No. 09-790

In the Supreme Court of the United States

EDMUND ZAGORSKI,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State's brief in opposition substantially narrows the issues before the Court. The State does *not* deny that, if the facts of petitioner's confinement were as presented in the petition, petitioner was subjected to impermissibly coercive pressure before making his inculpatory statements. The State also very notably does *not* deny that the petition *in fact* accurately describes the *actual* conditions of petitioner's confinement. Thus, as the compelling arguments offered by *amicus* Physicians for Human Rights confirm, a fundamental point here is not fairly debatable: Petitioner was subjected to literally intolerable treatment before making his inculpatory statements.

Against this background, the State makes no attempt to defend either aspect of the Sixth Circuit's analysis—the court's pronouncement that suppression of the coerced statements is inappropriate because state officials did not act with the *purpose* of coercing a confession, and its determination that a voluntariness inquiry is unnecessary when the defendant initiates contact with law enforcement personnel—because, the State insists, that analysis was not the basis for the court's holding. Instead, having essentially conceded all of these points, the State rests its defense of petitioner's conviction on two related arguments drawn from AEDPA that were not addressed by the court below: (1) that evidence of coercion was not presented at the initial state suppression hearing (or on direct review of petitioner's conviction); and (2) that evidence of coercion presented in subsequent state proceedings may not be considered now.

The State's argument, however, is wrong in every respect. The Sixth Circuit expressly rested its holding on the analysis we describe in the petition; that the court of appeals' analysis is not defended by the State, and is patently indefensible, accordingly is reason enough for this Court to grant review. As for the State's arguments under AEDPA, petitioner very plainly *did* present evidence of coercion to the state trial court. This means that the state-court suppression rulings were both contrary to the clear federal law governing coerced statements and manifestly unreasonable as a finding of fact under 28 U.S.C. § 2254(d)(1) and (2). And if there is any question on that score, the courts below (and this Court) are indeed entitled under 28 U.S.C. § 2254(e)(1) to rely on additional evidence of coercion presented during state post-conviction review; that evidence clearly and convincingly establishes the fact of coercion. Because the analysis used by the Sixth Circuit to uphold petitioner's capital sentence was wrong, and because the State's defense of that sentence before this Court adds nothing, the petition should be granted.

A. The Holding Below Rests On The Sixth Circuit's Misapplication Of Federal Law.

As a preliminary matter, even a quick glance at the Sixth Circuit's opinion reveals that the State is flatly wrong in arguing that "the questions presented [in the petition] are not directly implicated by the decision below." Opp. 11. In fact, far from suggesting that it was somehow precluded from considering petitioner's evidence of coercion, as the State would have it, the Sixth Circuit expressly acknowledged and addressed petitioner's argument that "he made the [inculpatory] statements because he had been incarcerated under oppressive conditions, kept in isola-

tion, and deprived of exercise or sunlight." Pet. App. 9a. The Sixth Circuit discounted those arguments, not because petitioner failed to present the relevant evidence to the state court or because that evidence in fact failed to establish coercion, but because the court believed that "the need for security prompted [petitioner's] confinement, not coercion." *Ibid.* Having thus read coercion out of the case as a legal matter, the court of appeals went on to hold the inculpatory statements admissible because petitioner "requested to speak with Detective Perry on his own initiative and insisted on confessing even though the detective advised him to speak with his lawyer first." *Ibid.*

It is true, of course, that the Sixth Circuit concluded by opining that the Tennessee Supreme Court's decision allowing the introduction of the inculpatory statements "was neither contrary to, nor involved an unreasonable application of clearly established Federal law." Pet. App. 10a. But the Sixth Circuit premised that conclusion on its own mistaken view of federal law: its belief that the State's motivation for creating coercive conditions was determinative and that there was no need to look into the circumstances lying behind the defendant's initiation of an exchange with the police. Because that analysis was wrong, the decision below should not stand.

Indeed, earlier this Term, in *Maryland* v. *Shatzer*, No. 08-680 (Feb. 24, 2010), the Court confirmed its concern about coerced confessions, reiterating that "'incommunicado interrogation' in an 'unfamiliar,' 'police-dominated atmosphere' involves psychological pressures 'which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'"

Shatzer, slip op. at 4 (citation omitted). The Court further explained that when, like petitioner here, a suspect initially refused to be questioned without counsel present and "the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated," "[i]t is easy to believe that [the] suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel." *Id.* at 7. Those considerations, fully present in this case, reinforce the strength of petitioner's arguments.

