No.

In the Supreme Court of the United States

EDWARD NATHANIEL BELL,

PETITIONER,

v.

LORETTA K. KELLY, Warden, Sussex I State Prison,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Capital Case – Execution Scheduled for April 8, 2008

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Petitioner asserted ineffective assistance of counsel at sentencing, and the district court found that he had diligently attempted to develop and present the factual basis of this claim in state court, on habeas, but that the state court's fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth Circuit affirmed. The questions presented are:

1. Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?

2. Did the Fourth Circuit err when, in conflict with decisions of several courts of appeals and state supreme courts, it categorically discounted the weight of mitigating evidence for *Strickland* prejudice purposes whenever the evidence could also have aggravating aspects?

3. Does Virginia's use and/or manner of administration of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, as a method of execution by lethal injection, violate the Cruel and Unusual Punishment Clause?

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OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Fourth Circuit is reprinted at Pet. App. 1a.[1] Its order denying rehearing and rehearing en banc is reprinted at Pet. App. 178a. The published decision of the United States District Court for the Western District of Virginia is reported at *Bell v. True*, 413 F. Supp. 2d 657 (W.D. Va. 2006), and reprinted at Pet. App. 18a. The district court's oral ruling is unreported and reprinted at Pet. App. 168a. The order of the Fourth Circuit denying expansion of the Certificate of Appealability is reprinted at Pet. App. 177a.

JURISDICTION

The Fourth Circuit entered judgment on January 4, 2008. A timely petition for rehearing and rehearing en banc was denied on January 29, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix, Pet. App. 179a-80a, reproduces the text of the Sixth Amendment, U.S. Const. amend. VI; the Eighth Amendment, U.S. Const. amend. VIII; and the provisions of 28 U.S.C. § 2254 at issue in this case.

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[1] The Appendix filed with this Petition is cited as "Pet. App." The joint appendix filed with the Fourth Circuit is cited as "JA." The joint appendix filed with the Supreme Court of Virginia is cited as "State JA."

STATEMENT OF THE CASE

Petitioner Edward Bell was convicted and sentenced to death for the 1999 murder of Sergeant Ricky Lee Timbrook, a police officer. Pet. App. 181a-82a, 18a, 2a. The facts of the underlying crime were recounted by the Supreme Court of Virginia and reiterated by the district court and the Fourth Circuit, and can be found at Pet. App. 182a-88a, 19a-25a, and 2a-8a respectively. As the case comes to this Court, it primarily concerns the failure of Bell's appointed counsel to investigate evidence in mitigation. The district court found that Bell's counsel rendered performance that was below the constitutional minimum, under *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 171a. The Fourth Circuit did not disagree. Yet the courts below found no prejudice and denied relief—even though trial counsel had presented *no* evidence in mitigation whatsoever.

Pre-Trial Proceedings

Bell's early defense team consisted of Lloyd Snook and Jud Fischel. Pet. App. 78a-79a. Fischel "blindly thought" that Snook, an experienced capital litigator, was preparing a mitigation case. Pet. App. 79a. Shortly before the first scheduled trial date, it became clear that Snook had done no investigation and developed "no mitigation evidence." *Id.* Snook withdrew, *id.*; *see also* JA 1811-12, and the court appointed Fischel's personal friend Mark Williams—who was "not on the list for capital defense attorneys and had never before handled a capital case." Pet. App. 79a; JA 1817-18. After interviewing Bell, his sisters, and his mother, Williams "concluded there was little evidence that would assist in mitigating

the case against Mr. Bell." Pet. App. 79a. Williams did not interview Bell's wife, girlfriends, or children, did not seek information about Bell's education, mental capacity, or employment, and did not investigate the prosecution's evidence in aggravation. Pet. App. 171a-73a.

The trial court authorized Bell's counsel to hire a fact investigator, a psychological expert under Virginia Code Ann. § 19.2-264.3:1 (commonly called a "3:1 expert"), and *two* mitigation specialists. JA 40-43, 1328; State JA 133. Williams, however, never deployed the fact investigator. JA 1234, 1969-70. Snook had retained a mitigation specialist, Marie Deans, but neither he nor Williams ever provided her the necessary paperwork or followed up with her. JA 41, 1170, 1419-20. Deans, a veteran of over 200 capital cases, would later testify that this case was "the most disorganized" one she had ever worked on. Pet. App. 80a; JA 1170, 1415. In her words, "it reached a level of absurdity, really." JA 1415.

Counsel did secure the appointment of a psychologist, Dr. William Stejskal. JA 1140, 1328. Williams "relied upon . . . Dr. Stejskal" to conduct the mitigation investigation, Pet. App. 173a, and neither directed Stejskal's work nor continued his own independent investigation. JA 1943, 1956-57.

Sentencing

Bell was convicted of capital murder on January 25, 2001. Pet. App. 27a. The next day, Bell's trial moved into the sentencing stage for which his counsel had failed to prepare. *Id.*

By law, Bell's jury could not return a death sentence unless it found, beyond a reasonable doubt,

at least one of two statutory aggravators: that the crime was "wantonly vile" or that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." *See* Va. Code Ann. § 19.2-264.2. The trial court ruled that the crime was not vile as a matter of law, leaving future dangerousness as the sole possible aggravator. *See* JA 142-44. Even if the jury found future dangerousness proven beyond a reasonable doubt, it was nevertheless free to return a life sentence in consideration of any mitigating evidence "which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment." JA 68.

To demonstrate future dangerousness, the Commonwealth introduced evidence of alleged prior bad acts. Pet. App. 188a. For example, a police officer from Jamaica testified about Bell's arrest for "assault" when he was a youth. *Id.* Because Bell's counsel failed to prepare, however, the jury did not hear that the victim of the "assault" characterized the incident as a childish scuffle. JA 1454-56.

A police officer testified to stopping Bell and finding a handgun concealed in the trunk of the car he was driving. Pet. App. 188a. Another testified that Bell gave him a false name when stopped, and then ran away. *Id.* And a third testified that he found ammunition on Bell during a "stop and frisk." *Id.* A maintenance worker at the jail where Bell was confined testified that Bell had threatened to kill him for refusing to corroborate a report Bell filed. JA 170-71. And a corrections officer testified that Bell had told him to "see what happens" if Bell's handcuffs were removed. JA 173-75. The prosecutor

summarized this testimony as demonstrating that Bell's "actions towards uniformed official personnel . . . are violent." JA 266.

