diagnosed in individuals who first qualify for the schizophrenic label and then have symptoms that put them into the paranoid subgroup. Schizophrenia is a group of psychotic disorders characterized by disturbances in thought, perception, affect,

behavior, and communication that last longer than 6 months. Symptoms include delusions, hallucinations, disorganized or incoherent speech, severely disorganized or catatonic behavior. The paranoid type indicates Mr. West is preoccupied with auditory hallucinations; as documented by the prison medical staff. *Id.*

To understand Mr. West's latest diagnosis, schizoaffective disorder, it helps to picture someone with the disordered brain and symptoms of schizophrenia, hallucinations and delusions, at the same time he is riding the rollercoaster of bipolar disorder. Dr. O'Connor took a careful history from Mr. West that traced his auditory hallucinations at least to his adolescence, years before he was involved in this offense. That timing fits with the usual onset of his illness. This current diagnosis by a doctor working on behalf of state prison officials constitutes a severe mental illness. *Id.*

In accord with these diagnoses, the prison medical staff has been dispensing a number of psychotropic medications. Beginning in 2001 and continuing to the present, Mr. West has been prescribed a number of different antidepressant and antipsychotic medications at normally prescribed levels that are used to treat severe mental illnesses. Those agents have included Haldol and Thorazine, both old line, or first generation, antipsychotic drugs, which have been described as "chemical straightjackets." As of April 5, 2010, he was taking 900 mg of Thorazine daily. This is considered a very high dose of Thorazine. The impact and side effects of those two drugs are so unpleasant that less sick individuals and those faking mental illness will refuse to take them. Stephen West's antidepressant medications have included Paxil, Pamelor, Effexor, Trazodone (a sedating antidepressant used as much to induce sleep

as to improve mood), and Wellbutrin. After Dr. O'Connor diagnosed West with the combined illness of schizoaffective disorder, she stopped his first generation antipsychotic and started him on a second generation or atypical antipsychotic, Respirdol, that has significant mood stabilizing effects as well. Although the exact medication has varied, since 2001, Mr. West has been continually taking some form of medication to treat his severe mental illness, including antipsychotics. *Id.*

There can be no dispute that Stephen West is severely mentally ill. The State of Tennessee clearly thinks so and prescribes strong medication to him because of it. Dr. Kenner's affidavit suggests that West may have been suffering from some form of this mental illness long before prison medical staff arrived at a diagnosis. This is consistent with the fact that the usual onset for schizophrenia is in adolescence. *Id.* At the time of the offense in this case, West's symptoms may well have been covered up by alcohol and drug usage. *Id.* The question now before this Court is what action it should take as a result of this evidence?

The Supreme Court has held that the Eighth Amendment forbids the execution of offenders who committed murder before the age of eighteen. *Roper v. Simmons*, 543 U.S. 551 (2005). The Eighth Amendment also forbids the execution of those who suffer from mental retardation. *Atklins v. Virginia*, 536 U.S. 304 (2002). These classes of offenders are exempted from the death penalty because, due to their immaturity or their substandard intelligence, they are less morally culpable than other offenders. *Roper*, at 571-72, *Atkins*, at 316. They are less in control of their actions. *Roper*, 543

U.S. at 569-70, *Atkins*, 536 U.S. at 320. They are less able to assist their attorneys in their own defense. *Atkins*, 536 U.S. at 320.

These same issues apply to defendants, like Stephen West, who are severely mentally ill. As demonstrated in the expert reports, Stephen West's mental illness affected his actions, and more particularly, his inability to act, at the time of this offense. Furthermore, his masking of his illness and its symptoms contributed to his lack of ability to assist his attorneys in proffering it as a mitigating factor. West could not be expected to understand his own mental illness or to show how it made him less morally culpable. Furthermore, because he had never been treated until the prison officials began to treat him, he could not show that his conditions were amenable to treatment. Through no fault of his own, his mental illness directly contributed to his death sentence.