B. Evidence Presented To The State Courts Established That Petitioner's Inculpatory Statements Were Involuntary.

1. Rather than address the Sixth Circuit's holding, the State's opposition is directed almost exclusively to arguing (1) that petitioner's coercion claim is "based largely on materials not before the state court at the time of its adjudication" (Opp. 11; see *id.* at 13-14, 15-16), (2) that these materials were not considered by the state courts and therefore may not be considered on federal habeas, and (3) that the Tennessee courts accordingly did not depart from federal law or make an unreasonable determination of the facts. *Id.* at 14, 19. But the Sixth Circuit notably did not accept or base its holding on that reading of the record; it nowhere indicated that petitioner sought to go beyond the state-court record. And it is easy to see why the Sixth Circuit made no such suggestion: The State is simply wrong in contending that the principal and compelling evidence of coercion was not before the state courts at the time the suppression motion was decided and the case proceeded on direct review.

a. The State ignores the evidence that *was* before the state courts on direct review. Trial counsel for petitioner, though inexpert, elicited much more than "the bare fact that petitioner was held in solitary confinement" at the pretrial hearing. Opp. 13. The trial judge, and every subsequent court on direct review, was aware of petitioner's:

- Lengthy confinement in an eight-by-eight-foot, Resp. App. 21b, steel-walled, *id*. at 30b, cell;
- Months of isolation, *id*. at 10b, 12b, 21b;
- Negligible human contact, *id*. at 21b;
- Lack of sunshine apart from a court visit, *id*. at 30b;
- Lack of exercise, *id*. at 30b-31b;
- Repeated hospital and doctor's visits and medication "for his nerves," *id*. at 31b-32b;
- Suicide attempt(s), *id*. at 28b-29b (overdose conceded, but electrocution misdescribed as escape attempt); and
- Bizarre request to set the date and method of his execution in exchange for giving a statement, *id*. at 16b, 20b.[1]

Thus, even a "cursory reading" of the hearing transcript (and a quick review of the State's own appendix) reveals that the state trial court had ample proof establishing "that [petitioner's] confinement condi-

[1] Defense counsel also summarized all of these facts in his opening, Resp. App. 6b, and closing remarks, Prelim. Mot. Hr'g Tr. 95-96, *State* v. *Zagorski*, No. 6052 (Robertson Cty. Crim. Ct. Feb. 17, 1984).

tions were 'torturous' or otherwise unduly oppressive" (Opp. 13), and that the trial court decided the motion to suppress in light of petitioner's physical condition brought on by the "trying circumstances" of his confinement. Hr'g. Tr. 91, reprinted in App., *infra* at 2a.[2]

b. The state courts' holding that a statement made in such circumstances was not coerced both "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," and "resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1), (2).[3] Unlike

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[2] Although the trial court ultimately rejected petitioner's motion to suppress, the judge did not come to that conclusion easily. In portions of his ruling edited out of the State's appendix, the judge revealed that he was troubled by specific aspects of petitioner's circumstances beyond his solitary confinement. Before issuing his ruling, the judge acknowledged that he was "bother[ed]" by the July 27 statement "because of the medical condition of the defendant," Hr'g Tr. 90, reprinted *infra* at 1a, 2a, and "ha[d] a problem" with the August 1 statement because "the defendant obviously was under some strain and medication," *id*. at 2a. The judge went on to comment: "Sometime during [the August 1 meeting with Detective Perry] it seems like the conversation should have been terminated or his attorneys notified * * *." *Ibid*.

[3] Whether a statement is voluntary given the totality of the circumstances is a mixed question of law and fact. See *Thompson* v. *Keohane*, 516 U.S. 99, 109-110 (1995) (comparing "subsidiary" facts, subject to deference, and the application of a legal test, such as the totality of circumstances assessment in involuntary statement claims, which is subject to independent federal review). The state court's decision, however, is clearly unreasonable whether analyzed as a determination of fact (as re-

the "thicket of Eighth Amendment jurisprudence" the state and lower courts faced in *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003), for example, this Court had not only established a "governing legal principle," *ibid*, for the state courts to follow here through its decisions on involuntary statements, but had also provided "clarity regarding what factors," *ibid*, render a defendant's statements inadmissible—factors the state courts failed to properly consider.

