STAMP & RETURN

No. 01-9094

IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,
Petitioner,

v.

RICKY BELL, WARDEN,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide. Along with 80 state and local affiliate organizations, NACDL numbers 28,000 members in all 50 states.[1] The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge in the area of criminal justice and practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as amicus curiae on numerous occasions. *See, e.g., Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Hohn v. United States*, 524 U.S. 236 (1998). Because this case presents important questions regarding federal court review of the merits of habeas petitioners' federal constitutional claims, NACDL respectfully submits this amicus curiae brief.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or part and no person or entity, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is Petitioner Abdur'Rahman's first federal habeas petition. If this Court does not remand, Abdur'Rahman will be put to death without the merits of his constitutional claims of prosecutorial misconduct ever being addressed by a federal court, despite the fact that he properly presented them through the available state procedures and in his initial federal habeas petition. That result would run counter to the very purpose of federal habeas law, which is to ensure that all state prisoners have at least one opportunity to have a federal court fully review the merits of their timely filed federal constitutional claims.

In this habeas petition, Abdur'Rahman raised substantial claims that his conviction and death sentence violated the federal Constitution. Indeed, the District Court vacated his death sentence after finding prejudicial ineffectiveness of counsel (although the Sixth Circuit subsequently reversed the finding of prejudice *sua sponte*). *Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1101 (M.D. Tenn. 1998), *rev'd*, 226 F.3d 696, 708-09 (6th Cir. 2000), *cert. denied*, 122 S. Ct. 386 (2001). The District Court refused to consider the merits of Petitioner's prosecutorial misconduct claims, however, on the ground that it was necessary to present them for discretionary review to the Tennessee Supreme Court in order to exhaust his state remedies. 999 F. Supp. at 1080. Since the time of the District Court's ruling of procedural bar – but before judgment on this first federal habeas petition has become final – the Tennessee Supreme Court unambiguously has clarified that discretionary review was not an available state remedy for Petitioner. Tenn. S. Ct. R. 39. Abdur'Rahman thus properly had exhausted the remedies available to him from the courts of Tennessee.

In light of the Tennessee Supreme Court's issuance of Rule 39 and this Court's intervening decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the District Court's refusal to decide the merits of Abdur'Rahman's claims of prosecutorial misconduct was clearly erroneous as a matter of fact and law. Nevertheless, the Sixth Circuit denied Petitioner consideration of those claims, by blocking both his motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and his motion to the Sixth Circuit to amend its judgment. In so doing, the Sixth Circuit completely denied Petitioner the protection of the writ of habeas corpus.

Allowing the Sixth Circuit's ruling to stand would breach the fundamental principle that all habeas petitioners who properly exhaust and timely file their federal habeas petitions are entitled to consideration of the merits of their constitutional claims. Under these circumstances, it would elevate form over substance to treat a claim timely asserted in a first habeas petition as "second or successive" simply because relief is sought pursuant to Rule 60(b) or pursuant to a motion to a federal appeals court to amend its judgment. Rather than looking to "the particular name that [a procedure] bears," courts should look to the substance of what is at issue: here the first federal review of properly exhausted claims. *See Carey v. Saffold*, 122 S. Ct. 2134, 2140 (2002). To do otherwise, and to deny review, would "den[y] the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

In addition, an affirmance actually would disserve the principle of federal-state comity that underlies the exhaustion requirement for purposes of federal habeas review. To ignore a state supreme court's judgment regarding the scope of its own review would allow federal courts to burden state courts with

habeas petitions they do not want to hear. It also would inject uncertainty and confusion into habeas law by creating federal exhaustion requirements beyond those required by the state itself.

ARGUMENT

I. An Affirmance Here Would Contravene The Fundamental Principle That Habeas Petitioners Are Entitled To One Federal Court Review Of Timely Filed Petitions.

