CAPITAL CASE

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 OF PETITIONER ABU-ALI ABDUR'RAHMAN

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in holding, in square conflict with decisions of this Court and of other circuits, that every Rule 60(b) Motion constitutes a prohibited "second or successive" habeas petition as a matter of law.

2. Whether a court of appeals abuses its discretion in refusing to permit consideration of a vital intervening legal development when the failure to do so precludes a habeas petitioner from ever receiving any adjudication of his claims on the merits.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

RULES

OPINIONS BELOW

The two orders of the district court transferring petitioner's Rule 60(b) motion to the court of appeals and holding that the district court lacked jurisdiction to issue a certificate of appealability are unpublished and set forth at J.A. 40-44. The Sixth Circuit's judgments denying petitioner relief on his Rule 60(b) motion and his motion to amend the judgment and remand his prior appeal are embodied in a single unpublished order set forth at J.A. 38-39, which incorporates a prior unpublished order set forth at J.A. 35-37. The district court's prior opinion vacating petitioner's death sentence is published at 999 F. Supp. 1073 (1998) and set forth at J.A. 45-100. The Sixth Circuit's divided opinion reversing is published at 226 F.3d 696 (2000) and set forth at J.A. 101-151.

JURISDICTION

The court of appeals entered its order February 11, 2002. The petition for certiorari was filed March 18 and granted April 22. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

This case involves 28 U.S.C. § 2244(b); Federal Rule of Civil Procedure 60(b); Tennessee Rule of Appellate Procedure 11(a); and Tennessee Supreme Court Rule 39. All are set forth in Appendix A.

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE STATE COURTS

1. In July 1987, petitioner Abu-Ali Abdur'Rahman (formerly James Lee Jones) was convicted in a Tennessee state court for first-degree murder, assault with intent to murder, and armed robbery. The jury and the state courts found that he and his co-defendant, Devalle Miller, went to the apartment of Patrick Daniels, a Nashville drug dealer, with intent to rob Daniels. J.A. 48. The two men entered the apartment and bound Daniels and his girlfriend, Norma Norman, with duct tape. Daniels was stabbed six times with a butcher knife taken from the kitchen;

four of the stabs penetrated his heart and caused a large amount of blood to splatter on the walls and nearby objects; he died of these wounds. *Id.* 103. Norman was also stabbed several times in the back, but she survived. *Id.* 103.

At the sentencing phase of the trial, the prosecuting attorneys contended that petitioner had been "the sticker" (T.T. 1983), the knife-wielder, who killed Daniels "four different times" (T.T. 1939). They relied on co-defendant Miller's testimony as a prosecution witness to this effect, assuring the jury that "Miller told you the truth" (T.T. 1944). In aggravation, they presented evidence of prior convictions for assault with a deadly weapon and for killing a fellow inmate in a federal reformatory (T.T. 1808-23). The jury found three aggravating circumstances—petitioner had prior violent felony convictions; Daniels' murder was especially heinous, atrocious, and cruel; and it was committed during a robbery—and sentenced petitioner to death. Petitioner's conviction and death sentence were affirmed on direct appeal. *State* v. *Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990).

2. The issues now before this Court arise out of evidence, first presented by petitioner in state and federal postconviction proceedings, that the prosecution knowingly used false testimony by Devalle Miller, other deliberately misleading fabrications, and a calculated strategy of concealment and deceit, to get a death sentence by covering up "weaknesses"[1] in the prosecution's case for death. Prosecutor John Zimmermann's multiple acts of misconduct implementing this strategy are too numerous to describe here; they are summarized at pages 10-24 below. The rest of this Statement recounts the course of postconviction proceedings bearing on the procedural question whether—as the Sixth Circuit ultimately held—petitioner is now barred from federal habeas corpus consideration of his prosecutorial misconduct claims.

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[1] The quotation is from a pretrial intra-office report by Zimmermann, acknowledging the weaknesses.

3. Petitioner first sought state postconviction relief, raising federal constitutional claims including ineffective assistance of counsel, prosecutorial misconduct, and unconstitutional jury instructions. The trial court rejected each of these claims.

Petitioner appealed as of right to the Tennessee Court of Criminal Appeals, presenting the same federal constitutional claims. That court rejected petitioner's prosecutorial misconduct claims, concluding that the evidence withheld by the prosecution was not "favorable to the defense." *Jones* v. *State*, CCA No. 01C01-9402-CR-00079, 1995 Tenn. Crim. App. LEXIS 140, at *7 (Tenn. Crim. App. Feb. 23, 1995). Rejecting his other claims as well, the court affirmed denial of postconviction relief.

4. There is no appeal as of right to the Tennessee Supreme Court in postconviction matters. Beyond the Court of Criminal Appeals, the only possibility for review is controlled by Tennessee Rule of Appellate Procedure 11(a) ("TRAP 11"), under which the Supreme Court may grant leave to "appeal by permission." Pursuant to TRAP 11, petitioner's counsel applied for leave to appeal on the basis of petitioner's claims of ineffective assistance and a subset of prosecutorial misconduct claims. The Tennessee Supreme Court denied the application (*Jones* v. *State*, No. 01C01-9402-CR-00079 (Tenn., filed Aug. 28, 1995)), and this Court denied certiorari (516 U.S. 1122 (1996)).

II. INITIAL PROCEEDINGS IN THE FEDERAL COURTS

1. On April 23, 1996, petitioner filed a federal habeas corpus petition. As amended, his petition asserted that he had received ineffective assistance of counsel; that the jury was instructed unconstitutionally at sentencing; and that the integrity of the sentencing phase of the trial was undermined by serious prosecutorial misconduct.

The district court declined to consider the bulk of petitioner's prosecutorial misconduct claims because they had not been presented to the Tennessee Supreme Court in a request for leave to appeal from the Court of Criminal Appeals on post-

conviction review and thus were not exhausted for purposes of 28 U.S.C. § 2254(c). J.A. 53-54. Because the time to seek permission to appeal those claims to the Tennessee Supreme Court had passed, the district court did not dismiss the claims without prejudice and remit petitioner to the state courts. Instead, it held the claims procedurally defaulted (J.A. 60) and proceeded to the merits of his other issues.