In particular, a federal habeas petitioner is entitled to relief where the state court "confront[ed] a set of facts that [we]re materially indistinguishable from * * * decision[s] of this Court and nevertheless arrive[d] at a result different from [its] precedent." *Williams* v. *Taylor*, 529 U.S. 362, 406 (2000). That is this case: In decisions materially indistinguishable from this one, this Court has held that sweat-box-like conditions, *e.g.*, *Brooks* v. *Florida*, 389 U.S. 413 (1967), extended isolation, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737 (1966), and a defendant's disturbed or otherwise altered mental state, *e.g.*, *Townsend* v. *Sain*, 372 U.S. 293 (1963), overruled in part on other grounds by *Keeney* v. *Tamayo-Reyes*, 502 U.S. 1 (1992); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960), all may establish an overborne will. The Tennessee courts' failure to apply this principle, and the decision below affirming that failure, was a patent error.[4]

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spondent would erroneously have it) or as a mixed question of fact and law.

[4] It is telling that the State does not seriously attempt to defend the reasonableness of the state court's decision. The State merely relies on conclusory language drawn from that decision to justify its position. Opp. 18-19.

2. Moreover, even if the evidence before the trial court was insufficient to establish coercion as a matter of federal law, the State itself concedes that substantial *additional* evidence on the subject was presented in state post-conviction proceedings. Opp. 16-17 & n.4. And the State is wrong in contending that, because this evidence was not before the state court when it initially decided the suppression motion, "it has no bearing on the federal court's analysis of the reasonableness of the state court's adjudication under § 2254(d)." *Id.* at 17. In fact, 28 U.S.C. § 2254(e)(1) permits consideration of just such extrinsic evidence, providing that a state-court factual determination is presumed correct *unless rebutted* by "clear and convincing evidence." This standard "contemplates * * * a challenge based wholly or in part on evidence outside the state trial record." *Lambert* v. *Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004). See *Taylor* v. *Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004) (section 2254(e)(1) "come[s] into play once the state court's fact-findings survive any intrinsic challenge" under § 2254(d)(2)).

The additional evidence of involuntariness produced in state post-conviction proceedings was compelling: it included emergency room records, showing petitioner's "sleeplessness, numbness, headaches, * * * elevated blood pressure," Resp. Br. 16, and severe psychological distress, which required medication, C.A. App. 615-617, as well as materials from *Douglas* v. *Emery*, No. 81-3826 (M.D. Tenn.), showing the deplorable conditions at the Robertson County Jail at the time of petitioner's confinement and the extreme heat of the summer. Resp. Br. 16 n.4; see also State Post-Conviction Ex. 30. The post-conviction record also included testimony by Sheriff Emery that petitioner was held "24 hours a day" in

the steel-walled cell during "the hottest part of the summer." Tr. 279, *Zagorski* v. *State*, No. 6052 (Robertson County Crim. Ct. Nov. 30, 1995).

The State's specific contention (Opp. 17-18) that this evidence must be disregarded here because it was introduced in the context of an effort to establish ineffective assistance of counsel is insupportable. There is no doubt that the evidence, although advanced in support of an ineffective assistance claim, was introduced to show the involuntariness of petitioner's statements.[5] Because this evidence is a part of the state-court record, AEDPA, in 28 U.S.C. § 2254(e)(1), provides for its consideration by the habeas court. And in this case, the evidence presented by petitioner on state collateral review, combined with that adduced initially in support of suppression, provides a "clear and convincing" rebuttal to the state-court determination that there was no coercion in this case. "[W]hen this evidence * * * is viewed cumulatively its direction is too powerful to conclude anything but" that petitioner's statements were involuntary. *Miller-El* v. *Dretke*, 545 U.S. 231, 240 (2005).[6]

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[5] Any evidence on this subject that petitioner's lawyers failed to introduce at trial could, realistically, have been be presented only after direct review, when advanced by new counsel in collateral proceedings; Tennessee courts have recognized that bringing an ineffective assistance of counsel claim on direct review is "fraught with peril," as it is "virtually impossible to demonstrate prejudice as required without an evidentiary hearing." *State* v. *Blackmon*, 78 S.W.3d 322, 328 (Tenn. Crim. App. 2001).