It simply offends current standards of decency to execute a severely mentally ill man who did not actually kill either of the victims in this case. Stephen West's illness is real. His mental illness is not something that he brought onto himself and it is not something that he is faking. *Id.* It almost certainly contributed to his actions at the time of this offense. At the same time, his prison records show that with proper medication, he has not been dangerous to anyone while incarcerated. He has been safely and successfully excluded from society for 23 years now. There is simply no reason for the State of Tennessee to execute him and therefore no reason for this Court to set an execution date.

IV. Because Multiple Errors Have Infected This Case, The Cumulative Effect Of Those Errors Is Sufficient Cause For This Court To Deny The Attorney General's Motion.

The above-cited reasons for are more than sufficient reason for this Court to deny the Attorney General's Motion. However, the Court must further consider the fact that it has already found serious error in Stephen West's trial. Although it denied relief, this Court found multiple instances of prosecutorial misconduct in its original review of this case. The prosecuting attorney made improper arguments "that were not supported by any direct evidence," arguments that the defendant was a "liar" who was "trying to throw sand in the eyes of the jury" and "blowing smoke in the face of the jury." *State v. West*, 787 S.W.2d 387, 394-95 (1989). The prosecution also asked improper and inflammatory questions of the defendant. *Id.* at 397.

In addition to these errors, this Court also recognized that the prosecution improperly attempted to lessen the jury's sense of responsibility for imposing the death sentence. Under *Caldwell v. Mississippi*, 472 U.S. 320 (!985), the prosecution may not make "statements [that] minimize the jury's role and allow them to feel that the responsibility for a death sentence rests elsewhere." *West*, 787 S.W.2d at 399. Again, the Court did not reverse, but found that prosecutorial arguments to the jury that the law "provides the punishment, not you," and that "the law is self-executing" violated the principals announced in *Caldwell*. *Id.*

This Court must consider and weigh the fact that it recognized serious error on its direct review of this case in its present decision about setting an execution date. TN S.Ct. Rule 12.4(A) calls for the Court to consider "all legal and / or factual grounds why

the execution date should be delayed, why no execution date should be set, or why no execution should occur." A consideration of the cumulative impact of the errors in this case must lead this Court to conclude that the death sentence here is unreliable.

Stephen West's death sentence was only obtained only after multiple instances of prosecutorial misconduct. It was further imposed without any consideration of West's background of severe childhood abuse. West's mental health issues, including his status as follower who could be easily dominated by a younger perpetrator, were never put before his jury to consider. Those mental health issues, now documented by the State of Tennessee, demonstrate that he is severely mentally ill and less morally culpable than other defendants. He is certainly less culpable than the man who actually killed the victims in this case and who received two life sentences. The cumulative import of all of these fact is to demonstrate that an execution of the death sentence is wholly inappropriate in this case. The Attorney General's Motion must be denied.

CONCLUSION

Wherefore, Stephen West respectfully requests this Court to deny the Attorney General's Motion to Set Execution Date and modify his sentence to life in prison. In the alternative, this Court should issue a Certificate of Commutation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen A. Ferrell, hereby certify that a true and correct copy of the foregoing document was hand delivered to:

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this the 24TH day of May, 2010, by postage prepaid delivery.

The undersigned attorney of record prefers to be notified of any orders or opinions of the Court by email to the following email addresses:

Stephen_Ferrell@fd.org and Sharlott_Swanger@fd.org.

Stephen A. Ferrell

INDEX TO APPENDICES

APPENDIX	DOCUMENT
A	Report of Claudia R. Coleman, M.D. dated 11/7/01
B	Report of Richard G. Dudley, Jr., M.D. dated 2/21/02
C	Report of Pablo Stewart, M.D. dated 12/13/02
D	Report of William D. Kenner, M.D. dated 5/17/10
E	Opinion of the United States District Court for the Eastern District of Tennessee (Judge Thomas A. Varlan) dated 9/30/04, p. 83-84