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LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR' RAHMAN, formerly known as JAMES JONES,	)	
Appellee/ Cross- Appellant	)	
vs.	)	**Nos. 98-6568 98-6569**
RICKY BELL, Warden,	)	**CAPITAL HABEAS CORPUS**
Appellant/ Cross-Appellee	)	

APPELLEE ABU-ALI ABDUR'RAHMAN'S MOTION TO WITHHOLD THE MANDATE AND GRANT REHEARING *EN BANC* OR REMAND FOR FURTHER PROCEEDINGS

Earlier today, the Supreme Court of the United States denied the Petition for a Writ of Certiorari filed by Appellee Abu-Ali Abdur'Rahman ("Appellee") to review this Court's judgment in this case. Accordingly, Appellee respectfully moves this Court for an Order withholding its mandate and directing either that the case will be reheard *en banc* or that the case will be remanded to the district court for further proceedings. This Court's authority to issue such an Order in light of the highly unusual intervening circumstances present in this case is clear. *Compare First Gibraltar Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995) (granting

rehearing, vacating judgment, and reaching different result after denial of certiorari based on intervening circumstances), *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989) (same), and *Alphin v. Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977) (same) *with Nyyssonen v. Bendix Corp.*, 356 F.2d 193, 193 (1st Cir.), *cert. denied*, 385 U.S. 846 (1966) (denying leave to file motion for rehearing after denial of certiorari when motion "contains nothing of substance that could not have been asserted in a timely motion in response to our original opinion").

Specifically, this Motion rests on five distinct intervening developments that have occurred since this Court last considered this case: (i) intervening decisions of this Court that create a conflict with the decision in this case that can only be resolved *en banc*; (ii) the State's express argument to the Supreme Court, in opposition to Appellee's Petition for a Writ of Certiorari, that the patent inconsistencies between the panel opinion in this case and other Sixth Circuit precedent "should be resolved *by the Sixth Circuit* and not by a grant of certiorari" (emphasis added); (iii) an intervening decision of the U.S. Supreme Court with which the panel opinion in this case conflicts; (iv) the State's concession that the panel opinion in this case was simply wrong in a critical respect; and (v) an important intervening procedural Order of the Tennessee Supreme Court. Particularly given that this Court's previous Order denying rehearing *en banc*

strongly suggests that the Court was narrowly divided at that time, Appellee's counsel file this Motion based on a sincere, good faith belief that these five intervening developments, alone or in combination, will lead the full Court to reconsider the case.

The relevant events relating to the issuance of the mandate in this case are as follows. On September 13, 2000, a divided panel of this Court entered its opinion reinstating Appellee's death sentence. 226 F.3d 696 (reversing the district court's decision, which is published at 999 F. Supp. 1073). On January 9 and 11, 2001, the panel entered a stay of mandate pending the filing and disposition of a Petition for a Writ of Certiorari. Appellee subsequently filed his Petition. Today, the Supreme Court denied the Petition.[1]

The Clerk of the Supreme Court will provide a certified copy of the Supreme Court's Order to this Court. *See* S. Ct. R. 45.3. Absent a further Order of this Court, this Court's current stay of mandate (which is in place pending the filing and disposition of Appellee's Petition for a Writ of Certiorari) will then expire. *See* Fed. R. App. P. 41(d)(2). This Court, however, has the broad power to issue a distinct stay pending Appellee's further request for rehearing *en banc* and to grant rehearing subsequent to the denial of certiorari. *See* Fed. R. App. P. 41(d)(1);

[1] The Supreme Court also denied a motion by the State to strike the discussion by an *amicus curiae* of affidavits sworn to by a majority of the trial jurors stating that they likely would *not* have voted to impose the death penalty had the available mitigation evidence been presented to them.

supra at 1-2 (collecting cases). For the reasons described in the Argument section below, this case presents extraordinary circumstances that merit withholding the mandate and granting *en banc* consideration, or at least remanding to the district court for further consideration.