[6] As this Court recognized earlier this Term in *Wood* v. *Allen*, 130 S. Ct. 841 (2010), there is substantial confusion in the lower courts over the degree of deference owed to state-court fact find-

C. This Case Should Be Remanded For A Proper Harmless Error Analysis

The State also is wrong in its apparent suggestion (Opp. 18) that any error in the admission of petitioner's coerced statements was harmless. Although the State made a harmless error argument to the Sixth Circuit**,** Br. Resp. at 39, *Zagorski* v. *Bell*, No. 06-5532 (6th Cir. Apr. 15, 2009), the court chose not to rely on harmless error in deciding the case. For present purposes, it therefore must be assumed that the error was not harmless. And the Sixth Circuit's opinion supports that conclusion: The court of appeals relied on the admissibility of petitioner's July and August statements to determine that any error in admitting his *June 1* statement was harmless. Pet. App. 7a ("[T]he error was harmless if the subsequent inculpatory statements were admissible."). The court therefore must have believed that the latter two statements had substantial probative value; otherwise, the court presumably simply would have held that the admission of all three statements was harmless and altogether avoided consideration of petitioner's coercion argument. And the Sixth Circuit was correct to understand that petitioner's statements were highly prejudicial: The trial judge himself concluded that petitioner's statements were "obviously * * * very damaging" and "detrimental" to him. App., *infra*, at 2a.

It is easy to see as a general matter how admission of a defendant's inculpatory statements would likely have a substantial and injurious effect in a

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ing under § 2254. If there is thought to be any doubt about the clarity of the extrinsic evidence needed to overcome a state-court finding of fact under AEDPA, this case would provide the Court with an opportunity to address the issue.

capital case. Not only do such statements influence the jury in the guilt phase—particularly when, as here, the prosecution repeatedly reminds the jury that the defendant "implicated himself" in the killings (see Pet. 8-9)—but they also play an important role during the sentencing phase. A defendant's inculpatory statements, whether confessions or, as here, more ambiguous statements, undoubtedly work to assuage any doubts a juror might have about the identity of the perpetrator of the crime in question, thereby influencing the juror's willingness to impose such a final, irreversible punishment. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3, 24-25 (2010) (reviewing literature on the importance of confessions in jury decision-making); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 921-923 (2004) (discussing the "virtually irrefutable presumption of guilt" that a confession creates in the minds of jurors). Because the Sixth Circuit did not address the question of harmless error, the case should be remanded so that the court of appeals may consider the issue in the first instance. See Pet. 30 n.11.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2010

APPENDIX

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IN THE CRIMINAL COURT OF
ROBERTSON COUNTY
AT SPRINGFIELD, TENNESSEE

STATE OF TENNESSEE,	)	
Appellee,	)	
	)	
vs.	)	No. 6052
	)	
EDMUND GEORGE ZAGORSKI,	)	
	)	
Appellant.	)	

PRELIMINARY MOTIONS

February 17, 1984

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[THE COURT:]

On the July 27th and August the 1st statement—we'll take up July the 27th. That statement gives me some problem for two reasons: one is that we have neither a confession, nor refusal to confess; it's just an offer to confess. That was where, as I understand it, he came in and told Detective Perry that he would confess if he had the option to be executed in a certain way and at a certain time. That statement, as I said, does bother me because of the medical condition of the defendant, as well as I don't know how that statement would really fit in, and I need some

authority on that. I need some assistance from the State.

Let's set aside the aspect of the medication for the moment. What is the admissibility when a man comes in and says, I will confess if so and so, and that if never was fulfilled—it obviously couldn't be. To a jury, though, that would be very damaging. I don't know that I've ever run across that before, and I will need whatever help you can give me.

On August the 1st, I have a problem on that statement for this reason; the defendant obviously was under some strain and medication. I don't think there's any doubt. There's a doubt as to the extent of it, but there's some medication. I don't think that Detective Perry led him on in any way nor solicited statements, yet he spent an hour in the Sheriff's office after attorneys had been appointed and when he did have attorneys. Sometime during that hour it seems like the conversation should have been terminated or his attorneys notified, and I will need some help from the State on that question also, on the admissibility of those statements.

One now, I've stated, has me really puzzled, the 27th when he offered to make the confession, and on August the 1st is when he did have attorneys, and he spent an hour in the office at the jail under—when he had been under rather trying circumstances and made certain statements that could be considered detrimental, although partly alibis. But when he stated that he was involved in the crime, obviously that was very damaging, so if you could help me on those points, I would appreciate it.

* * * *