The district court rejected petitioner's challenge to the jury instructions (J.A. 69) and his claim of ineffective assistance of counsel at the guilt phase of his trial (J.A. 86-87). It upheld his claim of ineffective assistance of counsel at the sentencing phase. JA 87-100. The latter holding was based upon extensive findings made after an evidentiary hearing held over respondent's objection. *Id.*

2. Respondent appealed to the Sixth Circuit on grounds that challenged only the district court's power to go beyond the state court record or to find sentencing-phase prejudice *without* going beyond the state court record. Petitioner cross-appealed, challenging the district court's conclusions with respect to the jury instructions and the district court's finding that he had not been prejudiced by his counsel's deficient performance at the guilt phase of his trial. J.A. 122, 127, 130.

A panel of the Sixth Circuit rejected every contention made by the parties. On respondent's appeal, it held that the district court did not lack discretion to conduct an evidentiary hearing. J.A. 114-118, 143-144. A two-judge majority also rejected petitioner's claims on his protective cross-appeal. J.A. 123, 127, 130. The same majority then *sua sponte* reversed the district court's finding that petitioner had been prejudiced at sentencing by his lawyer's ineffective assistance, and it vacated the judgment setting aside his death sentence. *Id.* 134.

Petitioner's motion for rehearing and suggestion of rehearing *en banc* were denied. The Sixth Circuit did grant a stay of its mandate to permit petitioner to seek certiorari. Thus, the case was never remanded to the district court, and no final judgment adverse to petitioner was entered in the district court.

3. On May 21, 2001, petitioner filed a petition for certiorari ("the 2001 Certiorari Petition"). He sought review of the Sixth Circuit's election to address the issue of prejudice *sua sponte*, of the substance of the Sixth Circuit's no-prejudice ruling, and of the Sixth Circuit's rejection of his protective cross-appeal with respect to his jury-instruction claim. This Court denied certiorari. 122 S. Ct. 386 (2001).

III. PROCEEDINGS RELATING TO TENNESSEE SUPREME COURT RULE 39

1. While petitioner's case was being briefed in the Sixth Circuit, this Court decided *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999), holding that 28 U.S.C. § 2254(c) requires "state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State." 526 U.S. at 847. The principal interest protected by § 2254(c), the Court explained, is comity, which dictates "that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Id.* at 845. The Court recognized that its rule could create an "increased burden [that] 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," but "note[d] that nothing in [its] decision . . . requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable." *Id.* at 847.

"[I]n response to *O'Sullivan*" (TRAP 11 Adv. Cmte. Comment), the Tennessee Supreme Court adopted that Court's Rule 39 ("TSCR 39") on June 28, 2001, while petitioner's 2001 Certiorari Petition was pending. TSCR 39 explicitly "clarif[ies]" existing law and applies to "all appeals from criminal convictions or post-conviction matters from and after July 1, 1967"—the date on which the state's Court of Criminal Appeals was created and when TRAP 11 went into effect. TSCR 39 provides:

> [A] litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all state remedies available for that claim.

As set forth in the TRAP 11 Advisory Committee Comments, the purpose of TSCR 39 is to make clear that a discretionary application for review in Tennessee is not an available remedy of the sort contemplated by the holding in *O'Sullivan* "that in order to satisfy the exhaustion requirement of collateral federal review under 28 U.S.C. § 2254, a state prisoner must present his or her claims to the state supreme court for discretionary review absent a state court rule or decision to the contrary." TRAP 11 (Adv. Cmte. Comment).

2. Immediately after this Court denied certiorari, petitioner called the lower federal courts' attention to TSCR 39 and moved to pursue the claims that the district court had held unexhausted without the benefit of the clarification of Tennessee law effected by TSCR 39:

a. On the day this Court denied certiorari, petitioner moved the Sixth Circuit to modify its judgment and remand the case to permit the district court to consider the effect of TSCR 39 on the district court's earlier decision.

b. Petitioner also sought relief in the district court. Fed. R. Civ. P. 60(b) permits a court to "relieve a party . . . from a final judgment" under certain circumstances. In petitioner's case, no final judgment had been entered and the case was still pending in the court of appeals, which had not yet entered its mandate following the denial of certiorari. Sixth Circuit precedent, however, permits a party to seek relief in district court under Rule 60(b) while a case is pending on appeal. The district court may

consider a Rule 60(b) motion and, if inclined to grant the motion, issue an opinion inviting the court of appeals to remand the case. See *First Nat'l Bank of Salem* v. *Hirsch*, 535 F.2d 343, 346 (CA6 1976).

Within forty-eight hours of this Court's order denying certiorari, petitioner secured a status conference to advise the district court that a Rule 60(b) motion would be promptly filed to address the impact of TSCR 39 upon petitioner's prosecutorial misconduct claims. Soon thereafter, petitioner filed the motion, raising only those claims that had been contained in petitioner's initial habeas application and that the district court had held unexhausted.

The district court concluded that it could not consider the motion because it was bound by Sixth Circuit precedent holding that a "Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive [habeas] petition." J.A. 40. Pursuant to Sixth Circuit protocol, the district court transferred the motion to the court of appeals for that court to apply the gatekeeping criteria of 28 U.S.C. § 2244(b)(1) and (2). J.A. 40.

3. In two summary orders, the Sixth Circuit denied petitioner the benefit of TSCR 39. It held that the district court had correctly treated petitioner's Rule 60(b) motion as a "second or successive" habeas application. It therefore ruled that the Rule 60(b) motion must be "dismissed" as raising only claims that were "presented in a prior application." See 28 U.S.C. 2244(b)(1). J.A. 35 (Order of Jan. 18, 2002). Finally, the Sixth Circuit rejected petitioner's request that it amend its judgment to permit the district court to consider TSCR 39. J.A. 38 (Order of Feb. 11, 2002).[2]

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[2] The Sixth Circuit decided petitioner's Rule 60(b) motion as an original matter because the motion had been transferred by the district court. Petitioner had sought review in the Sixth Circuit in three further ways: he noticed an appeal to the Sixth Circuit; he sought a certificate of appealability from the district court (which held that it lacked jurisdiction to grant the certificate because the motion had already been transferred to the court of ap-

SUMMARY OF ARGUMENT

Petitioner's claims of prosecutorial misconduct are based upon evidence of a shocking course of conduct deliberately pursued by prosecuting attorney Zimmermann with the aim of hiding acknowledged "weaknesses" in the prosecution's case for death by suppressing some facts and falsifying others to produce a deceptive and grossly inaccurate picture of petitioner's culpability. These are flagrant violations of due process that a federal court is obliged to rectify in habeas corpus proceedings if the state courts do not, and if a habeas petitioner has properly exhausted state remedies.