BACKGROUND

I. State Court and District Court Proceedings.

The factual and procedural history of this case is described in Appellee's Petition for a Writ of Certiorari (*see* Appendix 1, *infra*) and can be summarized here briefly.[2] In 1987, a Tennessee jury convicted Appellee of murder and sentenced him to death. He properly exhausted appeals in the state system, including state post-conviction appeals. The state post-conviction courts found that Appellee's trial counsel had been ineffective in at least thirteen different instances, but concluded that Appellee had not been prejudiced as a result.

The United States District Court for the Middle District of Tennessee subsequently vacated Appellee's death sentence and remanded the case to the state courts for resentencing. After hearing extensive testimony and reviewing

[2] All of the briefs and pleadings filed with the Supreme Court at the certiorari stage are reproduced as Appendices to this Motion. Appellee's counsel respectfully suggest that this Court's consideration of this Motion will be aided greatly by a review of the certiorari filings.

numerous exhibits, the district court found that Appellee's trial counsel had been grievously ineffective in failing to introduce five different classes of mitigating evidence, as well as evidence mitigating the principal aggravating circumstance underlying the death penalty. The district court found the available mitigation evidence to be "very impress[ive]," "vivid," "significant," "extremely credible," "compelling," and "overwhelming." The district court found the failure of Appellee's trial counsel to provide this evidence to the sentencing jury to be "grave," "serious," "very significant," "substantial," "breathtaking[]," and "grievous."

The district court noted two facts that buttressed its holding that Appellee had been prejudiced at sentencing by the ineffective assistance of his counsel. First, under Tennessee law, the death penalty cannot be imposed if even a single juror votes for a life sentence. The district court was fully persuaded "that at least one juror would have voted for a life sentence rather than the death penalty." Second, in a quotation on which a panel majority of this Court would later rely heavily (albeit for the remarkable purpose of *reinstating* Appellee's death sentence, *see infra*), the district court found that "[t]his is a case of no mitigating evidence–none–being offered to the jury despite its availability and abundance."

II. Sixth Circuit Proceedings.

On the State's appeal, a panel of this Court (divided two-to-one) reversed and reinstated Appellee's death sentence. The State had *a single* theory on appeal, which a majority of the panel (Judges Siler and Cole) *rejected*: that the district court was forbidden from expanding the factual record on Appellee's ineffective assistance of counsel claim.[3]

A different majority (Judges Siler and Batchelder, over a lengthy dissent by Judge Cole), however, proceeded *sua sponte* to summarily reject the district court's extensive factual findings that Appellee had been prejudiced by the failure of his counsel to introduce the voluminous available mitigating evidence. The entirety of the majority's analysis was set forth in essentially two sentences: "While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Appellee's motive for killing a fellow prison inmate and a history of violent character traits." 226 F.3d at 708-09.

In reaching this conclusion, the majority did not cite any precedent permitting it to reach the prejudice issue *sua sponte*. Indeed, the majority did not

[3] In its appeal, the State never challenged the district court's finding that trial counsel's performance was constitutionally deficient. Furthermore, in its appeal the State never challenged the district court's determination that the full district court record supported a finding of prejudice and the granting of habeas relief.

even acknowledge that its holding rested upon a fact-bound argument that (i) the State had waived by not raising on appeal, (ii) the State still did not embrace when Appellee repeatedly pointed out the waiver, and (iii) no member of the panel even raised at oral argument.

The panel majority also did not discuss the district court's conclusion that at least a single juror likely would have found the mitigating evidence compelling. Nor did the majority acknowledge this Court's extensive precedent attributing special significance in the prejudice inquiry to the failure to introduce any mitigating evidence.

