

**IN THE SUPREME COURT
OF THE UNITED STATES**

TERRY LYNN KING,

Petitioner,

v.

TONY MAYS,

Respondent.

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

**REPLY IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

– CAPITAL CASE –

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ARGUMENT

Petitioner seeks certiorari because the Sixth Circuit's approach to cumulative error review is out-of-step with the balance of the Circuits and contrary to this Court's precedents. Mr. King properly raised his cumulative-error claim in state court, but the Tennessee Supreme Court refused to consider the aggregate harm resulting from all of the errors found on both direct appeal and in state post-conviction proceedings. Mr. King then raised his cumulative error claim in federal habeas proceedings, arguing that the state court's denial of the claim constituted an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). But his claim was denied based on Sixth Circuit jurisprudence finding that this Court has never recognized a constitutional right to cumulative error review. As set forth in Mr. King's initial petition for certiorari, the Sixth Circuit is wrong. The majority of circuit courts of appeal have recognized that multiple decisions of this Court establish a due process right to cumulative-error review. Furthermore, this Court's Eighth Amendment jurisprudence establishes that a capital prisoner is entitled to cumulative error review of his death sentence. Mr. King asks that this Court grant certiorari and order full briefing or, in the alternative, grant certiorari, vacate, and remand to the Sixth Circuit in light of this Court's precedents that are contrary to the lower court ruling.

The bulk of the State's brief in opposition is a response to a strawman. In particular, the State argues from the erroneous premise that Mr. King has ignored the state court adjudication in this case and that he is seeking the creation of a *new*

constitutional right. In reality, Mr. King's claim is that the state court refused to conduct a constitutionally-adequate cumulative error review as required by this Court's precedents and that the federal court wrongly deferred to that ruling under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Nothing in the State's brief persuasively rebuts this claim.

The State also denies that Mr. King would be entitled to relief even if an appropriate cumulative-error review were conducted. But the State, like the Tennessee Supreme Court, fails to actually consider the cumulative effect of the many errors found in this case. This Court should grant review to address the Sixth Circuit's cumulative-error jurisprudence that is contrary to this Court's precedents and an outlier among the circuit courts of appeals.

I. CLEARLY ESTABLISHED FEDERAL LAW REQUIRES CUMULATIVE-ERROR REVIEW, AND THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE JURISPRUDENCE OF THOSE CIRCUIT COURTS THAT HOLD OTHERWISE.

As stated above, the State's first argument in opposition to Mr. King's petition effectively creates a strawman and then proceeds to attack it, while largely failing to respond to Mr. King's actual claim. Yet even if considered responsive, the State's position suffers from three fundamental flaws: it misrepresents the operative state court decision in this case, it ignores this Court's precedents that expressly and implicitly require cumulative-error review in capital cases, and it misconstrues the jurisprudence of the majority of circuit courts that conduct cumulative-error review.

First, the State accuses Mr. King of making "no mention that his cumulative-error claim was adjudicated on the merits in state court." BIO 13. In fact, Mr. King

accurately described the post-conviction decision of the Tennessee Supreme Court, explaining that it “declined” to conduct cumulative error review. *See* Pet. 12. The State does not debate that the high court failed to conduct a cumulative error analysis, yet argues that it implicitly adopted the reasoning of the Court of Criminal Appeals (“CCA”) and that this Court must “look through” the Tennessee Supreme Court opinion to that of the CCA on this issue. BIO 14–15 (citing *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)). But the *Wilson* “look through” doctrine applies only where the last state court summarily affirms a denial of relief. *See Wilson*, 138 S. Ct. at 1192. By contrast, when the “last state court to decide a prisoner’s federal claim explains its decision on the merits in a reasoned opinion[,] . . . a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons *if they are reasonable*.” *Id.* (emphasis added).

The state court’s decision that cumulative error review was not required was both reasoned and explicit. The Tennessee Supreme Court expressly granted discretionary review of Mr. King’s claim that his case had “yet to be subjected to a realistic, comprehensive view of the cumulative effect of the multiple errors which have infected [the] case from beginning to end.” *See* Rule 11 Application for Permission to Appeal Judgment of the Court of Criminal Appeals, *King v. State*, No. 03C01-9601-CR-204, 5 (Tenn. Sept. 12, 1997); Notice, *King v. State*, No. 03C01-9601-CR-204 (Tenn. Jan. 5, 1998). The high court then devoted one of the opinion’s four sections (and more than five hundred words) to reasoning through whether the

requested analysis was required. *King v. State*, 989 S.W.2d 319, 327–28 (Tenn. 1999). Ultimately, the court “decline[d]” to conduct a cumulative-error review. *Id.* at 328.