The district court below initially failed to adjudicate these claims on the merits because it believed that petitioner had *not* exhausted his state remedies. That conclusion was based upon a misunderstanding of state postconviction procedure which has since been dispelled through an unmistakably clear declaration of Tennessee law by the state's highest court, acting in its rulemaking capacity. The rule was promulgated to clarify that applications for permission to appeal to the Tennessee Supreme Court are not properly sought simply for federal exhaustion purposes, because the Tennessee Supreme Court's discretionary jurisdiction is reserved for issues of general importance and is not available for routine postconviction review. As a clarification of existing law, the rule was explicitly made applicable to cases like petitioner's, which had previously been processed through the state's postconviction procedure. It establishes beyond cavil that petitioner *did* exhaust all available state remedies for his federal claims.

The courts below erred in refusing to take account of this clarification of state law when petitioner promptly brought it to their attention and, in light of it, sought an adjudication of the

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peals (J.A. 40)); and he sought a certificate of appealability from the court of appeals. The Sixth Circuit concluded that no appeal would lie because the motion had been transferred rather than decided by the district court. See J.A. 38. The petition for certiorari asserts jurisdiction over all of the Sixth Circuit's rulings.

merits of his previously presented but unadjudicated prosecutorial misconduct claims. The Sixth Circuit's sole ground for the refusal was that petitioner's motions—one to the district court for relief from judgment under Fed. R. Civ. P. 60(b), the other to the court of appeals for a remand before issuance of its appellate mandate—were "second or successive habeas corpus application[s]" raising a previously presented claim and therefore were subject to the mandatory-dismissal rule of 28 U.S.C § 2241(b)(1). This is dead wrong for two independently sufficient reasons. *First*, motions like petitioner's, made in a habeas proceeding filed before AEDPA's effective date, are not governed by AEDPA. *Second*, petitioner's renewed request for *one and only one* federal adjudication of claims not previously determined on the merits would not be a "second or successive habeas corpus application" within § 2241(b)(1) even if AEDPA applied. *Lindh* v. *Murphy* squarely controls the first point; *Stewart* v. *Martinez-Villareal* and *Slack* v. *McDaniel* control the second.

Petitioner is now entitled to have his prosecutorial misconduct claims heard on the merits. Because his habeas case had not yet gone to final judgment but was still pending on appeal when the Tennessee Supreme Court clarified Tennessee law, petitioner comes within the rule that an appellate court's mandate ought not to flout the law as it is clearly understood at the time the mandate issues. And independently of this, his prompt motion for relief from a now demonstrably misinformed nonexhaustion ruling—a ruling that the Tennessee Supreme Court has clarified not only serves no state interest but *disserves* Tennessee's interest in the proper functioning of its postconviction process—brings his compelling due process claims within the proper ambit of Rule 60(b)'s corrective office.

ARGUMENT

I. THE RULINGS BELOW EQUATING PETITIONER'S MOTIONS FOR RELIEF FROM THE LOWER COURTS' JUDGMENTS WITH SUCCESSIVE HABEAS APPLICATIONS FORECLOSE FEDERAL REVIEW OF A COMPELLING CASE OF DENIAL OF DUE PROCESS THROUGH DELIBERATE PROSECUTORIAL FALSIFICATION AND SUPPRESSION OF EVIDENCE CRITICAL TO A FAIR SENTENCING DETERMINATION.

The record establishes the following facts, discovered only after trial, about Assistant District Attorney General John Zimmermann's concealment of information and deceitful manipulation of evidence in an all-out effort to obtain a death sentence against petitioner:[3]

1. Zimmermann knew very well from the outset that—as he testified below—Nashville jurors are "tougher to get death sentences from" than other Tennessee jurors. H.T. 905. They will not impose death verdicts unless, in Zimmermann's words, they can be "sure beyond a shadow of a doubt that the person the state is seeking the death penalty on was in actuality responsible for the murder." *Id*. To get the death penalty, the defendant must be "the shooter or the sticker." H.T. 907. Even then, "you . . . have to explain everything to the jury" about aggravation and the absence of mitigation. "They want that comfort." H.T. 905. To give the jurors comfort on each of these

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[3] The evidentiary record on this issue is complete, but no findings were made by the state courts (which denied the prosecutorial misconduct claims on the merits without comment) or the district court (which declined to consider most of the claims). Here, we summarize what the district court could properly find from the record.

For documentation of Assistant District Attorney General John Zimmermann's extensive history of serious misconduct as a prosecutor, including repeated findings by courts and disciplinary officials that his actions violated basic ethical standards and constitutional norms, see Brief of *Amici Curiae* Former Prosecutors James F. Neal et al. See also J.A. 254-260.

points in petitioner's case, Zimmermann relied upon factual misrepresentation and concealment.

2. In a March 24, 1987 intra-office report, Zimmermann listed several "Weaknesses in [the] Case" for "seek[ing the] death penalty." The only neutral witness, the surviving victim Norma Norman, was blindfolded and "did not actually see" who stabbed the deceased or herself. H. Ex. 42. The only other witnesses to the stabbing were petitioner and the co-defendant Devalle Miller, and "co-defendants . . . always want to point the finger at each other." *Id.*; H.T. 912. The finger could not convincingly be pointed at petitioner because, during the incident, he wore what Ms. Norman called a full-length, black "gangster coat" (T.T. 1332-33, 1334, 1342-43),[4] and the "T.B.I. Lab Report was unable to find any blood staining on the long wool coat worn by [petitioner]." H. Ex. 42; see H. Ex. 9A. Zimmermann recognized that, because "[p]hotographs of the decedent's house show blood spattering all over the kitchen" where the killing took place, "if the defendant did wear his coat . . . *he obviously was not present when the stabbing occurred*."[5]

Zimmermann was left in no doubt on this last point, in light of:

- The autopsy, showing that Patrick Daniels was killed by four stab wounds to the heart, one piercing the aorta—a vessel "about the size of a garden hose" that "carries blood from the heart to . . . the body"—and another piercing an "artery carrying blood to the . . . heart." H. Ex. 16; T.T. 1659.
- Police reports by lead Detective Mark Garafola and others "observ[ing] a large amount of blood splattering on items

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[4] Police seized the "long black coat" at petitioner's home shortly after the incident. H. Ex. 12, at 485.

[5] H. Ex. 42 (emphasis added). In his testimony below, Zimmermann explained that "when you have a murder with this much blood splatter, you would think some would have gotten on the defendant." H.T. 917.

near the victim [and] on the walls, bar, and divider." H. Ex. 1-4.