Judges Siler and Batchelder separately rejected Appellee's protective cross-appeal. Appellee maintained that he had been unconstitutionally sentenced to death based on a "heinous, atrocious, or cruel" ("HAC") instruction that this Court had held unconstitutionally vague in *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999), and *Houston v. Dutton*, 50 F.3d 381 (6th Cir.), *cert. denied*, 516 U.S. 905 (1995). The majority found that error harmless, however, because it concluded that Appellee would have been sentenced to death even if that aggravator had not been utilized, given the total failure of Appellee's trial counsel to introduce any mitigating evidence: "[I]n the instant case, as the district court found, '[t]his is a case of no mitigating evidence–none–being offered

to the jury despite its availability and abundance.'" 226 F.3d at 711 (citing the district court's decision, 999 F. Supp. at 1101).

In finding the use of the HAC aggravator to be harmless, the majority totally refused to consider the mitigation evidence introduced in the federal district court, concluding (erroneously, *see infra*) that Appellee had waived any such request. The majority did not explain on what basis the Court could deem Appellee's argument to be waived while simultaneously *sua sponte* reinstating Appellee's death sentence on an argument waived by the State.

Appellee sought rehearing and rehearing *en banc* on the ground that the panel majority's decision conflicted with a consistent line of Sixth Circuit precedent holding that arguments not raised on appeal are deemed waived. The Court called for a response, but denied rehearing *en banc* in an Order suggesting that the vote was narrowly divided. *See* Order of Dec. 22, 2000 ("less than a majority of the judges . . . favored the suggestion"). The Court did, however, stay its mandate pending the filing and disposition of a Petition for a Writ of Certiorari.

III. Supreme Court Proceedings.

Appellee filed a Petition for a Writ of Certiorari, supported by three sets of *amicus* briefs. A group of law professors – including Laurence Tribe and James Liebman – argued that certiorari should be granted because the panel majority

violated due process and basic principles of procedural regularity by (i) reinstating Appellee's death sentence based on an argument consciously waived by the State, and (ii) failing to give Appellee even the opportunity to submit briefing or oral argument on that issue. (*See* Appendix 4, hereto). The Cornell Death Penalty Project argued that certiorari should be granted because empirical evidence established that jurors would have been persuaded by the available mitigating evidence that Appellee's trial counsel failed to introduce. (*See* Appendix 5, hereto). Hence, Appellee had been prejudiced by the ineffective assistance of his trial counsel. Finally, a consortium of national and state mental health, social worker, and children's groups argued that certiorari should be granted because the panel majority misconstrued the available mitigating evidence, including particularly medical testimony regarding Appellee's mental health. (*See* Appendix 6, hereto).

In the Argument Section, *infra*, Appellee will discuss the substance of his grounds for seeking certiorari as they relate to this Motion. But the State's approach in opposing certiorari is itself a critical intervening development that merits discussion from the outset. The State's position was that, whatever manifest errors the panel majority's decision presented, they did not give rise to a clear *inter-circuit* conflict meriting Supreme Court review. For example, the State maintained that in reaching the question of prejudice *sua sponte*, the panel majority

had at most created "an intra-circuit conflict [that] *should be resolved by the Sixth Circuit* and not a grant of certiorari." St. Br. in Opp. 7 (Appendix 3, hereto) (emphasis added). The State also maintained that this case presented no circuit conflict regarding the relevance of a single juror's ability to hold out for a life sentence because the panel majority totally failed to say anything about that issue *at all*. *Id.* at 17. In response to Appellee's argument that other circuits would have found prejudice because Appellee's trial counsel had failed to introduced *any* mitigating evidence, the State took the position that the panel majority was *wrong* and that such evidence had in fact been introduced. *Id.* The State maintained that position notwithstanding that the panel majority, in addressing the HAC aggravator, had specifically relied on trial counsel's failure to introduce any evidence to *support* reinstating the death penalty.

ARGUMENT

In its current posture, this case is the subject of five intervening developments that, alone or in combination, plainly merit *en banc* consideration by this Court. At the very least, a remand to the district court is appropriate. Particularly given the ultimate finality of the death sentence *sua sponte* reinstated by the panel majority in this case, the full Court's careful consideration is warranted.