That section (and the one preceding it) are telling. It begins by acknowledging that Mr. King “contends that there are numerous ‘harmless’ errors in the record, that when considered cumulatively[,] . . . render his death sentence fundamentally unfair and invalid.” *Id.* But any further consideration of the cumulative effect of those errors, the court reasoned, was unnecessary: It had already conducted its own version of that analysis under a case called *State v. Howell*, 868 S.W.2d 238, 243 (Tenn. 1993). *King*, 989 S.W.2d at 325. *Howell*, however, describes a truncated version of error review, requiring only consideration of some of the errors that affected the sentencing phase of the trial and not others. *See Howell*, 868 S.W.2d at 262. In the preceding section, the Tennessee Supreme Court had applied *Howell* to Petitioner’s case. *See King*, 989 S.W.2d at 323–27. And, according to the process described in *Howell*, it had relegated all consideration of the *Bruton* error to a different section of the opinion, where it considered only the effect that error had on the determination of guilt. *See id.* at 330–34. Worse, it appeared to rely in part on the erroneously admitted statement itself when conducting the *Howell* analysis. *See id.* at 323 (relying on the “evidence at trial,” which included Sexton’s erroneously admitted statement, to conclude—exactly as Sexton’s statement had explicitly said—that Petitioner had killed the victim to avoid accusations of rape). And in the end, the Tennessee Supreme Court determined only that “appellant’s sentence of death would have been the same,” *id.* at 327, failing to apply any of the more strict standards of review that normally attend due-process

informed cumulative error review. *See, e.g., United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) (asking whether the errors “undermine due process” or “cast a shadow upon the integrity of the verdict”).

Even if the operative state court adjudication of Mr. King’s cumulative error claim is the decision of the CCA, Mr. King alleged in his federal habeas petition that the state court adjudication constituted an unreasonable application of clearly established federal law. But, relying on Sixth Circuit jurisprudence, the federal district court held that cumulative-error review is not required by this Court’s jurisprudence and that the state court adjudication could therefore not be challenged under § 2254(d)(1). *King v. Bell*, No. 3:99-CV-454, 2011 WL 3566843, at *49 (E.D. Tenn. Aug. 12, 2011), *aff’d sub nom. King v. Westbrook*, 847 F.3d 788 (6th Cir. 2017).

As detailed in Mr. King’s initial petition, the Sixth Circuit’s position runs afoul of this Court’s precedent under both the Fourteenth and the Eighth Amendments. *See* Pet. 3 (citing *Chambers v. Mississippi*, 410 U.S. 284, 289–94 (1973); *Taylor v. Kentucky*, 436 U.S. 478, 487–88 (1978); *Berger v. United States*, 295 U.S. 78, 84 (1935); *Chapman v. California*, 386 U.S. 18 (1967); *Kyles v. Whitley*, 514 U.S. 419, 420 (1995)); Pet. 34–35 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985); *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990)). The brief in opposition does not even mention any of these cases, let alone identify any flaws in Mr. King’s reasoning. Rather, it pretends that Mr. King relies

entirely “on various approaches taken by *other courts* when presented with claims of cumulative error.” BIO 1 (emphasis added). Of course, this assertion ignores not only the many cases from this Court cited in the petition, but also the fact the approaches of the “other courts” cited in the petition are themselves grounded in this Court’s precedents supporting cumulative-error review. *See* Pet. 23 (listing various circuit court opinions citing this Court’s precedents regarding cumulative error review).

The only portion of the brief in opposition that actually responds to the arguments presented in Mr. King’s initial petition appears in footnote 7, where the State denies that there is a circuit split concerning whether cumulative-error review is required under clearly established federal law. *See* BIO 17 n. 7. But even here, the State misses the mark. It incorrectly asserts that only the Ninth Circuit has declared cumulative-error doctrine to be clearly established federal law. *See id.* (citing *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007)). In fact, the First Circuit has recognized the same. *Mello v. DiPaulo*, 295 F.3d 137, 152 (1st Cir. 2002). And, while other circuits have not expressly declared cumulative review to be required under clearly established federal law, they have nevertheless conducted cumulative-error analyses of federal habeas claims, thereby “signal[ing]” that “cumulative-error analysis is clearly established federal law.” *Hooks v. Workman*, 689 F.3d 1148, 1194 n.10 (10th Cir. 2012); *see also Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008); *Alvarez v. Boyd*, 225 F.3d 820 (7th Cir. 2000); *cf. Nickleson v. Stephens*, 803 F.3d 748, 753 & n.5 (5th Cir. 2015) (declining to review habeas petitioner’s cumulative error claim because not

exhausted in state court, but recognizing that such review would be available on a properly-exhausted habeas claim).

Meanwhile, even if applied outside of the habeas context, a circuit court's recognition that this Court's jurisprudence establishes a constitutional right to cumulative-error review constitutes a recognition of a "governing principle from this Court's decisions" that may be applied unreasonably by a state court. *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (AEDPA recognizes "that even a general standard may be applied in an unreasonable manner"). Indeed, this Court has previously found clearly established federal law to have been formed across a series of prior decisions that together articulated a general legal principle. *See, e.g., Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (identifying a clearly established federal law with respect to whether a suspect is "in custody" from a "matrix" of prior decisions); *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (identifying controlling precedent regarding "gross disproportionality" even though its "precise contours . . . [were] unclear"). As detailed in Mr. King's initial petition, a number of circuit courts have relied on various decisions of this Court in identifying a due process right to cumulative-error review, and a similar right may be drawn from this Court's Eighth Amendment jurisprudence. *See* Pet. 23, 34–35.