The "historic capacity" of federal habeas courts has been "to assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights." *Herrera v. Collins*, 506 U.S. 390, 402 (1993); *see also O'Neal v. McAninch*, 513 U.S. 432, 442 (1995) ("basic purposes underlying the writ" include "avoid[ing] a grievous wrong – holding a person 'in custody in violation of the Constitution . . . of the United States'"). To this end, habeas law provides that state prisoners are entitled to federal court review of the merits of their timely filed federal constitutional claims, provided they first exhaust available state remedies.

Because the writ of habeas corpus "has been for centuries esteemed the best and only sufficient defence of personal freedom," *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869), this Court has long held that state prisoners must have at least one opportunity to present claims of unconstitutional punishment and to have those claims "thoroughly considered" by federal courts. *See Lonchar*, 517 U.S. at 326. Accordingly, a habeas petition filed after dismissal of an initial petition for failure to exhaust state remedies must be addressed on the merits and cannot be dismissed as a "second or successive"

petition. *Slack v. McDaniel*, 529 U.S. 473, 485-89 (2000). Similarly, when federal habeas claims are dismissed as premature, the petitioner is entitled to reopen such claims for federal court adjudication once those claims ripen. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). In short, where "the habeas petitioner does not receive an adjudication of his claim" due to an initial federal court dismissal, *id.* at 645, later proceedings must be adjudicated on the merits, "under the same standard as would govern those made in any other first petition," *id.* at 644. As this Court reasoned in *Martinez-Villareal*, "To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Id.* at 645.

Such review for constitutional error is particularly vital in capital cases such as this one in order to ensure the reliability – and constitutionality – of death sentences. *See Herrera*, 506 U.S. at 405 (noting that "the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed"). In recognition of the role of habeas review in assuring the reliability of death sentences, this Court held in *Lonchar* and *Barefoot v. Estelle*, 463 U.S. 880 (1983), that both district courts and courts of appeals are obligated to address the merits of any first federal habeas petition prior to the petitioner's execution; if the petition cannot be dismissed on the merits prior to a scheduled execution, that execution must be stayed. *Lonchar*, 517 U.S. at 320 ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot."); *Barefoot*, 463 U.S. at 893-94 ("When a certificate of probable cause is issued by the district court . . . or later by the court of appeals, petitioner must then be afforded an opportunity to address the

merits, and the court of appeals is obligated to decide the merits of the appeal.").

No federal court has ever reviewed the merits of Abdur'Rahman's prosecutorial misconduct claims on the merits. An affirmance in this case would contravene the fundamental principle that every habeas petitioner who files a timely, properly exhausted petition is entitled to consideration of the merits of his claims.

II. To Require The Habeas Petitioner To Pursue Relief That The State Supreme Court Has Made Unavailable Would Pervert The Purposes Of The Exhaustion Requirement And Create Confusion In Habeas Law.

The District Court dismissed Petitioner's claims of prosecutorial misconduct as procedurally defaulted solely because he did not seek discretionary review of those claims from the Tennessee Supreme Court. *See Abdur'Rahman*, 999 F. Supp. at 1080 ("That the Tennessee Supreme Court exercises only discretionary review of post-conviction matters . . . does not excuse the petitioner from raising his claims before that court."). The District Court based this decision on the Sixth Circuit's decision in *Silverburg v. Evitts*, 993 F.2d 124 (6th Cir. 1993). In that case, the Sixth Circuit affirmed the dismissal of a habeas petition for failure to exhaust state remedies "because the petitioner's claims had not been presented to the Kentucky Supreme Court by way of a motion for discretionary review." *Id.* at 126.