Because Bell's counsel did not uncover them, his jury did not hear the witnesses who could have contradicted that summary. Carmeta Albarus, Bell's post-conviction mitigation specialist, testified that she interviewed Bell's family and friends in Jamaica—who agreed Bell was not violent and who considered murder "totally out of character" for Bell. JA 1482; *see also* JA 1456. A former coworker of Bell's, Precious Henderson, testified before the district court that she never saw Bell "violent or fighting with anyone." JA 1543-44. Barbara Bell Williams, Bell's ex-wife, also noted that Bell had many friends who were police officers, including an "excellent" relationship with officers Steveroy Campbell and Angellita Hamilton, and performed community volunteer work through "police youth clubs." JA 1549-50; *see also* JA 1072, 1075.

Other prosecution witnesses alleged altercations with Bell. Billy Jo Swartz claimed that Bell slammed her head into his car and held a gun to her head. JA 202. Swartz testified that, during the same incident, Bell got into a physical fight with his then-pregnant girlfriend Tracy Nicholson. JA 204. Bell's counsel never learned that Nicholson's mother, Joanne, was present during the incident, JA 1519-20, 1533, and as the district court found, "would . . . have been available to rebut the testimony" of Swartz. Pet. App. 172a. In particular, Joanne would have testified the incident involved "no physical contact . . . just words exchanged," and that Bell did not strike either Swartz or Tracy. JA 1519-20. She

also could have described how Bell had a "good relationship" with Tracy, and was a "very caring father" to Tracy's children. JA 1518.

The prosecution also called Dawn Jones, another former girlfriend, who told the jury that Bell once came to her trailer with a gun, but did not "do anything with" it. JA 226. As the district court found, Jones was not effectively cross-examined "because [trial counsel] had not interviewed her." Pet. App. 171a. Bell's trial counsel also failed to elicit the positive testimony that Jones later gave before the district court on habeas, in which she described how Bell tended to her when she was sick and unable to work. JA 1491. Jones also could have testified that when their daughter Kydesha was born prematurely, Bell sat for days by her incubator praying for her survival. JA 1110, 1259, 1492-93.

Moreover, Bell's trial counsel did not discover, or inform the jury, that Bell was given drugs and alcohol as a toddler, "a form of child abuse" that likely caused him physical brain damage. JA 1131, 1188-89, 1445, 1563. Nor did they learn that Bell suffered physical abuse as a child. He was often "awaken[ed] in the middle of the night by blows to the head for some offense that occurred earlier in the day"—and he was regularly beaten "with electrical cords, belts, wood planks, and brooms" until his body bore lasting scars. JA 1195; *see also* JA 1341, 1445-46. In the opinion of multiple psychologists, Bell may be mildly retarded. JA 308, 342-44, 1227-31, 1349-50, 1746-47.

Finally, Sergeant Timbrook's family gave victim impact statements, including his widow's description of her son's life without his father. JA 229-47.

Because Bell's counsel failed to investigate, however, his jury did not learn that his family and children would be similarly devastated by his execution. While the district court was introduced to Bell's youngest children, Diontre, Xavian, and Eddie Junior, JA 1515, Bell's jury was not. The district court understood the introduction of Bell's children to be "very relevant." JA 1516. The district court learned that Bell "was more of a father to [Tracy's daughter Alyse] than her own father," even though he shared no blood kinship with her. JA 1518. Bell's jury did not. The district court learned that Bell's daughter Kydesha would be "devastated" if he were executed, while his daughter Kamille would "end up in a psychiatric ward." JA 1503, 1553-54. Bell's jury did not. When asked about the possibility of Bell's execution, Joanne Nicholson told the district court, "I don't know if I could handle it, but—(witness crying)—excuse me. I don't know. It's going to be hard because we just love him so much." JA 1524. The district court found that Ms. Nicholson "would have been a helpful mitigation witness." Pet. App. 172a.

The district also found that Barbara Bell Williams "would have testified that Bell was a loving, decent, and hard working person . . . and was otherwise a good father." Pet. App. 171a-72a. Williams was prepared to corroborate her testimony with letters Bell wrote and proof of money he paid to support his daughter Kamille. JA 1555-56. Other witnesses trial counsel missed would have testified that Bell worked hard, at menial jobs, in an attempt to support his family. Nicholson "worked with Eddy" at a manufacturing plant, and would have testified that "Eddy worked hard and he was well liked

there." JA 1262. Henderson also would have testified about Bell's work ethic. *See* JA 1540-41; Pet. App. 172a.

As the case comes to this Court, however, it is undisputed that Bell's trial counsel presented no mitigation evidence.[2] The only witnesses called by defense counsel at sentencing were Bell's sister and father, Pet. App. 189a, but, having not prepared, Bell's counsel elicited only harmful testimony from them. Bell's sister "testified not about the impact of Mr. Bell's execution, but . . . that her children were being beaten up, being harassed just for being related to Eddie." JA 1917; *see also* JA 251. Bell's father, Oswald, told the jury that if Bell was "guilty of the act" they should "punish him." JA 254. Oswald asked the court for an opportunity to plead for his son's life, but when asked to proffer what Oswald would say, trial counsel could not—having not interviewed him. *Id.* And when the court ruled that Oswald could only testify in response to a question, trial counsel could not think of anything to ask him. JA 254-55.

The prosecutor relied on the lack of mitigation evidence as an affirmative reason to sentence Bell to

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[2] *See* JA 2018 (district court finding that counsel "present[ed] no mitigating evidence, zero mitigating evidence. The prosecutor said it, you agree, I agree. The defense counsel presented zero"); *see also* JA 2005-06, 2008-09 (counsel for respondent agreeing); JA 264, 266, 276, 277 (trial prosecutor); JA 1180 (Dr. Mark Cunningham). Respondent's protest before the Fourth Circuit, that she agreed only that "there was no mitigating evidence in this case," is a distinction without a difference. *See* Brief of Respondent-Appellee at 25 n.1, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 13, 2007).

death—indeed, it became the centerpiece of his final argument to the jury. He contended multiple times that "there is no mitigation evidence in this case." JA 266; *see also* JA 264 ("This is not an individual . . . who has produced one shred of evidence of mitigation."), JA 276-77 ("The relationship that Edward Bell has to authority and law enforcement has absolutely not one shred of mitigation to it."). With no mitigating evidence to argue in closing, trial counsel instead maligned his client, conceding that "[t]he testimony that was offered was very graphic about a violent man. We didn't rebut it. Not try to defend it, refute it. We didn't." JA 269. Bell's counsel concluded by stating that both he and the prosecutor had "done [their] job[s]. Now, it is time for you to do yours." JA 274.