I. Intervening Decisions Of This Court Establish A Clear Conflict Between The Panel Majority's Decision And Sixth Circuit Precedent Holding That The Complete Failure To Introduce Mitigating Evidence Strongly Supports A Finding Of Constitutionally Ineffective Assistance Of Counsel.

The district court in this case attributed considerable significance to the fact that Appellee's trial counsel completely failed to introduce any mitigating evidence at sentencing. "This is a case of no mitigating evidence–none–being offered to the jury despite its availability and abundance." 999 F.Supp. at 1101. In effect, Appellee's trial counsel provided no reason at all to spare his life.

The panel majority relied on this finding of the district court, but for precisely the opposite reason. The majority invoked it not to support Appellee's claim of ineffective assistance of counsel, but rather reasoned that, although Appellee had been sentenced pursuant to a "heinous, atrocious, or cruel" aggravator that is unconstitutional under Sixth Circuit precedent, that error was harmless. 226 F.3d at 711. Specifically, the majority reasoned that, because Appellee's trial counsel had introduced no mitigating evidence, the jurors would have sentenced Appellee to death based on the remaining aggravators even if the HAC aggravator had not been utilized. In other words, the panel majority found the constitutional error harmless precisely *because* Appellee's counsel had provided no reason to save his life.

The panel majority's decision flatly conflicts with intervening decisions of this Court, and this intra-circuit conflict can only be resolved by *en banc* review. Intervening Sixth Circuit precedent establishes beyond peradventure that counsel's failure to introduce any mitigating evidence calls the death penalty seriously into question, directly contrary to the panel majority's reasoning that it *supports* reinstating a death sentence. Thus, in *Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000), *cert. denied*, 2001 U.S.LEXIS 7348 (2001), a case that (like this one) involved trial counsel's failure to present psychiatric testimony in mitigation, the Court found prejudice. "[T]he jury that sentenced Skaggs to death did not have accurate information about the mental status of the person it was sentencing. If counsel had performed adequately, the jury would have had significant mitigating evidence to consider." Even more recently, this Court has emphasized its "many recent decisions vacating death sentences due to ineffective assistance," including particularly "based upon inadequate penalty phase preparation by trial counsel." *Greer v. Mitchell*, No. 98-4330, 2001 U.S. App. LEXIS 19599, at *22 n.2, **27-28 (6th Cir. Sept. 4, 2001). It is bitterly ironic that the *Greer* opinion cites as support for that line of precedent Judge Cole's *dissent* in this case. *Id.* at *22 n.2. *See also Cone v. Bell*, 243 F.3d 961, 977 (6th Cir. 2001) (failure to present evidence in mitigation is a clear "red flag").

Granting rehearing *en banc* on this question is supported by two further considerations. First, the State opposed certiorari in the Supreme Court on the ground that the panel majority was *wrong* when it agreed with the district court that Appellee's counsel introduced no mitigating evidence. *See* St. Br. in Opp. 17 (Appendix 3, hereto) ("[T]he record does not support petitioner's assertion that counsel wholly failed to introduce any mitigating evidence. Thus, contrary to petitioner's argument, this case does not squarely present the prejudice issue where the jury was provided with no reasons to spare petitioner's life."). It is fundamentally unfair to execute Appellee on two totally irreconcilable premises: (i) that the use of the unconstitutional HAC aggravator at Appellee's trial was harmless error because Appellee's counsel introduced no mitigating evidence; and (ii) that Appellee was not prejudiced by the concededly ineffective assistance of his counsel because that counsel did introduce mitigating evidence.[4]

Second, although not itself an intervening development, it remains the case that the panel majority's reasoning is fundamentally flawed because one of the two votes to reinstate the death penalty in this case is internally inconsistent and conflicts with Sixth Circuit precedent. Judge Batchelder joined Judge Siler in