- Consultation with Detective Garafola (see H. Ex. 110, at 19), who reasoned that the blood splattering occurred following each blow to the heart. H. Ex. 110, at 42-43 ("there was more than one wound and after the first one there probably was blood spurting out of the first wound or the second wound, and if you hit the second or third time it would cause it to splatter").[6]

Given this evidence, Zimmermann realized that there were two, and only two, possible versions of what happened. "Either the defendant removes his coat before he began to stab these people . . . or if the defendant did wear this coat the entire time he obviously was not present when the stabbing occurred." H. Ex. 42. The prosecution's case for death depended on establishing the first of these two scenarios and excluding the second. But then Devalle Miller was apprehended and complicated

[6] Below, Georgia's Chief Medical Examiner, Dr. Kris Sperry, confirmed that each of the four stab wounds to the heart "would have resulted in immediate blood coming forth profusely from the stab wound itself," turning into a "spray" with "each beat of the heart"; that each time the knife was "pulled back," "cast-off" blood would "spray . . . into the immediate environment"; and that additional spray would be caused by "each subsequent" blow to the chest, causing blood "splatter to the area, the hand, the knife, clothing that is on . . . like striking a wet sponge." H.T. 37-39, 77. As a result, any assailant squatting over the prone victim and stabbing him four times in the heart "would have had blood from those wounds transferred to his . . . clothing," particularly, "smears . . . droplets and splatters . . . [c]lustered around the sleeve area of whatever hand was holding the knife." H.T. 37, 77. Dr. Sperry testified that the tests the Tennessee Bureau of Investigation used to examine the coat were extremely sensitive and would find any trace of blood that was present; and that blood stains cannot be washed or dry-cleaned out of wool sufficiently to escape detection without destroying what was, in fact, an intact coat. H.T. 35-36, 59-61.

Zimmermann's task immeasurably by making him aware that the first scenario simply was not true.[7]

3. When Miller was initially questioned about the killing, he gave Zimmermann and Garafola a three-hour oral confession in which he admitted taking part in the assault but blamed the stabbing on petitioner. See H. Ex. 51; T.T. 1612-14. As did Ms. Norman, Miller repeatedly and consistently placed petitioner in the long black coat at the scene.[8] According to Miller's narrative recounting of the events in his confession, as Zimmermann recorded them in his report, petitioner at no time removed the long black coat.[9] Miller's statement tracked the other evidence available to Zimmermann. In a recorded statement to police shortly after the events, Norma Norman's daughter Shonta told them she had "peeped" out of her bedroom into the kitchen on one occasion—after the victim was stabbed but before he died—and *at that crucial moment, petitioner (the "light skinned" man in "glasses") "had on a wool coat."*[10] Moreover, because there was no blood on petitioner's pants or shoes, which were seized along with his coat, it was altogether unlikely that he had stabbed the victim with or without the coat on. H. Ex. 9A, 12, 16.

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[7] Miller fled Nashville after the killing. He was captured in Pennsylvania 14 months later. T.T. 1487, 1605. Petitioner remained in Nashville and was arrested at his job two days after the killing. H. Ex. 110, at 53-59.

[8] Norma Norman: H. Ex. 4; T.T. 1332, 1333, 1334, 1342-43, 1348, 1364, 1366-67. Devalle Miller: H. Ex. 51 (at 160-61); T.T. 1451, 1454-55, 1462.

[9] H. Ex. 42. Although this part of Miller's oral confession is tracked and described in Zimmermann's report, Zimmermann omitted it from an hour-long videotaped interview of Miller that he conducted shortly after the three-hour oral statement. See T.T. 1612-14; H. Ex. 51. The taped interview was turned over to the defense as *Jencks* material, but Zimmermann's report (H. Ex. 42) was suppressed. Zimmermann's report is Appendix B to this brief.

[10] H. Ex. 6. Norma Norman described hearing the assault on Patrick Daniels and moments later hearing him choking on his blood. T.T. 1376-78; H. Ex. 5. Shonta describes "peep[ing]" at the latter point. H. Ex. 6.

Still, Zimmermann was not without resources. When invited to explain how petitioner could have stabbed the victim four times in the heart and come away with no blood on his clothes (see H. Ex. 42), "Miller stated that the stabbing of the deceased did not produce the blood that was spattered, but that the blood that was splattered occurred as the deceased gasped for air after the defendant had gone to the second victim and begun to stab her." H. Ex. 42. This tale of Miller's depended on a premise—that no blood had splattered from Daniels' wounds during the repeated stabbings—which Zimmermann and Detective Garafola knew to be false, given the nature and number of wounds and the blood shower each wound precipitated. But the tale was enough for Zimmermann to run with if he could conceal its lameness.

4. In sentencing-phase summation, the prosecuting attorneys conceded that "*the main issue in this case was who was the sticker, who wielded that knife.*" T.T. 1944. To satisfy a skeptical jury on this point despite what Zimmermann knew, he systematically suppressed the truth and misrepresented the facts:

- Despite discovery motions concededly obliging Zimmermann (in his words) to turn over "anything favorable to the defendant," Zimmermann admittedly decided to withhold: (1) all police reports describing the "large amount of blood splattering on the items near the victim . . . on the walls, bar and divider" (H. Ex. 1-4); (2) his own report concluding that unless petitioner took off his coat, "he obviously was not present when the stabbing occurred" and describing Miller's oral statement that dodged this dilemma by recounting the incredible tale "that the stabbing . . . did not produce the blood that was spattered" (H. Ex. 42); and (3) Shonta Norman's statement that petitioner "had on a wool coat" moments *after* the victim was stabbed (H. Ex. 6). H.T. 903-04, 926-27, H. Ex. 41, 11, 60-63.

- Six months before Miller's confession revealed the significance of petitioner's blood-free clothes, Zimmermann had given petitioner's original lawyer (Neal McAlpin) a copy of the lab report finding no blood on the coat, pants, or shoes. H. Ex. 19. But *after* Miller's confession, when Lionel Barrett replaced McAlpin and again asked for the forensic reports (H. Ex. 39, 41, 63), Zimmermann withheld the blood report (H.T. 930-31), giving Barrett instead an inconclusive report about soil found on petitioner's pants and in the victim's yard (H. Ex. 62). Barrett thus never knew that a large amount of blood splattering was found near the victim's body, nor that petitioner's clothes tested negative for blood (H.T. 292). Tellingly, the prosecutors realized—and remarked to Miller's lawyer at the beginning of trial—how surprisingly little Barrett knew about the facts of the case.[11]
- Zimmermann called Miller to testify to what Zimmermann (and lead Detective Garafola) knew was "obviously" untrue—that petitioner *both* wore the black coat *and* "squatted over [the victim] stabbing him," and that the blood splattered only after the stabber had "backed up off the vic-

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[11] See H.T. 1040-41 (prosecutor Barnard "mentioned that he was surprised how little Mr. Barrett knew or was aware of"; ruled hearsay as to what Barrett knew but not as to what the state knew). Petitioner had also been misinformed on the point. After his arrest, staff members of the mental health facility where he was sent for evaluation told him based on false statements by police that clothes found at his home had blood stains on them. See H. Ex. 151 (at 2), 110 (ex. 77), 42.