Bell's jury nevertheless struggled with the sentencing decision. The jury asked the court whether, if Bell were sentenced to life without parole, there would be "any other way to be released from prison." JA 290. The trial judge declined to answer. JA 290. One of Bell's jurors since has stated under oath that the jury was "looking for something mitigating, some reason not to sentence him to death, but . . . were given nothing by his lawyers." JA 1247. Ultimately, Bell's jury returned a death sentence. Pet. App. 27a.

Direct Appeal And State Habeas

On direct appeal, Bell argued, *inter alia*, that Virginia's lethal injection procedures were unconstitutional. The Supreme Court of Virginia held that ruling on this claim "would be an unnecessary adjudication of a constitutional issue" because Virginia permits capital defendants to

choose between lethal injection and electrocution. Pet. App. 221a.

On state habeas, Bell argued that he was denied the effective assistance of counsel because "counsel failed to investigate, identify or present available mitigating evidence for the penalty phase." Pet. App. 237a. The Supreme Court of Virginia denied Bell's requests for expert assistance, discovery, and an evidentiary hearing, and held that Bell satisfied neither prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 237a-39a, 261a. The court held that "counsel is not ineffective for failing to present evidence that could be 'cross-purpose evidence.'" Pet. App. 239a.

District Court Proceedings

Bell timely filed his petition for a writ of habeas corpus, raising multiple issues, including ineffective assistance of counsel at sentencing and a challenge to the constitutionality of Virginia's lethal injection procedures. Pet. App. 30a n.7, 31a-32a. On motion, the district court dismissed all of Bell's claims except for ineffective assistance of counsel. Pet. App. 167a. The district court rejected Bell's lethal injection claim, reasoning both that lethal injection is constitutional and that "[f]or Bell's lethal injection claim to be relevant, he would first have to choose it over electrocution, the constitutionality of which has been established by existing precedent. If he does so choose lethal injection, however, he waives his right to object to it." Pet. App. 165a (citation omitted).

With respect to Bell's ineffective assistance of counsel claim, the district court found that "Bell diligently developed the factual basis of" this "claim in state court," hence "an evidentiary hearing is not

barred by § 2254(e)(2)." Pet. App. 84a. Finding further that the "fact finding procedure employed by the state court was not adequate to afford a full and fair hearing," the district court ordered and conducted a two-day evidentiary hearing. Pet. App. 84a, 167a.

After hearing Bell's trial counsel testify live, and judging their credibility, the district court found their performance deficient within the meaning of *Strickland*. Pet. App. 171a. The district court found "as a matter of fact that it was unreasonable for Bell's counsel to depend upon Dr. Stejskal to do an investigation of the nature required." Pet. App. 174a. The court noted that, as evidenced by his report, Dr. Stejskal never indicated that he would undertake a full investigation of mitigating evidence. *Id.* Stejskal had informed trial counsel that it was *not* his role to conduct the mitigation investigation, JA 1379-80, and that neither he nor his staff were uncovering or developing mitigation evidence. Stejskal explained that "[t]he 3:1 expert is tasked with doing an evaluation of what would be a subset of [the] broader universe of mitigation evidence." JA 1329. Trial counsel could not have misunderstood Stejskal—having themselves previously advised courts that using a 3:1 expert as a mitigation investigator would be "ineffective assistance of counsel." JA 1854, 1872-76. And the district court rejected the suggestion that trial counsel made a strategic decision to omit investigation or presentation of mitigation evidence. The court concluded that because "much of the so-called double-edged sword evidence had already been presented in the state's . . . case," any fear

concerning the negative ramifications of the cross-purpose evidence was "unfounded." Pet. App. 174a.

The district court nonetheless held that "prejudice has not been shown" and denied relief, but *sua sponte* granted a Certificate of Appealability ("COA") on Bell's ineffective assistance of counsel claim. Pet. App. 175a. Bell moved for an expansion of the COA to cover the constitutionality of Virginia's lethal injection procedures. *See* Bell's Motion for Expansion of the Certificate of Appealability, *Bell v. Kelly*, No. 7:04CV00752 (W.D. Va. 2006). The district court denied Bell's motion.

Appellate Proceedings

Bell moved the Fourth Circuit for a similar expansion of his COA. *See* Motion to Expand Certificate of Appealability, *Bell v. Kelly*, No. 06-22 (4th Cir. 2007). But the Fourth Circuit also denied Bell's motion, Pet. App. 177a, and the case proceeded forward only on Bell's ineffective assistance of counsel claim.

After argument, the Fourth Circuit affirmed in a brief, unpublished opinion. Pet. App. 1a-17a. The Fourth Circuit did not disturb the district court's finding of deficient performance, and focused solely on *Strickland's* prejudice prong. Pet. App. 13a-14a. Bell argued that the prejudice issue should be reviewed *de novo*, and not under the deferential standard of 28 U.S.C. § 2254(d), because the state court's inadequate fact-finding procedures prevented it from receiving or ruling upon the mitigating evidence bearing on prejudice that was introduced for the first time on federal habeas. *See* Brief of Petitioner-Appellant at 37-38, *Bell v. Kelly*, No. 06-22 (4th Cir. filed July 13, 2007) ("Pet. Br."); Reply

Brief of Petitioner-Appellant at 23 n.9, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Aug. 30, 2007) ("Pet. Reply"). The Fourth Circuit, however, applied § 2254(d) and reviewed only for whether the Supreme Court of Virginia's "determination was unreasonable—a substantially higher threshold" than mere error. Pet. App. 13a.