[4] This was not the only instance in which the State sought to avoid certiorari on the perverse ground that the panel majority was wrong. Thus, the State argued that the HAC aggravator previously held unconstitutional by this Court is in fact constitutional under Supreme Court precedent. See St. Br. in Opp. 14 (Appendix 3, hereto).

holding that the use of the unconstitutional HAC aggravator was harmless. But in a separate concurrence, Judge Batchelder made clear that she agreed that Appellee had not been prejudiced by the ineffective assistance of his counsel because the jurors would inevitably have imposed the death penalty based on the remaining two aggravators, including particularly the *HAC aggravator*. "What the state court said in 1995 holds true today: 'It is unrealistic to expect the jury to change the result because of testimony about the petitioner's troubled background and mental illness in the fact of a prior murder conviction which is added to two additional aggravating circumstances *including the heinousness of the killing*.'" 226 F.3d at 719 (emphasis added). Because that aggravator was unconstitutional under Sixth Circuit precedent, Judge Batchelder's reliance on that aggravator to determine that Appellee was not prejudiced by the ineffective assistance of his counsel presents a clear intra-circuit conflict meriting *en banc* review.[5]

[5] It also bears emphasizing that the state courts, in making an assessment of the evidence upon which Judge Batchelder relied, did not have the benefit of the extensive mitigation proof introduced in the federal district court. Particularly relevant here, the district court found that competent counsel would have proved to the jury that Appellee's "prior murder conviction" of a fellow prisoner was the result of his uncontrollable reaction to being assaulted and raped by a gang led by the victim.

II. *En Banc* Consideration Is Warranted Because Intervening Developments Demonstrate That The Panel Majority's Decision Conflicts With Sixth Circuit Precedent Holding That Fact-Bound Questions Not Raised On Appeal Are Waived, And Furthermore That The Panel Majority's Decision Rests On A Fundamental Misconception Regarding Appellee's Contentions On Appeal.

The panel majority in this case reversed the district court on a ground not raised by the State in its appeal. The State did not contest the district court's finding of prejudice based on the record developed in the district court. Appellee repeatedly pointed out the waiver, which the State did not dispute. *E.g.*, Appellee's Br. on Appeal 14; Trans. of Oral Arg. 11, 45. In the Supreme Court, the State maintained that this issue presented only "an intra-circuit conflict [that] should be resolved by the Sixth Circuit and not by a grant of certiorari." State Br. in Opp. 7 (Appendix 3, hereto).[6] Alternatively, the State maintained that the panel's decision was consistent with Sixth Circuit precedent holding that the Court may raise an issue *sua sponte* in order to avoid a fundamental miscarriage of justice. *Id.*

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[6] This Court's precedent – which the panel majority failed to even acknowledge – is in accord with the rule applied by other circuits, which clearly would have declined to consider the prejudice issue – and therefore would have reached a result contrary to that of the panel majority in this case – because the State failed to raise the issue in its appeal. *See, e.g., Rivera v. Dep't of Corrections*, 915 F.2d 280, 283 (7th Cir. 1990) (per Posner, J.) ("[T]he issues in habeas corpus as in other civil cases are framed by the parties, so that if the state waives its best arguments it must live with the consequences."); *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (per Easterbrook, J.) ("All arguments for reversal must appear in the opening brief, so that the appellee may address them. . . . Procedural rules apply to the government as well as to defendants."); *Demarest v. Price*, 130 F.3d 922, 942 n.9 (10th Cir. 1997); *Boardman v. Estelle*, 957 F.2d 1523, 1537 (9th Cir.) (per curiam), *cert. denied*, 506 U.S. 904 (1992).