The district court ruled (1) that Zimmermann's failure to give Barrett the blood report was not improper because the state had given McAlpin the report (instead, Barrett was ineffective for not getting the file from McAlpin) (J.A. 77, 83); and (2) that Barrett's failure to retrieve the report from McAlpin deprived petitioner of a "good argument" but was not by itself prejudicial at the *guilt* phase – in part because of the possibility that petitioner took off the coat. *Id.* 64. The district court's rulings as to guilt-phase ineffective assistance do not resolve petitioner's claims of sentencing-phase prosecutorial misconduct – particularly because the court refused to consider the suppressed evidence indicating that petitioner wore the coat the whole time.

tim, a couple of feet, and just stood, you know . . . ." T.T. 1451, 1454-55, 1462, 1471, 1472.[12]

- Because "Ms Norman did not actually see [petitioner]. . . stab the deceased" and Zimmermann "needed an eyewitness to the assault," he "recommended . . . that a deal be struck with Mr. Miller." H. Ex. 42; H.T. 912, 932. Miller had been charged with first-degree murder, assault with intent to kill, and armed robbery, carrying a potential death sentence or three consecutive life sentences and a minimum ninety-year term without parole. H. Ex. 44. In a letter to Miller's lawyer *after* trial, Zimmermann described what he had promised "in exchange for" Miller's "agree[ment] to testify against [petitioner]." H. Ex. 92. Miller would be permitted to plead to *two* offenses, "Second-Degree Murder and Armed Robbery," and would receive "*concurrent* sentences" with parole eligibility in *seven and a half years*. H. Ex. 92, 93 (at 8, 47); H.T. 1040-43,1050. But in a formal pleading filed *before* petitioner's trial, Zimmermann described the promise as being only that the state "would not seek the death penalty against Mr. Miller." H. Ex. 67 ("No other promises, inducements, agreements, or other-

[12] Miller testified that he "froze," and petitioner ransacked the living room, "throwing pillows everywhere." T.T. 1467, 1469. Shonta Norman's suppressed statement says it was *Miller* who was "tearing paper and throwing stuff all over the floor and tearing the pillow up." H. Ex. 6. Miller testified that petitioner stabbed the victim in the back while the victim was face down. T.T. 1471-72. The forensic evidence shows "[t]here were no stab wounds involving the back whatsoever"; "there is no evidence at all [that the victim] was ever face down in any way, shape or form." H.T. 48, 41-42, 72-74. Miller testified that the splattering occurred when the victim thrashed wildly, spraying blood "from his nose and mouth." T.T. 1472-73. But see H.T. 42, 57-58 (habeas testimony of Georgia Medical Examiner Sperry: the victim "didn't move appreciably . . . during the course of the stabbing and immediately thereafter"; blood splatter "could not have been produced by blood emanating from the decedent's nose" or mouth; it only "occurred during the course of the infliction of the stab wounds"). For Miller's admission that he repeatedly lied to Zimmermann before trial to keep from "look[ing] more involved," see T.T. 1461, 1504, 1527-28, 1550-51, 1566.

wise have been made or shall be made to Mr. Miller."). Miller then testified repeatedly at trial that this was the "only promise," and Zimmermann gave color to the lie by telling the jury in closing argument that Miller was "guilty of *first*-degree murder." H. Ex. 67; T.T. 1492-95, 1568-70, 1680 (emphasis added).

- Finally and most egregiously, having assured the jury that "Devalle Miller told you the truth," Zimmermann and his partner argued explicitly in summation that petitioner did two things that they knew could not both be true: Petitioner "wore that coat . . . that gangster coat" (T.T. 1672-74); and "at his hands—at his enjoyment," he "kills [the victim] four different times" (T.T. 1944, 1939, 1985).

5. Long before petitioner's trial, this Court had unmistakably informed prosecutors that the rule of Due Process requires them to give defense counsel all exculpatory evidence in their files—whether bearing on sentence or guilt. *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963). Their failure to do so violates the Due Process Clause "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the [guilt or sentencing] proceeding would have been different.'" *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)).

Even earlier than *Brady* this Court made it plain as a pikestaff that prosecutors may not constitutionally "contrive[] a conviction" or a capital sentence "through a deliberate deception of the court and jury." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935). This rule bans "the knowing use of false evidence" and "false testimony" (*Napue* v. *Illinois*, 360 U.S. 264, 269 (1959)); advertent misrepresentation of the nature of physical evidence (see *Miller* v. *Pate*, 386 U.S. 1, 7 (1967)); letting "false evidence . . . go uncorrected when" a co-defendant misstates a deal he struck in return for testifying against the defendant (*Giglio* v. *United States*, 405 U.S. 150, 153 (1971)); and letting stand a witness's evident falsehood that a "diligent" defense lawyer would have impeached but the actual lawyer let

pass (see *Giles* v. *Maryland*, 386 U.S. 66, 74 (1967); *id*. at 82 (White, J., concurring)). In any of these situations, "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

Assistant District Attorney General Zimmermann did all of these things. He suppressed Devalle Miller's and Shonta Norman's statements to police that petitioner wore the coat the whole time. He suppressed four police reports revealing the "large amount of blood splattering on items near the victim" and thus the importance, in deciding who was the stabber, of garments free of blood. He knowingly exploited defense counsel's lack of diligence in discovering the TBI report establishing that petitioner's coat and clothes were not stained with blood. He presented Miller's testimony that the blood splattering came after the fact from the victim's nose, though both he and his chief detective knew that the splattering "was [from] blood spurting out of the first wound or the second wound [when the knife] hit . . . the second or third time" (H. Ex. 110, at 43), and "obviously" (H. Ex. 42) "would have gotten on the defendant" during the stabbing (H.T. 917). He misrepresented his deal with Miller—a seven-and-a-half-year minimum, in place of what could have been a ninety-year sentence without parole—to the court, defense counsel, and the jury, and he let Miller make the same misrepresentation under oath. In the end, Zimmermann and his partner rested their case for death on the professed truth of two factual propositions that they *knew* could not both be true—that petitioner "had the gangster coat on" (T.T. 1673) and that he killed the victim "at his hands—at his enjoyment" (T.T. 1985).