II. BUT FOR THE SIXTH CIRCUIT’S MISAPPLICATION OF THIS COURT’S PRECEDENTS REGARDING CUMULATIVE ERROR, PETITIONER WOULD HAVE BEEN ENTITLED TO RELIEF.”.

Mr. King has identified five trial errors found by the state courts that should be reviewed cumulatively:

- the trial court permitted the introduction of irrelevant and highly prejudicial testimony of Mr. King’s ex-girlfriend, Lori Eastman Carter, who falsely told the jury that Petitioner had once beaten her with a stick while asking, “how it felt to be dying, so that the next woman he killed he would know how she felt,” and added that Mr. King was not intoxicated at the time of this purported beating;
- it allowed the state to cross-examine Petitioner about his juvenile record in violation of a state statute;
- it instructed the jury to apply an unconstitutionally vague “heinous, atrocious or cruel” aggravating circumstance in violation of the Fourteenth Amendment;¹

¹ In his initial petition, Mr. King incorrectly repeated an error made by the federal district court, namely that on direct appeal, the Tennessee Supreme Court had found no error regarding the use of the so called “HAC” aggravator in this case. *See* Pet. 12–13; *King*, 2011 WL 3566843, at *16. In reality, the Tennessee Supreme Court identified the error on direct appeal, but found that it was not “prejudicial.” *State v. King*, 718 S.W.2d 241, 249 (Tenn. 1986); *see also King v. State*, No. 03C01-9601-CR-00024, 1997 WL 416389, at *18 (Tenn. Crim. App. July 14, 1997) (CCA recognizing, on post-conviction review, that the Tennessee Supreme Court’s direct appeal decision had found error in the “the trial court’s failure to define the word ‘torture’ in its instruction to the jury on the [HAC] aggravating circumstance,” but that the high court had determined the error to be harmless).

- it permitted Petitioner's co-defendant to inculcate Petitioner without taking the stand in violation of the Confrontation Clause, including testimony that directly bolstered the improper testimony of Ms. Carter; and
- it permitted the jury to sentence Petitioner to death for the same reason it found him death-eligible in violation of the Eighth Amendment.

In denying that these errors cumulatively prejudiced Mr. King at his sentencing proceeding, the State largely relies on the state courts' holdings determining each error to have *individually* been harmless, which cannot resolve the issue of whether they are *collectively* harmless. The State also cites to the Tennessee Supreme Court's harmless-error analysis under *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), in which, after finding that the jury's reliance on the felony-murder aggravating circumstance was erroneous, the court considered whether any of the three errors found on direct appeal *individually* affected the remaining aggravating circumstances. Again, this analysis did not satisfy the requirements of either the Fourteenth Amendment's Due Process Clause or the Eighth Amendment's Cruel and Unusual Punishment Clause.

Under a proper cumulative-error analysis required by this Court's precedents, the five errors listed above unconstitutionally prejudiced Mr. King at his capital sentencing. During the penalty phase, the defense argued four mitigating circumstances, two of which were: (i) Mr. King was under the influence of extreme mental or emotional disturbance at the time of the crime; and (iii) his capacity to

appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of intoxication. Collectively, three of the five trial errors decimated each of these circumstances. In particular, Ms. Carter's testimony falsely conveyed to the jury that Mr. King was violent towards women even when not under the influence of an extreme emotion disturbance or intoxication, and Mr. Sexton's unconstitutionally-admitted confession bolstered Ms. Carter's testimony.

Likewise, the improper admission of Mr. King's juvenile crimes conveyed that he had long been engaged in criminal activity and that therefore the jury could not reasonably view the present crime as the product of emotional disturbance and/or intoxication.² Meanwhile, the remaining two errors each invalidated one of four aggravating circumstances relied upon by the prosecution. In other words, absent the errors, the jury would have been weighing just two aggravating circumstances against four convincing mitigating circumstances. With the errors, the jury weighed four aggravating circumstances against just two credible mitigating circumstances. Mr. King was prejudiced, particularly given that his jury was instructed that it *must* impose death if it did not find that the mitigating circumstances were "sufficiently

² Although Mr. King had been convicted of another murder as an adult, that crime had occurred shortly before the capital crime. Absent the juvenile convictions, the defense could have portrayed both murders as having taken place in the context of a larger emotional disturbance, which had itself driven him to become grossly intoxicated.

substantial” to outweigh the aggravating circumstances. Trial Testimony, Vol. 18 at 948.

CONCLUSION

The Sixth Circuit’s approach to cumulative error claims is at odds with this Court’s precedents and out of step with the other courts of appeals. Mr. King respectfully requests that, for the reasons set forth above and in Mr. King’s petition, the Court should grant the petition for a writ of certiorari. In the alternative, he requests that the Court grant the petition, vacate the lower court’s decision, and remand in light of this Court’s cumulative error precedents.

Respectfully submitted,

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