The State cannot now avoid *en banc* review having argued in the Supreme Court that any conflict between the decision below and Sixth Circuit precedent should be resolved by this Court alone. Furthermore, intervening precedent establishes that the State was wrong to contend that the panel majority's decision could be reconciled with circuit precedent on the theory that this Court will decide an issue *sua sponte* to avoid a miscarriage of justice. In *Vance v. Spencer County Public School District*, 231 F.3d 253, 258 n.3 (6th Cir. 2000), the Court explained that it will address only those arguments raised on appeal. In *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 984 (6th Cir. 2000) (emphasis added), the Court explained that the exception to that rule is when the Court faces "*a pure question of law* that cries out for resolution." The panel majority's decision in this case, by contrast, addressed an entirely *fact-bound* question – *viz.*, whether the district court record established prejudice – not a question of law. It therefore is not surprising that the panel majority cited no authority at all – whether from the Sixth Circuit or any other court – explaining on what authority it reached the question of prejudice *sua sponte*.[7]

[7] No doubt, the panel majority's failure to even acknowledge that it was deciding the prejudice question *sua sponte* undermined Appellee's claim that the decision below created a circuit conflict meriting Supreme Court review. As noted in the text *supra*, the State opposed certiorari on the ground that this Court had not announced any principle of law at all, and thus had not announced any principle that could be said to conflict directly with the precedent of another circuit.

Even if the Court were in the future to recognize a broad "miscarriage of justice exception," the State has never explained what injustice would result from having Appellee resentenced in light of the mitigation proof that constitutionally adequate counsel would have introduced at Appellee's trial. Nor has the State explained why, even if the Court were to reach the issue of prejudice *sua sponte*, it would not give Appellee the opportunity at least to brief the question or present oral argument before resentencing him to death. To the contrary, all that has resulted is an exceedingly dangerous precedent that ought to be overturned post-haste by the *en banc* Court. This prejudice issue in this case, as in many death penalty cases, was heavily fact-bound and nuanced; to hold that the Court will decide it without any input from the parties is deeply troubling and a marked departure from the Court's otherwise consistent precedent.

There has also been an important intervening development with regard to the panel majority's fundamentally unjust, *one-sided* application of the waiver principle. Inexplicably, the majority reinstated petitioner's death sentence on an issue waived by the State but refused to consider an argument for sustaining the district court's judgment on the ground that the argument had been waived by Appellee. Specifically, in holding that the use of an unconstitutional HAC aggravator was harmless, the majority refused to consider the mitigating evidence

compiled by the district court on the ground that Appellee had waived any such argument.

The intervening development is the State's total failure in the Supreme Court to contest that the panel majority's decision both (i) was utterly and completely wrong to hold that Appellee had waived reliance on the district court record with respect to the HAC aggravator, and (ii) was inexplicable in its one-side application of the waiver rule. In his Petition for a Writ of Certiorari, Appellee specified in the strongest possible terms:

> The majority's assertion that petitioner's counsel had not requested that the Sixth Circuit consider the federal court record with respect to the HAC aggravator, Pet. App. 24a n.6, is totally false, and we specifically defy respondent to defend it. Petitioner expressly argued that "[t]he error was not harmless" in light of "the ineffective assistance of counsel that pervaded the sentencing hearing in this trial," and in the same sentence referred the court to a six-page single-spaced discussion of the mitigation evidence developed in the federal court. Pet'r C.A. Reply Br. 9-15 nn.6-7, 21. We also invite respondent to explain on what conceivable basis the Sixth Circuit could have been justified in reinstating petitioner's death sentence by *sua sponte* reaching the prejudice argument waived by the state while simultaneously purporting to hold that petitioner also must be sentenced to death because, although an unconstitutional instruction was used at petitioner's trial, that error was harmless because his counsel had *waived* on appeal a particular evidentiary argument.

Pet. for Cert. at 20-21 n.12 (Appendix 1, hereto) (emphasis in original). Despite this perfectly explicit challenge, the State said nothing at all in response, unable to provide a single sentence in defense of the panel majority's ruling. The State's

effective acknowledgment that this Court's order reinstating Appellee's death sentence was erroneous is a significant intervening event that justifies reconsideration.

III. *En Banc* Consideration Is Warranted Because The Panel Majority's Decision Conflicts With An Intervening Supreme Court Decision.