Zimmermann used each of these deceptive stratagems, believing that his chances of procuring a death sentence hinged upon his ability to persuade the jury beyond any doubt that petitioner was "the sticker." He set about to, and he did, construct the necessary tools of persuasion out of Devalle Miller's falsehoods and his own, while withholding evidence that would

have revealed the truth. Such a course of misconduct undoubtedly could have changed the outcome of petitioner's sentencing trial, and probably would have—or so the district court below could properly find if it is free to consider the merits of petitioner's prosecutorial misconduct claims.

6. Beyond who wielded the knife, there were additional issues of aggravation and mitigation to be resolved by the jury. Zimmermann dealt with these issues as well through suppression and misrepresentation.

a. The most important aggravating circumstance (see J.A.120) was petitioner's 1972 conviction for killing a fellow inmate at a federal reformatory. Outside of court, Zimmermann repeatedly expressed concern that the aggravating potential of this incident would be diminished by three facts: (1) As revealed by the 1972 trial transcript, a letter from the prosecutor in the 1972 case, and interviews with the FBI agents who investigated it, "this was . . . a defensive killing because [petitioner] was being the victim of a homosexual attack" (H. Ex. 42; see H. Ex. 15, 34, 45, 48, 49, 66); (2) A psychiatrist testified at the 1972 trial that petitioner was insane at the time of the offense due to a mental disease that caused him to lose control under stress (H. Ex. 131, at 763, 766-70); (3) On these bases, the jury had rejected first-degree murder and convicted of second-degree; and the federal judge had recommended that petitioner receive psychiatric care. *Id.* at 643. Zimmermann proceeded to conceal these aspects of his 1972 aggravator by:

- Suppressing the 1972 trial transcript and the judgment recommending psychiatric care.[13]

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[13] The district court ruled that Zimmermann's withholding of the 1972 transcript violated his obligation to disclose exculpatory evidence, but that this nondisclosure was not material "standing alone." J.A. 73. On the Rule 60(b) motion now at issue, the materiality of any one act of nondisclosure by Zimmermann would not be "considered . . . item by item" (*Kyles* v. *Whitley*, 514 U.S. at 437 & n.10 (1995)), but "collectively" (*id*.) in light of all Zimmermann's acts of subterfuge, concealment, and misrepresentation.

- Misrepresenting the contents of the 1972 transcript and judgment in a letter to the psychiatrists who had been ordered by the trial judge to evaluate petitioner and report to the court. Zimmermann told the psychiatrists that there was "*no evidence from the records submitted to us in that [1972] proceeding that the defendant relied upon an insanity defense at that trial.*" H. Ex. 34; see H. Ex. 28, 36.
- Falsely informing the same psychiatric evaluators that the 1972 incident did not involve homosexual threats and "was a cold blooded premeditated murder" in a "gang" war in the prison. H. Ex. 34.
- Falsely informing defense counsel that if the defense delved into the 1972 murder at trial (which it thereupon did not), an FBI agent "would testify that Petitioner's 1972 conviction was the result of a 'drug turf war,' and not a homosexually-related killing, as Petitioner contended." J.A. 85. As the district court found in addressing petitioner's ineffective-assistance claims, "the 1972 conviction was not over drugs and gangs as represented by the prosecution to defense counsel. The murder concerned homosexual conduct that the jury could have found more mitigating." *Id.*
- Falsely assuring the jury in sentencing-phase summation that the 1972 murder was "deliberate[] with malice aforethought" and involved no "psychiatric examination or . . . extreme emotional disturbance or whatever." T.T. 1979, 1982.

b. Additionally, to jigger the balance of aggravation and mitigation:

- Zimmermann contrived to enhance the aggravating power of petitioner's prior convictions by (1) promising he would not pass indictments to the jurors, but then (2) passing to the jury the indictment underlying petitioner's 1970 juvenile conviction for assault, which revealed other charges.

The Tennessee Supreme Court ruled this gimmick "improper," "border[ing] on deception," but not prejudicial by itself. 789 S.W.2d at 552.

- Zimmermann suppressed a number of statements by Miller saying that Miller and petitioner had not planned the Daniels incident themselves but were taking orders from their employer Alan Boyd and his henchman William Beard, who (as Zimmermann knew) supplied the guns used in the incident, paid Miller to flee the jurisdiction, lied to police about Miller's departure, and (as the district court found) were the leaders of "a nascent religious group that had as its goal 'cleaning up' the African-American community by eliminating illegal . . . drug dealing" (J.A. 74). According to this evidence, Boyd and Beard cooked up the plan for Miller and petitioner to intimidate the marijuana- and cocaine-dealing victim as (in Zimmermann's words) the group's "first vigilante mission" (H. Ex. 42). See T.T. 1800; H. Ex. 15, 57, 93, 110 (ex. 82); H.T. 1039, 1047. Having suppressed the state's failure to investigate these leads (cf. *Kyles*, 514 U.S. at 442, 447), Zimmermann argued to the jury that petitioner had planned the incident himself for entirely venal reasons and that his sentencing-phase testimony about the religious organization was "bunk." T.T. 1837-48, 1982-83.
- Knowing that the defense hoped to rely on emotional distress and mental disorder as mitigating factors (H. Ex. 63, at 600), Zimmermann suppressed: (1) evidence suggesting (as he described it) that petitioner "is plain wacko" and revealing that petitioner "has a long history of institutionalization . . . and at every juncture seems to be shrunk two or three different ways" (H. Ex. 42); (2) the 1972 trial transcript and order recommending psychiatric care based on evidence that he blacks out under stress and has a "borderline" psychosis (see J.A. 95); (3) two law enforcement reports that after his arrest, petitioner "was crying . . . would not respond to our questions . . . started to hit his head on

