IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR'RAHMAN,	)	
	)	
Petitioner-Appellee/	)	
Cross-Appellant,	)	
	)	
v.	)	**Nos. 98-6568/98-6569**
	)	
RICKY BELL, Warden,	)	
	)	
Respondent-Appellant/	)	
Cross-Appellee.	)	

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

Abdur'Rahman has filed with this Court a paper styled "Motion to Withhold the Mandate and Grant Rehearing En Banc or Remand for Further Proceedings." He seeks to have this Court or the district court again take up the case disposed of in this Court's opinion in *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *reh'g and sugg. for reh'g en banc denied* (Dec. 22, 2000); *cert denied, Abdur'Rahman v. Bell*, ___ U.S. ___, 2001 WL 575672 (U.S. Oct. 9, 2001) (No. 00-1742). He filed the

instant motion on October 10, 2001, following issuance of the Supreme Court's order of October 9 denying certiorari, which was received by this Court on October 16.

Federal Rule of Appellate Procedure 41(d)(2)(D) provides that a mandate stayed by a court of appeals pending disposition of a petition for certiorari shall issue "immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." The issuance of a mandate upon receipt of the Supreme Court's order is a ministerial act this Court is compelled to perform pursuant to Rule 41(d)(2)(D). To stay the mandate following denial of certiorari is therefore an extraordinary act equivalent to a decision by the court of appeals to recall the mandate. *See Adamson v. Lewis*, 955 F.2d 614, 619-20 (9th Cir. 1992) (en banc) (continuing to stay the mandate following denial of certiorari because the law governing the case changed in a manner that furnished grounds for recall); *Bryant v. Ford Motor Co.* , 886 F.2d 1526, 1529 (9th Cir. 1989) (same). Because this Court has already exhausted its initial consideration of Abdur'Rahman's conviction and sentence by issuing an opinion and by denying his petition for rehearing and rehearing en banc, and because the Supreme Court's order denying his petition for certiorari has been filed with this Court, this Court may grant the motion to continue a stay or the mandate only for extraordinary circumstances. *See Adamson*, *supra*; *Bryant*, *supra*; *Alphin v. Henson*, 552 F.2d 1033 (4th Cir. 1977) (en banc). For the

reasons that follow, Abdur'Rahman has not demonstrated any extraordinary circumstances warranting that remedy.

ARGUMENT

1. *Intervening decisions of this Court do not establish a conflict with the panel's decision on the issue of ineffective assistance of counsel for failure to introduce mitigating circumstances.*

The panel concluded that, despite trial counsel's deficient performance, Abdur'Rahman did not suffer prejudice at his sentencing hearing because the mitigating evidence that could have been introduced also contained harmful information. Abdur'Rahman points to two cases, *Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000), and *Greer v. Mitchell*, ___ F.3d ___, 2001 WL 1001080 (6th Cir. Dec. 18, 2000), in which this Court found ineffective assistance of counsel for failing to present mitigating evidence, and he contends that those decisions conflict with the panel decision. A close examination of the decisions fails to show any such conflict. Of course, *Skaggs* and *Greer* do establish that failure to investigate and present possible mitigation evidence at sentencing *can* constitute ineffective assistance of counsel. But neither can be fairly read for the proposition that, as a matter of law, prejudice from counsel's deficient performance is shown whenever counsel fails to

investigate and offer evidence of mitigating circumstances despite the fact that the evidence contains information likely to harm the defense. Indeed, such a per se rule would conflict with Supreme Court precedent. *See Williams v. Taylor*, 529 U.S. 362, 391 (2000) (application of *Strickland* test "'of necessity requires a case-by-case examination of the evidence'") (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring)). On the facts of this case, the panel simply concluded that the petitioner did not suffer prejudice. The conclusions in *Skaggs* and *Greer* likewise rest on the application of the *Strickland* standard to the facts of those cases. Having failed to demonstrate a conflict, Abdur'Rahman has failed to demonstrate a need for extraordinary relief.[1]

[1]Abdur'Rahman's further assertion that the State opposed certiorari in part on the ground that some mitigating evidence *was* introduced by trial counsel fails to furnish a basis for relief. The State's view of the record espoused in a brief in opposition to certiorari is hardly an extraordinary circumstance warranting extraordinary relief.

And Abdur'Rahman's contention that the panel majority's reasoning is internally inconsistent could have been presented in the original petition to rehear, but was not. The argument was presented to the Supreme Court in the petition for writ of certiorari, Petition for Cert. at 20-22, but obviously was rejected.

2. *The argument that the panel improperly decided the case on an unreviewable issue is merely reargument of the original petiton to rehear.*

Abdur'Rahman continues to assert that the panel majority reversed the district court on a ground not raised by the State in its appeal. However, this issue was presented in the original petition to rehear and rejected. Therefore, this argument fails to establish extraordinary circumstances warranting extraordinary relief.