The panel majority in this case reinstated Appellee's death sentence based on its view of how the jury would have regarded the "balance" of aggravating and mitigating circumstances had it been presented with the available mitigating evidence. 226 F.3d 696, 707. The majority's approach thus contrasted starkly with the district court's view that a death sentence properly should be vacated if it is clear that, notwithstanding the balance of aggravating and mitigating circumstances, the jurors would have deemed the defendant insufficiently morally culpable for the murder.

Subsequent to the panel's decision, the Supreme Court made clear that the district court's approach was the correct one. In *Penry v. Johnson*, 121 S. Ct. 1910, 1920-21 (2001) (*"Penry II"*), the Court held that the Constitution requires that a capital sentencing jury be given the opportunity to reach a "reasoned moral response to [the mitigating and aggravating] evidence in rendering its sentencing decision." In this respect, the Court reaffirmed its conclusion in an earlier decision in the same case that the sentencing determination must account for our societal

view "'that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). To the same effect is the Supreme Court's recent pronouncement – not acknowledged by the panel majority in this case – that a death sentence properly is vacated based on substantial mitigating evidence "even if it *does not* undermine or rebut the prosecution's death-eligibility case." *Williams v. Taylor*, 529 U.S. 362, 398 (2000).

It is perfectly clear that if the panel majority had followed the standard for determining prejudice articulated in the Supreme Court's intervening decision in *Penry II*, it would have affirmed the district court's finding of prejudice. Of particular note, neither the State nor the panel majority expressed any doubt that the exceedingly graphic and compelling mitigating evidence found by the district court (but never even mentioned by the panel majority) demonstrated that Appellee was not sufficiently morally culpable to be put to death for his crime insofar as he had suffered vicious abuse, had a grossly dysfunctional upbringing, suffered from

serious mental illness, and had made substantial contributions to society.[8] For example, the district court found:

> Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit.

999 F. Supp. at 1098. The district court also found that Appellee "had a family history of serious mental conditions" – his sister attempted suicide on several occasions, while his brother committed suicide several days after his arrest for sexually and physically abusing his children – and that Appellee himself had been diagnosed as having a "paranoid" and "passive aggressive" personality and as being "very sick and in need of immediate commitment," "in serious need of therapy," and "highly disturbed." *Id.* at 1098 & n.33. Moreover, the district court found that, "despite his mental health problems," Appellee had "held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence." *Id.* at 1099. Finally, the district court found that the principal aggravating circumstance invoked by the prosecution to justify Appellee's death

[8] The district court's findings regarding this testimony are summarized in the Petition for Certiorari at 12-14 (Appendix 1, *infra*).

sentence – a prior homicide while in prison – was in reality Appellee's defensive reaction to being raped by a gang led by the victim. *Id.* at 1100.

IV. *En Banc* Consideration Is Warranted Because Intervening Developments Demonstrate That Appellee Was Seriously Prejudiced By The Panel Majority's Failure To Address The Significance Of A Single Juror's Ability To Hold Out For A Life Sentence.

En banc reconsideration also is appropriate in light of an intervening development regarding the panel majority's determination to reinstate Appellee's death sentence without addressing the relevance of the fact that, under Tennessee law, a single juror who was persuaded by mitigating evidence could require the imposition of a life sentence. The district court relied on that fact in finding that Appellee was prejudiced by the ineffective assistance of his counsel. Appellee's Petition for a Writ of Certiorari demonstrated that four circuits – the Third, Fifth, Seventh, and Eighth – have embraced the district court's approach, employing a more relaxed prejudice standard in cases arising from states with the same single-juror rule as Tennessee. *See* Pet. for Cert. at 25 & n.13 (Appendix 1, hereto). Appellee argued that certiorari should be granted because the panel majority, by rejecting the district court's finding of prejudice, brought the Sixth Circuit into conflict with those other courts of appeals.