the table and then he jumped up still handcuffed to the chair and banged his head up against the wall"; "started to bang his head on the wall again"; and later "started banging his head against the floor in the presence of Rev. Turner," requiring petitioner to be placed in a padded cell on "suicide" watch (H. Ex. 7, 8). In an eve-of-trial motion to bar the defense from mentioning petitioner's mental condition to the jury, Zimmermann misinformed the court that the results of petitioner's court-ordered psychiatric evaluation (which had itself been skewed by Zimmermann's misrepresentations to the evaluators) "reflect *no* [emphasis in original] diagnosis of any mental disease, defect, emotional disturbance or even a personality disorder," and that "the co-defendant . . . has no evidence of the same either," notwithstanding the diagnosis of petitioner as insane in the suppressed 1972 transcript, and the prosecutors' own notations on their copy of Miller's statement (in which Miller said petitioner "went from day to night," "was just . . . babbling," was acting "crazy," and was "a maniac") that Miller's description suggested "Insanity & [a] mitigating factor." H. Ex. 73, 51 (at 166-67, 171, 177); H.T. 962. Then, in summation at the capital-sentencing phase, Zimmermann baldly asserted that there was no evidence "of a psychiatric examination"—"you're looking at a depraved man, not someone suffering from severe extreme emotional disturbance, a depraved man." T.T. 1981-82.[14]

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[14] At the sentencing phase, petitioner testified that he could not remember what happened on the night of the killing. T.T. 1865, 1896. Petitioner also testified:

> I can't give you – to you detail to detail on how things transpired insofar as Mr. Daniel Patrick's (sic) death . . . . When I say that, I mean – I'm saying that my mind – I'm not telling you that I was crazy – I'm not saying that I am crazy. But what I am saying is, I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. But I don't remember – you know, I don't remember too much of

7. It is plain that if the jurors had been reliably informed of the facts that the prosecutor suppressed and misrepresented, they would probably not have returned a death verdict by the unanimous vote required under Tennessee law. See *Kyles*, 514 U.S. 419, 433. So petitioner's claims of prosecutorial misconduct are (at the very least) quite strong; and the question now presented is whether he must be categorically barred from receiving federal judicial consideration of their merits because, at an earlier stage of this same federal habeas corpus proceeding, he was barred from merits review by the district court's now-dispelled misunderstanding of an aspect of Tennessee postconviction procedure as that bears upon the exhaustion requirement of 28 U.S.C. § 2254(c).

> why that all of a sudden came to me. All I know is that I'm the man that stabbed Mr. Daniel Patricks (sic) and I'm the man that assaulted Ms. Norma Jean Norman.

T.T. 1864-65. Petitioner's meandering and incoherent testimony leaves entirely unclear whether he is saying he assaulted the victims; that a memory of doing so had just that moment "all of a sudden came to me"; that he only "submits" that he committed the assaults based on what "I learned from the information you [the state] have given" (T.T. 1865, 1895-96); or that he thought (as he at other points says) he was being asked to confirm what other witnesses had said (see T.T. 1893). In the state's closing argument moments after petitioner testified, the prosecutors did *not* claim that petitioner had admitted stabbing the victims, but instead were at pains to convince the jury that petitioner wasn't crazy. TT. 1938, 1981-82. Likewise, the district court found that petitioner "lost his composure" on the stand–crediting testimony by petitioner's trial lawyer that petitioner's bizarre behavior was "'one of the saddest things I have seen in my legal career'" and that due to counsel's "deficiencies," petitioner "was not prepared to go on the stand, [and] . . . because of . . . his mental health problems . . . he just broke down." J.A. 96.

II. PETITIONER'S REQUESTS FOR A MERITS ADJUDICATION OF HIS PREVIOUS, UNADJUDICATED PROSECUTORIAL MISCONDUCT CLAIMS ARE NOT, AS THE SIXTH CIRCUIT ERRONEOUSLY HELD, NONJUSTICIABLE "SECOND OR SUCCESSIVE" HABEAS CORPUS APPLICATIONS.

The prosecutorial misconduct claims summarized in the preceding pages were all presented to the district court below in petitioner's 1996 habeas corpus application but were not adjudicated on the merits.[15] They were deemed unexhausted, and thus procedurally barred, for failure to present them to the Tennessee Supreme Court in an application for discretionary appeal under TRAP 11. Immediately after the Tennessee Supreme Court promulgated TSCR 39, clarifying that TRAP 11 review was not, and never had been, an available state remedy for petitioner, he promptly sought an adjudication of his previously presented, unadjudicated claims, both by a Rule 60(b) motion in the district court and by a motion to the court of appeals to remand to the district court for its consideration of TSCR 39.

The Sixth Circuit closed both routes to the merits. It accepted respondent's argument that "a Rule 60(b) motion is the equivalent of a successive habeas corpus petition." J.A. 38. It also denied petitioner's motion to remand his appeal—in which no mandate had yet been entered—to permit the district court to take account of the supervening effect of Rule 39. *Id.* 38 Although the Sixth Circuit did not explain the latter ruling, it presumably rested on the notion that the remand motion, too, was

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[15] A few other, isolated claims of misconduct were adjudicated on the merits because the district court found them exhausted. These were rejected on the ground that the specific items of undisclosed or improperly handled information involved were not material, "standing alone." J.A. 73. In connection with Rule 60(b) consideration of the overwhelming bulk of petitioner's prosecutorial misconduct claims – those that the district court held unexhausted – the materiality of *all* of the items involved in the numerous unadjudicated claims as well as the few adjudicated ones would have to be assessed "collectively" under *Kyles* v. *Whitley*, 514 U.S. 419 (1995).

equivalent to a successive habeas application for purposes of 28 U.S.C. § 2244(b). The upshot was to categorically bar any federal-court consideration of petitioner's unadjudicated claims, because 28 U.S.C. § 2244(b)(1) requires, without exception or qualification, the dismissal of every "claim presented in a second or successive habeas corpus application . . . that was presented in a prior application."

The Sixth Circuit's rulings are irreconcilable with this Court's precedents and with the basic principles of federal habeas corpus law.

1. This is not a case in which petitioner has failed to do anything required of him in order to preserve his prosecutorial misconduct claims for federal review. From day one, he pursued those claims in precise conformity with state and federal law. Petitioner presented all of his federal constitutional claims—including the prosecutorial misconduct claims—to the state trial court and to the state Court of Criminal Appeals on postconviction review. He then followed the dictates of Tennessee law in seeking permission to appeal to the state supreme court on some claims but not others. TRAP 11, like this Court's Rule 10, provides that permission to appeal will be granted only in narrow, extraordinary circumstances, such as "(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority." TRAP 11(a). These provisions tell the litigant or lawyer who respects them that an application to Tennessee's highest court is not an available remedy for each and every one of a convicted defendant's postconviction claims of federal constitutional error. Petitioner's counsel determined that the screening criteria of TRAP 11 were met only with respect to a subset of his federal constitutional claims, which he raised in his motion for permission to appeal. These did not include the bulk of his prosecutorial misconduct claims, which had been resolved without discussion by the Tennessee Court of Criminal Appeals and involved no is-

sues of general applicability precisely because Zimmermann's misbehavior was so extreme.