The Fourth Circuit found that the state court's determination was reasonable because the relevant evidence was "cross-purpose." Pet. App. 14a.[3] Specifically, the court held that, had counsel attempted to elicit testimony from Dawn Jones, she would have been forced to testify "that Bell physically assaulted her three or four times during their five-year relationship." Pet. App. 15a. But Jones *was* called by the prosecution at trial, and the prosecutor did not elicit that testimony. Moreover, Jones testified on federal habeas (and would have testified at sentencing, if asked) that none of these incidents resulted in injury or required legal assistance, *id.*, and that they did not fairly represent her relationship with Bell. JA 1499. The Fourth Circuit also noted that presenting Bell as a devoted father "would have allowed the prosecution to emphasize multiple instances of Bell's infidelity . . . and failure to provide child support." Pet. App. 16a-17a. But Bell's infidelity had already been the subject of Swartz's testimony. JA 202-03. And, if asked, Jones would have testified at sentencing that Bell "pa[id] child support" even without an order to

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[3] Despite this Court's repeated admonitions to consider the totality of available evidence, the Fourth Circuit confined its review to only "the evidence that the district court found would have been the most beneficial to Bell." Pet. App. 14a.

do so, JA 1507; Williams would have testified that he sent money and gifts to support his daughter in Jamaica, JA 1552-53; and Nicholson would have testified that Bell always made sure his children by Tracy had "their formula, their diapers, anything they needed." JA 1517. Finally, the Fourth Circuit noted that "focusing on Bell's domestic relationships likely would have caused the jury to compare Bell unfavorably to Officer Timbrook," whose wife was pregnant when he was killed. Pet. App. 17a. Mrs. Timbrook had, however, already invited precisely that comparison with her victim impact statement. JA 242-47.

Bell timely petitioned for rehearing and rehearing en banc. Petition for Rehearing & Petition for Rehearing En Banc, *Bell v. Kelly*, No. 06-22 (4th Cir. filed Jan. 18, 2008) ("Rehearing Pet'n"). In his petition, Bell advised the court that its application of § 2254(d) to the prejudice aspect of his *Strickland* claim conflicted with decisions of the Ninth and Tenth Circuits. *Id.* at 3-5. Bell's petition was denied on January 29, 2008, Pet. App. 178a, and the Circuit Court of Winchester promptly scheduled his execution for April 8, 2008. Pet. App. 262a.

REASONS FOR GRANTING THE WRIT

The jury that sentenced Edward Bell to death heard hours of testimony in aggravation and no evidence at all in mitigation. The case comes to this Court with an undisturbed finding that the mitigation investigation conducted by Bell's trial attorneys was constitutionally deficient. The Fourth Circuit nevertheless found no prejudice, and denied relief, in reliance upon two erroneous rules of law.

First, the Fourth Circuit reviewed the prejudice aspect of Bell's *Strickland* claim under the highly deferential standard of 28 U.S.C. § 2254(d), pursuant to which habeas relief is denied unless the state court's decision is unreasonable. Section 2254(d) applies only to claims decided by a state court "on the merits," and the merits of the prejudice prong of a *Strickland* claim require an assessment of the *totality* of all available mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Because the state court failed to provide adequate fact-finding procedures, Pet. App. 84a, 167a, the totality of mitigating evidence omitted in this case included evidence uncovered for the first time on federal habeas, which the state court never addressed. Pet. App. 13a. In nevertheless applying § 2254(d) to its review of the state court's decision, the Fourth Circuit chose sides in a mature circuit conflict recognized in *LeCroy v. Secretary, Department of Florida Corrections*, 421 F.3d 1237, 1262-63 (11th Cir. 2005), *cert. denied*, 546 U.S. 1219 (2006), and adopted a position contrary to the one this Court assumed when it reserved the question in *Holland v. Jackson*, 542 U.S. 649, 653 (2004).

Second, the Fourth Circuit dismissed the potential impact of the mitigation evidence Bell's trial lawyers had failed to uncover, for no reason other than the bare designation of that evidence as "cross-purpose"—meaning that a jury might also have found aspects of that evidence unflattering to Bell. Pet. App. 14a, 16a-17a. In so doing, the Fourth Circuit deepened another conflict—siding with the Fifth Circuit and the Supreme Courts of Virginia and Florida against the Third, Tenth, and Eleventh Circuits, and the Supreme Court of Georgia. The latter courts recognize that virtually *all* mitigating evidence will also have an aggravating aspect, and nonetheless give such evidence full weight in their prejudice analyses.

Independently, this Court at a minimum should hold Bell's case pending the resolution of *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 128 S. Ct. 34 (2007). By operation of Virginia law, Bell will be executed by lethal injection, using virtually the same cocktail of drugs under review in *Baze*. It would be a miscarriage of justice for Bell to be executed on April 8 by lethal injection while this Court's decision on the constitutionality of that method is imminent.

I. THE FOURTH CIRCUIT'S APPLICATION OF 28 U.S.C. § 2254(d) SHARPENS A SIX-CIRCUIT SPLIT OF AUTHORITY

The Fourth Circuit withheld habeas relief on Bell's *Strickland* claim because it concluded that the Supreme Court of Virginia's no-prejudice finding was not unreasonable within the meaning of 28 U.S.C. § 2254(d). But the opening clause of § 2254(d) limits that deferential standard to claims that have been

"adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d).

In the *Strickland* context, the merits of any prejudice decision are inextricably intertwined with the evidence properly before the court at the time. As *Strickland* itself held, a reviewing court "must consider the *totality* of the evidence before the judge or jury." 466 U.S. at 695 (emphasis added). In the capital sentencing context, that means "the *totality* of available mitigating evidence." *Wiggins*, 539 U.S. at 534 (emphasis added). Where a petitioner overcomes § 2254(e)(2)'s strict limitations and qualifies for an evidentiary hearing, and where the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing, new evidence properly may be adduced on federal habeas. At that point, the "totality" changes, such that no prior state court adjudication can be deemed to have been "on the merits" for § 2254(d) purposes.

The Ninth and Tenth Circuits so hold. In *Killian v. Poole*, the Ninth Circuit considered this issue in the analogous context of materiality under *Brady v. Maryland*, 373 U.S. 83 (1963)—holding that where "[e]vidence of . . . perjury" is "adduced only at" a federal hearing, "AEDPA deference does not apply . . . because the state courts could not have made a proper determination *on the merits*." 282 F.3d 1204, 1207-08 (9th Cir. 2002) (emphasis added), *cert. denied*, 537 U.S. 1179 (2003). Within a year of deciding *Killian*, the Ninth Circuit did what the Fourth Circuit has now refused to do: apply the

same rule to *Strickland* prejudice determinations.[4] *See Harris v. Terhune*, 92 Fed. Appx. 462, 463 (9th Cir. 2004) (citing *Killian* in context of *Strickland* claim, and holding that § 2254(d) deference applies only to "matters adjudicated on the merits" by the state court); *see also Brodit v. Cambra*, 350 F.3d 985, 993 (9th Cir. 2003) (same), *cert. denied*, 542 U.S. 925 (2004). Similarly, in *Cargle v. Mullin*, the Tenth Circuit held that, if a state court does not hear the evidence trial counsel failed to present, then "an adequate assessment of prejudice arising from the ineffectiveness of petitioner's counsel has never been made in the state courts," because *Strickland* requires courts to evaluate "all of counsel's deficient performance" collectively. 317 F.3d 1196, 1212 (10th Cir. 2003). In such circumstances, the Tenth Circuit holds, there is "no state decision to defer to under § 2254(d) on this issue." *Id.*; *see also Miller v. Champion*, 161 F.3d 1249, 1253-54 (10th Cir. 1998).