The State opposed certiorari on this issue on only a single ground: "The court of appeals did not specifically address the potential effect of the omitted

evidence upon a single juror, and nothing in the opinion below suggests that the court either adopted or rejected petitioner's argument . . . ." State Br. in Opp. 17 (Appendix 3, hereto). In this respect, the State sought to avoid Supreme Court review on the ground that this Court's opinion effectively ignored an important issue of law that was critical to the case, and thereby could not be said to create a circuit conflict. (No doubt, the panel majority's failure to address the point arose from the fact that it reinstated Appellee's death sentence *sua sponte* without giving Appellee's counsel any opportunity to brief or argue the relevant legal principles.) Our justice system cannot, or at least should not, embrace judicial decision making of this sort when the death penalty is at stake. At the very least, *en banc* consideration should be granted so that this Court can determine if it should in fact reject the considered view of four other circuits and, if so, provide Appellee a fair and reasonable opportunity to seek review in the Supreme Court.

V. *En Banc* Consideration Is Warranted Because, On The Majority's Rationale, Appellee Is Entitled To The Benefit Of An Intervening Tennessee Supreme Court Order.

Finally, rehearing also should be granted in light of an intervening Order of the Tennessee Supreme Court providing that issues not presented in a discretionary application to that Court following an adverse decision of the Tennessee Court of Criminal Appeals shall be deemed exhausted. *See* Tenn. S. Ct. R. 39.[5]

[5] Tenn. S. Ct. R. 39 provides:

Alternatively, this Court should modify its judgment to permit the district court to consider the effect of this Order.

The recent promulgation of Tenn. S. Ct. R. 39 is highly relevant to this case. The district court held that Appellee had failed to exhaust and had therefore procedurally defaulted a number of claims by failing to present them to the Tennessee Supreme Court in an application for discretionary review. The district court thus refused to consider a number of Appellee's claims of prosecutorial misconduct which, in fact, were properly exhausted according to Rule 39.[10] Appellee did not challenge that determination in this Court, principally because he

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"In all appeals from criminal convictions or post-conviction relief from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

[10] These claims of prosecutorial misconduct include: whether the prosecution should have disclosed the statements of certain witnesses, the redacted portions of certain police reports, a memorandum in the prosecution's file concerning a bank account in the victim's name, the statement of the victim's brother together with lab reports about the victim, and information about Petitioner's bank account; whether the prosecution unconstitutionally influenced the co-defendant's testimony which was given as part of a plea bargain; whether the prosecution provided false information to the state mental health evaluators; whether the prosecution improperly manipulated the testimony of a key witness (in addition to the co-defendant); and whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's prior murder conviction. *See* 999 F. Supp. at 1082, n.8.

had prevailed in the district court, and also because substantial page limits constrained the number of points he could raise.

In light of the Tennessee Supreme Court's intervening enactment of Rule 39, it is clear that the district court's legal conclusion was erroneous. Because the comity interests underlying the district court's finding of procedural default are therefore not in fact present, it would be appropriate for this Court to resolve the claims that the district court refused to resolve.[11] At the least, the Court should remand to the district court to permit it to consider those claims in the first instance.[12]

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court issue an Order providing that this Court's mandate shall be withheld and the case shall be reheard *en banc* or the case will be remanded to the district court for further consideration.

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[11] Appellee has not defaulted those claims in this Court. Appellee's argument only became apparent when the Tennessee Supreme Court issued its Order. In addition, for the reasons stated in the text, it was reasonable for Appellee (having prevailed in the district court) not to continue to pursue those claims in this Court. Finally, there can be no reasonable dispute that, if this Court is going to consider issues not raised in the appellate briefing, it must do so evenhandedly. Hence, the Court would be justified in raising the Tennessee Supreme Court's ruling *sua sponte*.

[12] Appellee is preparing to file with the district court a protective motion under Fed. R. Civ. P. 60(b) that is based on the Tennessee Supreme Court's rule.

Respectfully submitted,

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