Abdur'Rahman's reliance on *Vance v. Spencer County Public School District*, 231 F.2d 253 (6th Cir. 2000), and *Rybarczyk v. TRW, Inc.*, 235 F.3d 975 (6th Cir. 2000), is misplaced. Neither case can be fairly read to overrule the principle established in *Dorris v. Absher*, 179 F.3d 420, 425 (6th Cir. 1999), and *Mayhew v. Allsup*, 166 F.3d 821, 823-24 (6th Cir. 1999), that the waiver rule is not jurisdictional and may be disregarded in exceptional cases or to avoid a miscarriage of justice. And, contrary to Abdur'Rahman's assertion, the principle is not restricted to pure questions of law; that is only one factor. *See e.g.*, *Dorris*, 179 F.3d at 425 (discussing three reasons for treating the case as exceptional, one being factual (the damages awarded against appellee "appear to be disproportionate to her conduct")).

3. *An intervening Supreme Court decision does not conflict with the panel decision.*

Abdur'Rahman contends that *Penry v. Johnson*, 121 S.Ct. 1910 (2001), conflicts with the panel's decision, which concluded that he did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. But the language he relies on from *Penry* is taken completely out of the context in which it was given. In *Penry*, the Court concluded that the sentencing jury was deprived of a vehicle for expressing its "reasoned moral response" to the evidence by a confusing jury instruction on mitigating evidence. *Id*. at 1920-21. This case involves no such instruction.

Furthermore, Abdur'Rahman raised the possible applicability of the pending *Penry* decision in his petition for a writ of certiorari. Petition for Cert. at 11, n.7. (Despite the filing of the Court's opinion in *Penry* on June 4, 2001, Abdur'Rahman did not press the point in his reply brief filed July 5, 2001.) In any event, the Supreme Court, obviously aware of its own decision in *Penry*, denied certiorari. *Penry* furnishes no basis for extraordinary relief.

4. ***The argument that the panel decision failed to account for the ability of a single juror to impose a life sentence could have been presented in the original petition to rehear.***

Abdur'Rahman contends that, in reaching its determination on the prejudice prong of the ineffective assistance of counsel issue, the panel decision failed to account for the ability of a single juror to impose a life sentence on the basis of the omitted mitigating evidence. But this argument could have been presented in the original petition to rehear but was not. Thus, the panel was never given the opportunity to address this issue, despite the fact that all but one of the decisions relied on by the petitioner to support his argument were extant at the time of the filing of his petition for rehearing and suggestion for rehearing en banc. *See* Petition for Cert. at 25 & n.13. Therefore, his contention hardly furnishes extraordinary circumstances warranting relief at this stage of the proceedings.

5. ***Tennessee Supreme Court Rule 39 furnishes no basis for extraordinary relief.***

Abdur'Rahman asserts that Tenn. S.Ct. Rule 39, adopted June 28, 2001, providing that issues need only be presented to the intermediate Court of Criminal Appeals in order to be "exhausted" for federal habeas corpus purposes, constitutes a basis for further staying the mandate and rehearing this case. In the first place, Rule

39 is plainly inapplicable to Abdur'Rahman's case. Although the rule purports to apply to all appeals from and after July 1, 1967, the operative language of the rule demonstrates that it is prospective, and not retroactive, in scope: "a litigant *shall not be required"* to petition to rehear or apply for permission to appeal; "the litigant *shall be deemed* to have exhausted all available state remedies available for the claim." (emphasis added) Nor would the primary purposes of Rule 39—to relieve the burden imposed upon the state supreme court by numerous discretionary petitions and to eliminate unnecessary delay—be served by retroactive application; only applying it to discretionary petitions yet to be passed on can accomplish those objectives. Furthermore, the exhaustion issue focuses on whether there was an "available" state remedy, *see* 28 U.S.C. § 2254(b)(1)(A)—an objective historical fact that retroactivity cannot alter. *Cf. Wenger v. Frank*, ___F.3d ___, 2001 WL 1042454, at *6-7 (3d Cir. Aug. 27, 2001) (refusing to apply similar Pennsylvania Supreme Court rule retroactively to cases in which the time to petition for review by the state supreme court expired prior to the date of the order). Finally, even if the rule could be said to be retroactively applicable, Abdur'Rahman did not appeal any of the district court's procedural default rulings, and he acknowledges that this was a deliberate choice. Motion at 23-24. For these reasons, he has failed to demonstrate extraordinary circumstances warranting extraordinary relief.

CONCLUSION

For the reasons stated, the motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded via First-Class U.S. mail, postage prepaid on this the _____ day of October, 2001 to:

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