The Fifth, Sixth, and Seventh Circuits disagree. Those courts apply § 2254(d) even where new evidence relevant to a *Strickland* or *Brady* claim has surfaced for the first time on federal habeas. *See Johnson v. Luoma*, 425 F.3d 318, 324, 328 (6th Cir. 2005) (acknowledging but declining to follow *Killian*), *cert. denied*, 127 S. Ct. 58 (2006); *Pecoraro*

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[4] In *Kyles v. Whitley*, this Court confirmed that the *Brady* materiality standard, derived from *United States v. Agurs*, 427 U.S. 97 (1976), just like *Strickland*'s prejudice standard, requires that the effect of "suppressed evidence [be] considered collectively, *not item by item*." 514 U.S. 419, 436 (1995) (emphasis added); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (equating *Strickland* prejudice with *Brady* materiality).

v. Walls, 286 F.3d 439, 443 (7th Cir. 2002) (applying § 2254(d) to a *Brady* claim and noting that "evidence obtained in [an evidentiary] hearing is quite likely to bear on the reasonableness of the state courts' adjudication" but that this "should [not] alter the standard of federal review"); *Matheney v. Anderson*, 377 F.3d 740, 747 (7th Cir. 2004) (acknowledging but declining to follow *Miller*, and construing *Pecoraro* as making "clear . . . that § 2254(d) 'is applicable even though the district judge held an evidentiary hearing'"), *cert. denied*, 544 U.S. 1035 (2005); *Valdez v. Cockrell*, 274 F.3d 941, 951-53 (5th Cir. 2001) (acknowledging but declining to follow *Miller*, and holding over a dissent that § 2254(d) applies even where new evidence is adduced on federal habeas review because a case is adjudicated on the merits whenever "the state court reached a conclusion as to the substantive matter of a claim, as opposed to disposing of the matter for procedural reasons"), *cert. denied*, 537 U.S. 883 (2002).

The Eleventh Circuit recognized this conflict in *LeCroy*, noting:

> Some courts have concluded that the fact that a district court holds an evidentiary hearing in accordance with AEDPA does not alter the federal standard of review; that is, courts are still required to apply the deference mandated in § 2254(d).
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> * * *
>
> On the other hand, some courts have concluded, at least in certain instances, that AEDPA's requirement of deference

> to state court determinations is not applicable when the federal evidentiary hearing reveals new evidence that was not considered by the state court.

421 F.3d at 1262. The *LeCroy* court avoided this question by holding, on its facts, that relief would not be appropriate even under *de novo* review. *Id.* at 1263.

The Fourth Circuit has now charted a third course, agreeing with the Ninth and Tenth Circuits with respect to *Brady* materiality, yet siding with the Fifth, Sixth, and Seventh Circuits with respect to *Strickland* prejudice. In *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003), the Fourth Circuit held that "AEDPA's deference requirement does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal proceedings." *Id.* at 297. In *Holland v. Jackson*, 542 U.S. 649, 653 (2004), this Court assumed without deciding that the rule of *Monroe* would also apply to *Strickland* prejudice analyses predicated on new evidence adduced on federal habeas in connection with *Strickland* claims. The Fourth Circuit here rejected that approach.

This case came to the Fourth Circuit (and comes to this Court) with an undisturbed district court finding that "Bell diligently developed the factual basis of this claim in state court" and "that 'the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing'" within the meaning of *Townsend v. Sain*, 372 U.S. 293 (1963). Pet. App. 84a. Bell therefore expressly asked the Fourth Circuit to follow the same

reasoning and extend *Monroe*'s rule to *Strickland* cases as well. Pet. Br. at 38; Pet. Reply at 23 n.9. The court declined. By strictly applying § 2254(d)'s unreasonable-application standard to a claim of prejudice heavily predicated on evidence newly received on federal habeas, it effectively limited *Monroe* to *Brady* cases only. Pet. App. 12a-13a. Bell raised this problem again as the first issue in his petition for rehearing en banc, Rehearing Pet'n at 3-5, but the Fourth Circuit denied rehearing. Pet. App. 178a. Fourth Circuit law now inexplicably provides that a § 2254 petitioner properly introducing new evidence to support a *Brady* claim will receive *de novo* review of the materiality issue, while a petitioner introducing new evidence to support a *Strickland* claim will find prejudice reviewed only for unreasonableness under § 2254(d).

This issue is one of recurring national importance. As *LeCroy* demonstrates, it arises often enough to give rise to a thoroughly developed split in the courts of appeals. Time will not sharpen this issue, nor further illuminate the question—it will merely deepen the growing gulf between the circuits. This Court already reserved decision on this question once. The time has come to resolve it.

II. THE FOURTH CIRCUIT'S HOLDING, THAT THE OMISSION OF EVIDENCE THAT COULD HAVE ANY AGGRAVATING ASPECT IS NOT PREJUDICIAL, DEEPENS A CONFLICT AMONG COURTS OF APPEALS AND STATE SUPREME COURTS

It is undisputed in this case that trial counsel presented literally *no* evidence whatsoever in mitigation. *See supra* note 2. The district court

found, as a fact, that Bell's trial counsel performed a woefully inadequate investigation, and held that their work fell below the constitutional minimum, qualifying as deficient performance within the meaning of *Strickland*. Pet. App. 171a. The Fourth Circuit did not disagree. Pet. App. 13a. As the case comes to this Court, therefore, the *only* question is whether counsel's failure to present any evidence in mitigation prejudiced Bell. The Fourth Circuit held that it did not, reasoning that a defendant is not prejudiced by counsel's failure to present mitigating evidence if a jury might also find something about that evidence unflattering or aggravating. Pet. App. 14a, 16a-17a. The Fourth Circuit is joined in this view by the Fifth Circuit and the Supreme Courts of Virginia and Florida—in sharp conflict with the Third, Tenth, and Eleventh Circuits, and the Supreme Court of Georgia. Review is warranted to resolve this conflict.