While this case was on appeal to the Sixth Circuit, this Court decided *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), which affirmed the basic rule of *Silverburg*: a state prisoner must generally present his claims to a state supreme court in a

petition for discretionary review in order to satisfy the exhaustion requirement for federal habeas relief. *Id.* at 839-40. But in *O'Sullivan*, this Court indicated that state prisoners are required to petition for discretionary review *only* when that review is "part of the ordinary appellate review procedure in the State." *Id.* at 847. This Court thus established that, because the purpose of the exhaustion requirement is to promote federal-state comity, "nothing in the exhaustion doctrine requir[es] federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 847-48; *id.* at 849-50 (Souter, J., concurring); *id.* at 861-62 (Stevens, Ginsburg, Breyer, JJ., dissenting); *see also County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979) ("[I]f neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."). Accordingly, under the reasoning of *O'Sullivan*, there is no general federal rule requiring all state prisoners to petition for discretionary review to the state supreme court. Rather, federal courts must look to the appellate review procedures made available by the state to determine whether state remedies have been exhausted.

Subsequent to *O'Sullivan* but prior to issuance of the Sixth Circuit mandate in this case, the Tennessee Supreme Court promulgated Rule 39, which unambiguously provides that "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." Tenn. S. Ct. R. 39. The Order adopting the Rule expressly provides that the Rule was passed "to clarify" existing law – and not to change a prior rule. The Rule also states that it applies "[i]n all

appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967," *id.*, making clear that the Rule governs Petitioner's case.

With the promulgation of Rule 39, the Tennessee Supreme Court made absolutely clear that discretionary review was not available to Petitioner. The Rule clarifies that Tennessee's highest court takes seriously the limitations of its discretionary review rule, Tenn. R. App. P. 11, and that habeas petitioners and their counsel cannot petition for review of claims simply for exhaustion purposes. That satisfies the rule of *O'Sullivan*. As this Court recognized, to ignore such a clear statement by a state supreme court regarding the availability of certain appellate review procedures "disserves the comity interests underlying the exhaustion doctrine." *O'Sullivan*, 526 U.S. at 847. Tennessee, like other states, has made clear that it does not want the increased burden that would ensue if *all* habeas filings passed first through the doors of its highest court. *See id.* (recognizing that requiring habeas petitioners to file discretionary petitions "may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court"). In light of this Court's decision in *O'Sullivan* and Tennessee Supreme Court Rule 39, it is clear that Abdur'Rahman fully exhausted his state remedies when he presented his prosecutorial misconduct claims, which are indisputably substantial, to the Tennessee Court of Criminal Appeals.

To hold otherwise would perversely fail to accord full weight to a state supreme court's judgment regarding the scope and availability of its appellate review procedures, when the fundamental purpose of the exhaustion requirement is to accord due weight to the decisions of state courts. *See Duncan v.*

Walker, 533 U.S. 167, 178-79 (2001); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). Such a ruling also would create confusion and uncertainty in habeas law. It would allow federal courts to apply exhaustion requirements beyond those recognized by the states themselves, potentially barring the federal courthouse door to state prisoners who follow state directives concerning the availability of state appellate review procedures.

III. A Timely Filed, Exhausted Habeas Claim Should Be Considered On The Merits, Regardless Of The Rule Of Procedure Under Which Consideration Is Sought.

Both the District Court and the Sixth Circuit had the power and the opportunity to allow consideration of Petitioner's prosecutorial misconduct claims. Their failure to do so in this first federal habeas petition in a capital case – despite governing law establishing the clear error of the District Court's exhaustion holding – was clearly erroneous and a grave abuse of discretion.

After the District Court granted Abdur'Rahman's habeas petition and vacated his death sentence, the Sixth Circuit *sua sponte* reinstated that sentence on grounds never argued by the State. 226 F.3d 696, 708 (6th Cir. 2000); 999 F. Supp. at 1101-02. While Abdur'Rahman's petition for a writ of certiorari on that decision was pending, the Tennessee Supreme Court issued Rule 39. Following this Court's denial of that first petition for certiorari, *Abdur'Rahman v. Bell*, 122 S. Ct. 386 (2001), Petitioner promptly moved the Sixth Circuit to amend its judgment and remand to the District Court for further proceedings on his prosecutorial misconduct claims in light of Rule 39. Petitioner also moved for similar relief in the District

Court pursuant to Rule 60(b). Both the District Court and the Sixth Circuit denied Petitioner relief, reasoning that his requests were impermissible successive petitions.