A. The Courts Below Are In Irreconcilable Conflict Regarding The Standard For Evaluating So-Called "Cross-Purpose" Evidence Under *Strickland*

As the Third Circuit has noted, it "is nearly always the case" that evidence in mitigation will open the door to some "harmful information." *Outten v. Kearney*, 464 F.3d 401, 422 (3d Cir. 2006). Nevertheless, some courts discount entire categories of mitigation evidence because they can imagine some downside to the evidence.

The Fourth Circuit adopted the rule that so-called "cross-purpose" evidence may be ignored in *Barnes v. Thompson*, 58 F.3d 971, 980-81 (4th Cir. 1995), and has reaffirmed it unfailingly since. The

day before deciding *Bell*, the Fourth Circuit held that "mitigating evidence . . . should be discounted, *under our precedent*" if "double-edged." *Bowie v. Branker*, 512 F.3d 112, 121 (4th Cir. 2008) (emphasis added). The Fourth Circuit applied that rule in Bell's case, disregarding every potential mitigating witness it considered merely by imagining some potentially negative aspect to their testimony. Pet. App. 13-15. And the Fourth Circuit continues categorically to disregard evidence that "could have been 'cross-purpose evidence capable of aggravation as well as mitigation.'" *Yarbrough v. Johnson*, No. 07-10, 2008 U.S. App. LEXIS 5645, at *28, *37 (4th Cir. Mar. 17, 2008) (citation omitted). Indeed, since this Court's decision in *Williams*, the Fourth Circuit has *never* found prejudice from a capital defense lawyer's failure to investigate and present available mitigating evidence—instead, it has repeatedly dismissed such claims by characterizing the omitted evidence as "cross-purpose" or "double-edged." Every time the Fourth Circuit has found evidence to be "cross-purpose" or "double-edged," it has found counsel not ineffective, and denied relief.

The Fifth Circuit similarly discounts all evidence, such as evidence of brain damage, that may be labeled "double-edged" or "cross-purpose." *See, e.g.*, *Faulder v. Johnson*, 81 F.3d 515, 519-20 (5th Cir. 1996). For example, in *Harris v. Cockrell*, 313 F.3d 238, 244 (5th Cir. 2002), *cert. denied*, 540 U.S. 1218 (2004), the court dismissed evidence of prior childhood and prison experiences—categorically holding that "[t]he failure to present such double-edged evidence is not prejudicial." So does the Supreme Court of Virginia. *Lewis v. Warden*, 645 S.E.2d 492, 505-06 (Va. 2007)

(dismissing evidence of substance abuse for purposes of its prejudice analysis solely because such evidence is "double-edged"). And the Supreme Court of Florida holds that "an ineffective assistance claim does not arise from failure to present mitigation evidence where that evidence presents a double-edged sword." *Willacy v. State*, 967 So. 2d 131, 144 (Fla. 2007); *see also Evans v. State*, 946 So. 2d 1, 12-13 (Fla. 2006) (applying rule to disregard even evidence falling within Florida's mental health statutory mitigator).

The Eleventh, Third, and Tenth Circuits, on the other hand, explicitly give weight to all mitigating evidence, even where it might have some aggravating aspect. Had Bell been convicted in Winchester, Georgia, rather than Winchester, Virginia, his case would have been materially indistinguishable from, and controlled by, *Harris v. Dugger*, 874 F.2d 756, 763-64 (11th Cir.), *cert. denied*, 493 U.S. 1011 (1989). Counsel in *Harris* failed to interview their client's friends and family, who could have testified that he was "a kind, decent man, a dependable employee, a family man, dedicated to his son, his niece and his ex-wife's other children." *Id.* at 760-61. Witnesses Bell's trial counsel failed to interview would have given indistinguishable testimony—that Bell was kind to them, "hard-working, loving, and a good father," dedicated to his children. Pet. App. 15a-16a. The state court in *Harris* found that the petitioner could not show prejudice because evidence of his good character would open the door to introduction of his numerous prior convictions and dishonorable military discharge. 874 F.2d at 762-63. The Eleventh Circuit, however, disagreed—emphasizing

that evidence of good character is vital to the particularized inquiry that juries must apply in death penalty cases, even though it will always carry with it other aspects of the defendant's human complexity and limitations. *Id.* at 764. The Eleventh Circuit observed that this type of evidence "constituted the only means of showing that [he] was less reprehensible than the facts of the murder indicated." *Id.* at 763-64; *see also Turpin v. Lipham*, 510 S.E.2d 32, 39, 42-43 (Ga. 1998) (finding prejudice from failure to introduce evidence of child abuse and mental disorders, even though trial counsel believed such evidence amounted to "a loaded gun" that would convince a jury the defendant was either "a poor institutionalized soul" or "an outright sociopath").

Had Bell been convicted in Delaware, his case would have been controlled by *Outten*, 464 F.3d at 422-23. In *Outten*, trial counsel failed adequately to investigate the defendant's background, and, as a result, did not present evidence of severe child abuse, neurological damage, low IQ, and substance abuse. *Id.* at 419-20. The court acknowledged that this evidence could be considered aggravating but noted that most of the aggravating aspects of it had already been introduced at sentencing in any event. *Id.* at 422. As the district court found, the same is true in Bell's case. *See* Pet. App. 174a (the "double-edged sword" aspect of Bell's evidence "was already before the jury"). The first witness whose positive testimony the Fourth Circuit discounted as "cross-purpose" was Dawn Jones—a witness who *already had been called* by the prosecution as a witness in aggravation. Pet. App. 15a n.6. While the Fourth Circuit emphasized that other witnesses would have

"allowed the prosecution to emphasize multiple instances of Bell's infidelity" or "domestic abuse," Pet. App. 16a-17a, Swartz already had testified that Bell was having an affair with her while his girlfriend was pregnant with his child and had accused Bell of assaulting both her and his then-pregnant girlfriend. JA 202-03. And while the Fourth Circuit pointed out that "focusing on Bell's domestic relationships likely would have caused the jury to compare Bell unfavorably to Officer Timbrook, whose death left behind a pregnant wife," Pet. App. 17a, multiple members of the Timbrook family already had invited the jury to make that very comparison through the vehicle of their victim impact statements. Pet. App. 188a. And, of course, as the Third Circuit noted, efforts to humanize a defendant by showing the jury his family and social connections will essentially *always* pose that risk. It "is nearly always the case" that omitted mitigation evidence can be characterized as "double-edged" or "cross-purpose" in nature. *Outten*, 464 F.3d at 422. Lest an exclusion of "cross-purpose" evidence defeat the principles this Court articulated in *Williams* and *Wiggins*, the Third Circuit found "the determination that [the defendant] could not establish prejudice because [his] records contained some harmful information" is unreasonable within the meaning of § 2254(d). *Id.*

Finally, had Bell been convicted in Winchester, Oklahoma, his case would have been controlled by *Smith v. Mullin,* 379 F.3d 919 (10th Cir. 2004). Trial counsel in *Smith* failed to uncover and present evidence that the defendant was mentally retarded, had suffered brain damage affecting his ability to regulate emotions, and had been abused as a child.

Id. at 941-42. The district court in *Smith* reasoned the way the Fourth Circuit did in *Bell*, finding no prejudice because the omitted evidence could have led the jury to see the defendant as "an unstable individual with very little control over his impulses." *Id.* at 943. Indeed, *Smith* presented a far better case for the application of the Fourth Circuit's rule disregarding "cross-purpose" evidence: while there was *no* mitigation case presented in *Bell*, counsel in *Smith* had an affirmative mitigation strategy, with evidence that would have been directly undercut by introducing evidence of retardation, brain damage, and child abuse. *Id.* Nevertheless, the Tenth Circuit held that the district court's perfunctory dismissal of "double-edged" evidence "reveal[ed] a fundamental misunderstanding of the purpose for which such mitigation evidence would have been presented." *Id.* Just as in Bell's case, the jury in *Smith* already had been shown the aggravating aspects of the omitted mitigation evidence. *Id.* at 943-44 & n.11. The Tenth Circuit reasoned that Smith was prejudiced because, without mitigating evidence, the jury was left with nothing but aggravation and no explanation for the defendant's conduct *Id.* In the Tenth Circuit's words, the petitioner was prejudiced by his counsel's failure to present "the mitigating 'edge.'" *Id.* at 943 & n.11.

B. But For Its Disregard Of Evidence With Aggravating Aspects, The Fourth Circuit Would Have Been Obliged To Find Prejudice

This Court's precedents make clear that consideration of mitigating evidence by the jury is essential to the "reliability" of a capital sentencing.

Penry v. Lynaugh, 492 U.S. 302, 328 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Mills v. Maryland*, 486 U.S. 367, 375 (1988). And prejudice is shown where trial counsel's errors deprive a defendant of a sentencing hearing "whose result is reliable." *Strickland*, 466 U.S. at 687. Bell's jury could only return a death sentence upon a unanimous verdict, and each individual juror was free to refuse the death penalty if he or she simply chose to grant mercy. *See* JA 65-68, 278-80. Under such circumstances, this Court's teachings dictate that prejudice must be found if there is "a reasonable probability that *at least one juror* would have" reached a different conclusion. *Wiggins*, 539 U.S. at 537 (emphasis added).

This Court has had no difficulty finding that standard met in cases where the potentially aggravating aspect of omitted mitigation evidence was significantly greater than in this case. *Williams*, *Wiggins*, and *Rompilla* all involved evidence that the Fourth Circuit would have disregarded as "cross-purpose" or "double-edged." In all three cases, the omitted evidence was of severely abusive and violent childhoods, often conjoined with drug and alcohol abuse. *See Rompilla v. Beard*, 545 U.S. 374, 381-86, 390-93 (2005); *Wiggins*, 539 U.S. at 534-36; *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *cf. supra* page 7 (similar evidence missed by Bell's counsel). Such evidence is significantly more "cross-purpose" than the evidence at issue in *Bell*—a jury either could view child abuse and drug use as mitigating (because it diminishes the defendant's "blameworthiness") or as aggravating (because it indicates a probability of future dangerousness). *See*

Penry, 492 U.S. at 324. Indeed, the Fourth Circuit withheld relief in *Wiggins* for precisely this reason, noting that "counsel is not ineffective for failing to introduce evidence that would have hurt as much as it helped," and finding that "the jury could just as easily have viewed Wiggins' childhood and limited mental capacity as an indicator of future lawlessness." *Wiggins v. Corcoran*, 288 F.3d 629, 642 (4th Cir. 2002), *rev'd sub nom. Wiggins v. Smith*, 539 U.S. 510 (2003); *see also Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000). And in *Rompilla*, counsel's principal error was failing to investigate the prosecution's aggravating evidence—facts that, by definition, would be "cross-purpose" and therefore irrelevant under the Fourth Circuit's rule. 545 U.S. at 389-90. This Court, however, found that each defendant had demonstrated prejudice. *See Wiggins*, 539 U.S. at 534-35; *Williams*, 529 U.S. at 397-99.

The case for prejudice here is particularly strong for three reasons. First, the fact that counsel presented *no* evidence in mitigation itself effectively operated as an aggravating circumstance—inviting the jury to infer that Bell was so irredeemable that no one was willing to speak on his behalf. The prosecutor used the absence of mitigation evidence that way, reminding the jury of it six times. JA 264, 266, 276-77; *see also* JA 2008-09 (district court noting the significance the prosecutor attached to the absence of mitigating evidence). If the prosecutor, who watched the sentencing proceeding live and gauged the jury's reactions, thought the absence of mitigation evidence that significant, then the Fourth Circuit was not free to disregard it. Indeed, the district court received expert testimony

that the total lack of mitigation evidence was particularly damning. *See* JA 1980 (testimony of Dr. Mark Cunningham). Not only did trial counsel present no mitigation, they affirmatively undercut their client—calling harmful witnesses and characterizing their client to the jury as "a violent man." JA 269, 271; *see also* JA 2006 (district court finding that counsel's presentation "hurt Mr. Bell more than it helped him"); JA 1948-49. This Court previously has recognized the prejudicial impact of "an inadequate or harmful closing argument, when combined . . . with a failure to present mitigating evidence." *Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993). The Fourth Circuit did not see as clearly.