A. Petitioner's Prosecutorial Misconduct Claims Should Be Considered Pursuant To Rule 60(b).

Rule 60(b) entitles Petitioner to relief from the District Court's erroneous procedural bar ruling and to consideration of the merits of his prosecutorial misconduct claim. Petitioner's 60(b) motion cannot be construed as a "second or successive" habeas petition within the meaning of 28 U.S.C. § 2244(b)(1) because the federal courts never adjudicated his prosecutorial misconduct claims on the merits, despite the fact that he raised them in his first attempt to acquire relief from a federal court after fully exhausting the available state remedies.

The Sixth Circuit relied on an inflexible rule that *any* Rule 60(b) motion to vacate a judgment denying habeas is always "the equivalent of a successive habeas corpus petition." *Abdur'Rahman v. Bell*, No. 98-6568, at 2 (6th Cir. Jan. 18, 2002) (citing *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996)). This cannot be squared with this Court's habeas jurisprudence, and is inconsistent with the rule in all of the other Circuits that have addressed the question.[2] As noted above, the crucial factor in determining whether a second

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[2]*See Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (whether motion under Rule 60(b) was equivalent of "second or successive" petition judged on facts of particular case); *United States v. Rich*, 141 F.3d 550, 553 (5th Cir. 1998) (same); *Felker v. Turpin*, 101 F.3d 657, 660 (11th Cir. 1996) (same); *Mathenia v. Delo*, 99 F.3d 1476, 1480 (8th Cir. 1996) (same); *Hunt v. Nuth*, 57 F.3d 1327, 1339 (4th Cir. 1995) (same); *see also Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001) (holding that Rule 60(b) motions do not constitute successive petitions).

attempt to receive federal court review is "second or successive" is whether the claims have ever been adjudicated on the merits. *See Slack*, 529 U.S. at 485-89; *Martinez-Villareal*, 523 U.S. at 644-45. This should hold true regardless of the label attached to that second attempt or the rule of federal procedure under which it is pursued. *See Carey*, 122 S. Ct. at 2140 (looking to "how a state procedure functions, rather than the particular name that it bears," for purposes of the federal habeas statute).

To hold otherwise would create procedural traps for habeas petitioners, who often proceed pro se, and elevate form over substance. Indeed, such a rule would be truly ironic here, where – unlike in *Slack* and *Martinez-Villareal* – the Petitioner actually brought a ripe, fully exhausted claim in his first federal habeas petition, and is merely trying to obtain review of the merits in that very case before judgment is even final. Moreover, such a categorical rule would strip the district courts of their equitable power in all habeas cases to correct mistakes in their judgment pursuant to Fed. R. Civ. P. 60(b)(1), or to remedy judgments that rest on fraud, Fed. R. Civ. P. 60(b)(3). To strip the federal courts of this power would contravene not only Rule 60(b), but the equitable purpose of the writ of habeas corpus.

Because the District Court erroneously dismissed Petitioner's prosecutorial misconduct claims on the ground that he had not exhausted his state remedies, his claims were never adjudicated on the merits. Under these circumstances, Petitioner's Rule 60(b) motion is not a "second or successive" habeas petition. Furthermore, the failure to adjudicate the prosecutorial misconduct claims rests on an erroneous view of the law, precisely the kind of error that Rule 60(b) is intended to give courts the power to correct. The very purpose of the

Rule is to "vest[] power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 234 (1995) ("Rule 60(b) . . . reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity.") (citation omitted). That power should have been exercised here to allow the Petitioner an opportunity to present his substantial claims of prosecutorial misconduct.