Second, the mitigating evidence Bell's counsel neglected would have undercut powerfully the future dangerousness aggravator that was necessary to establish death eligibility. The Commonwealth characterized Bell as violent, but a host of witnesses could have shared with the jury their sense that this crime was entirely out of character for Bell. JA 1456, 1482, 1543, 1554, 1567. The Commonwealth specifically argued that Bell was a threat to law enforcement officials, but the jury never heard that Jamaican police officers believed Bell did not bear animosity towards law enforcement, nor did they hear of Bell's volunteer work with police youth clubs. JA 1456-57, 1536, 1549-50, 1567. The prosecution's star witness, Billy Jo Swartz, testified that Bell assaulted her. Had trial counsel prepared, they could have called the Nicholsons to testify that Swartz simply lied. JA 1244, 1262, 1519-20, 1533; Pet. App. 172a. The prosecution called a Jamaican police officer to testify to Bell's arrest for "assault." Having not prepared, trial counsel failed to call the

putative victim himself—who would have testified that the "assault" was simply a childish scuffle he barely recalled. JA 1454-56. Bell's jury was forbidden by their instructions from even considering a death sentence unless they unanimously found future dangerousness *beyond a reasonable doubt*—yet the Fourth Circuit found no prejudice from the failure to investigate and present mitigating evidence that directly negated the Commonwealth's future dangerousness case. Had they not categorically discounted "cross-purpose" evidence, the Fourth Circuit could not have reached that result.

Third, even if the jury still would have found future dangerousness, the mitigation evidence the district court received would have given the jury affirmative reasons to spare Bell's life. Bell's jury only heard Dawn Jones testify to the worst moment in her entire relationship with Bell. JA 1496-97. Instead of leaving the jury with an image of Bell entering her home with a gun, had trial counsel interviewed and examined her, Jones could have left the jury with the image of Bell kneeling by their daughter Kydesha's incubator, praying for her survival. JA 1110, 1259, 1492-93. After the Commonwealth presented the jury with the worst of Bell's bad acts, trial counsel missed the opportunity to have Barbara Williams tell them how Bell cared for her and their daughter Kamille, and how he worked as a volunteer with police youth groups to clean churches and minister to the sick and elderly. JA 1549. Bell's jury never learned how he worked twelve-hour shifts at a bottling plant to earn money to support Dawn Jones through her pregnancy and to support his children in Jamaica and America. JA

1262, 1491, 1517, 1540-41, 1552, 1555-56. Perhaps most critically, the jury never knew that a death sentence would negatively impact innocents—they never heard how Kamille and Kydesha "would be devastated" by Bell's execution, and they never heard Alyse, Diontre, Xavian, and Eddie Jr. ask them not to take away their father. JA 433, 444, 458, 1261, 1515-18. The district court received expert testimony that such evidence, depicting the defendant's redeeming qualities and attachments, is critically important to juries. JA 1247, 1291, 1317-18, 1405, 1431-32, 1488. Had the Fourth Circuit not categorically "discounted" evidence based on potential cross-purpose application, it could not have remained "'confiden[t]'" that not even "one juror" would have chosen to grant mercy and spare Bell's life. *Wiggins*, 539 U.S. at 534, 537 (citation omitted).

This Court has never required a capital defendant to prove he or she is of flawless moral character. Indeed, by the time a defendant reaches the *sentencing* stage of a capital proceeding, such a showing will always be impossible. Rather, this Court has consistently understood mitigating evidence to serve the function of completing the picture of a defendant's character—balancing the picture that the prosecution's aggravating evidence began, enabling the jury to "give a 'reasoned moral response'" to the crime. *Brewer v. Quarterman*, 127 S. Ct. 1706, 1709 (2007) (citation omitted). Bell's jury was denied that opportunity.

C. This Issue Is Of National Importance And Ripe For Review

This Court need not, and should not, await further percolation of this issue in the courts below.

The split on this issue is deep and sharply defined. The Third, Tenth, and Eleventh Circuits, and the Supreme Court of Georgia, have followed this Court's teachings and give weight to evidence even where it might have some potential unflattering or even aggravating implication, while the Fourth and Fifth Circuits and the Supreme Courts of Virginia and Florida do not, as a matter of law. This issue has been amply developed. This Court should not delay its review, especially since each new decision risks the wrongful execution of a defendant who, under this Court's precedents, should not be executed.

III. THIS COURT SHOULD, AT A MINIMUM, HOLD THIS CASE PENDING THE RESOLUTION OF *BAZE V. REES*

This Court should, at a minimum, stay Bell's execution and hold this case pending decision in *Baze v. Rees* (U.S. Sept. 25, 2007) (No. 07-5439). Bell faces lethal injection using a drug cocktail nearly identical to that which Kentucky employs. *Compare Baze v. Rees*, 217 S.W.3d 207, 212 (Ky. 2006) (Kentucky uses three grams of sodium thiopental, fifty milligrams of pancuronium bromide, and 240 milligrams of potassium chloride) *with Walker v. Johnson*, 448 F. Supp. 2d 719, 720 (E.D. Va. 2006) ("Virginia uses three drugs in the lethal injection procedure . . . two grams of sodium thiopental . . . fifty milligrams of pancuronium bromide . . . [and] 240 milliequivalents of potassium chloride.").

Bell challenged lethal injection as a method of execution on state habeas, and the Supreme Court of Virginia denied relief, reasoning that electrocution is permissible under the Eighth Amendment and Bell

may choose electrocution over lethal injection pursuant to Va. Code Ann. § 53.1-234. Pet. App. 220a-21a. Bell raised the same claim on federal habeas, and the district court dismissed, reasoning in part that lethal injection on its face is a constitutional method of execution. Pet. App. 165a-66a. The district court also adopted the Supreme Court of Virginia's reasoning, expanding it into an inescapable Catch-22. According to the district court, Bell cannot have a ripe claim until he affirmatively chooses lethal injection, but by choosing, Bell forfeits his right to challenge the constitutionality of lethal injection. Pet. App. 165a.

Virginia law, however, provides a third path. Bell has refused to elect any method of execution "at least fifteen days prior to the scheduled execution." Va. Code Ann. § 53.1-234. Accordingly, absent the intervention of this Court, Bell will be executed by lethal injection by operation of law, not by virtue of his affirmative choice.

The Fourth Circuit denied a Certificate of Appealability, Pet. App. 177a, implicitly holding that no reasonable jurist could even debate the district court's reasoning. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). It also denied Bell's application for a stay of execution pending the decision in *Baze*. In *Baze*, this Court may find lethal injection protocols like that used in Virginia to be unconstitutional. It would be a miscarriage of justice for Bell to be executed on April 8 by a method the constitutionality of which remains unresolved. This Court should therefore, at a minimum, stay Bell's execution pending *Baze*, and then grant the petition, vacate

the decision of the Fourth Circuit, and remand for further proceedings not inconsistent with *Baze*.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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