B. The Sixth Circuit Should Have Amended Its Judgment And Remanded To The District Court.

In addition, and alternatively, the Sixth Circuit should have granted Petitioner's motion to amend its judgment. The case was not yet final, as the Sixth Circuit had not yet issued its mandate. *See, e.g., Forman v. United States*, 361 U.S. 416, 426 (1960) (an appellate court's ruling is ineffective if "no mandate was ever issued thereon"), *overruled in part on other grounds by Burks v. United States*, 437 U.S. 1 (1978). In this situation, the Sixth Circuit clearly had the power to withhold its mandate and to reconsider its decision.[3] Federal courts exercise this authority where intervening developments call previous judgments and precedents into question. *See, e.g., Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1520 (9th Cir. 1989) (staying

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[3]The Sixth Circuit had withheld its mandate during the pendency of the initial petition for certiorari. This is thus not a situation where the Sixth Circuit would even have had to recall its mandate. *See Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998) (noting appellate courts have the "inherent power to recall their mandates" in extraordinary circumstances).

mandate and granting rehearing on the basis of an intervening statute that caused the Supreme Court to vacate its earlier order granting certiorari); *Alphin v. Henson*, 552 F.2d 1033, 1034-35 (4th Cir. 1977) (withholding mandate and granting rehearing based on intervening change in statutory law). Rule 39 is precisely the sort of substantial intervening development that justifies further consideration, because it establishes the legal error in the District Court's holding that Petitioner failed to exhaust the available state remedies.

The Sixth Circuit did not explain its denial of the motion to amend its judgment. To the extent its ruling was based on the mistaken notion that the motion was somehow a "second or successive" habeas petition, that conclusion is erroneous for the reasons stated above. As with the Rule 60(b) motion, it would elevate form over substance to deny review on the merits of a petitioner's timely filed, properly exhausted claim simply because it was made in the form of a motion to amend the judgment.

To the extent the Sixth Circuit was exercising some discretion in denying the motion to amend its judgment, it was a grave abuse of discretion not to apply existing law to Abdur'Rahman's still pending appeal of his first federal habeas petition. This Court has recognized that a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Federal courts of appeals routinely reverse lower court dispositions for abuse of discretion when they rest on an erroneous view of the law. *See, e.g.*, *Dusenberry v. United States*, 97 F.3d 1451 (6th Cir. 1996) (table decision), *aff'd*, 122 S. Ct. 694 (2002) (finding abuse of discretion when district court denied a motion for lack of jurisdiction in a due process challenge to forfeiture); *Firestone*

v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (holding that district court abused its discretion in denying leave to amend complaint, because it did so without meeting legal requirement of sufficient reason); *James v. Jacobson*, 6 F.3d 233, 242-43 (4th Cir. 1993) (finding abuse of discretion when court fails to exercise discretion based on legal or factual misapprehension); *Deitchman v. E.R. Squibb & Son, Inc.*, 740 F.2d 556, 563-64 (7th Cir. 1984) (holding judge abuses his discretion when his ruling is based on erroneous conclusion of law). Similarly, this Court in *Foman v. Davis*, 371 U.S. 178, 182 (1962), held that a district court's refusal to grant leave to amend was an abuse of discretion because it was based on an erroneous interpretation of Rule 15(b) and the "spirit of the Federal Rules [of Civil Procedure]."

In refusing to remand, the Sixth Circuit abused its discretion by leaving Petitioner no avenue for federal court review of the merits of his constitutional challenges to his death sentence, while letting stand an erroneous holding of procedural default of those very claims. The Sixth Circuit's action here is akin to that condemned by this Court in *Lonchar*, where the Court concluded that "a district court would abuse its discretion" if it allowed an execution to proceed before it could address the habeas petitioner's claims on the merits. *Lonchar*, 517 U.S. at 320. Similarly, it would be an abuse of discretion to permit the execution of Abdur'Rahman without ever affording him a single opportunity to present the merits of his constitutional claims to a federal court.

CONCLUSION

The orders of the Court of Appeals should be reversed and the case remanded to the District Court for consideration of the merits of Petitioner's prosecutorial misconduct claims.

Respectfully submitted,

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