After the Tennessee Supreme Court denied petitioner leave to appeal, he properly presented all of his federal constitutional claims in his federal habeas corpus application. The district court found that he had been denied effective assistance of counsel at sentencing and accordingly vacated his death sentence. But it declined to consider most of his claims of prosecutorial misconduct as an alternative or additional ground for sentencing relief because it took the view that his failure to include them in his TRAP 11 motion for permission to appeal rendered them subject to the strictures of 28 U.S.C. § 2254(b), forbidding habeas corpus relief when an "applicant has [not] exhausted the remedies available in the courts of the State." This ruling supposed that an appeal by permission to the Tennessee Supreme Court under TRAP 11 *was* a "remed[y] available" to petitioner within the meaning of § 2254(b) and its companion provision, § 2254(c).

That supposition has been rendered entirely untenable by supervening events. While petitioner's case was pending in the court of appeals on the state's appeal and his protective cross-appeal, this Court decided *O'Sullivan* v. *Boerckel*, holding that a discretionary application to a state's highest court is ordinarily an "available" remedy which must be exhausted under § 2254(b) and (c) but that "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." 526 U.S. at 847-48. And while petitioner's case was pending in this Court on his 2001 Certiorari Petition, the Tennessee Supreme Court accepted the option offered by *O'Sullivan* to make clear that the monitory criteria of TRAP 11 reflect that court's considered policy that it does "not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." *Id.* at 847. It promulgated TSCR 39 as its means of "clarif[ying]" (TSCR Order (June 28, 2001)) that the TRAP 11 criteria are not to be disregarded for the sake of fed-

eral habeas exhaustion, but that a convicted defendant in Tennessee "exhaust[s] all available state remedies . . . when the claim has been presented to the Court of Criminal Appeals" (TSCR 39). And, to clarify that this had always been the correct interpretation of TRAP 11, the Tennessee Supreme Court expressly made Rule 39 applicable to all cases—past, present, and future—processed under TRAP 11 since 1967 when the Court of Criminal Appeals was created.

In light of TSCR 39, petitioner promptly moved (beginning on the very day that his 2001 Certiorari Petition was denied) to obtain a merits adjudication of the prosecutorial misconduct claims that the district court had previously—and now demonstrably incorrectly—held were not properly exhausted.

Again, as at every earlier stage of the proceedings, petitioner faithfully followed the controlling dictates of state and federal law in attempting to secure a single federal habeas adjudication of these claims. The Sixth Circuit did not, and could not, find otherwise or fault petitioner for his diligence and perseverance in preserving the claims. Instead, the Sixth Circuit foreclosed their consideration on the merits by mechanically applying an iron-clad equation of *any* Rule 60(b) motion in a habeas corpus proceeding with a "second or successive habeas corpus application" that must be dismissed automatically under 28 U.S.C. § 2244(b)(1).

2. That equation is doubly wrong. It rests on two premises, both of which are foreclosed by this Court's precedents. The first premise is that the successive-petition provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEPDA"), current 28 U.S.C. § 2244(b)(1), apply to petitioner's Rule 60(b) motion. They do not, because petitioner's application for a writ of habeas corpus was filed in the district court on April 23, 1996, prior to the effective date of AEDPA. See *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997). Of course, *appellate* proceedings instituted after AEDPA's effective date are governed by AEDPA's appeal provisions (*Slack* v. *McDaniel*, 529 U.S. 473, 478 (2000)), but that is because they constitute a

distinct "case" on appeal which is "the relevant case for a statute directed to appeals" (*id*. at 482). Even in post-AEDPA appeals, "*Lindh* requires a court of appeals to apply pre-AEDPA law in reviewing [a] . . . trial court's ruling" on issues presented by a pre-AEDPA habeas petition. *Id*. at 481. And Rule 60(b) motions come squarely within this dictate because the very office of a Rule 60(b) motion is to correct an erroneous judgment previously entered in the *same* case, and Rule 60(b) on its face recognizes that the motion is *not* an "independent action" or new case. "Because the question whether [petitioner's Rule 60(b) motion is to be treated as a] . . . second or successive [habeas petition] implicates his right to relief in the trial court, pre-AEDPA law governs." *Id.* at 486. And *Slack*, as we shall see, also clearly establishes that nothing in pre-AEDPA law bars a Rule 60(b) motion in petitioner's circumstances.

3. This Court has also authoritatively rejected the second premise of the Sixth Circuit's ruling equating petitioner's Rule 60(b) motion with a successive habeas petition—the notion that a federal habeas petitioner's second attempt to secure relief on a previously presented claim is *eo ipso* a "successive application" within § 2244(b)(1) even when the claim was not adjudicated on the merits at the first attempt. On this point, *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack* v. *McDaniel*, *supra*, are controlling. In both of those cases, a federal habeas corpus court declined to reach the merits of constitutional claims on a procedural ground that subsequently ceased to have force, and this Court held that the habeas applicant's renewed effort to obtain a single merits adjudication of his otherwise properly preserved claims could not be turned away as "second or successive."

In *Stewart*, the federal district court had initially granted Martinez-Villareal habeas relief on one claim but dismissed another claim—that he was incompetent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986)—as premature. The court of appeals reversed the grant of relief. Subsequently, Martinez-Villareal filed a motion in the district court "to reopen his

Ford claim," which the district court held to be an impermissible "second or successive" petition. This Court ruled that the district court had erred in so doing. Specifically, the Court rejected the position that, because Martinez-Villareal "already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive.'" 523 U.S. at 643 (quoting Pet. Br. 12)). The error in this position, the Court explained (*id*.), was its failure to recognize that "the only claim on which [Martinez-Villareal] . . . now seeks relief is the *Ford* claim that he presented to the District Court, along with a series of other claims, in [his original habeas application]":

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). *There was only one application for habeas relief*, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. *Respondent was entitled to an adjudication of all the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief*.

Id. (emphasis added). The Court thus distinguished the case before it from "the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application." *Id.* at 645 n.*.

The Court in *Stewart* found particularly persuasive an analogy to the proper treatment of habeas applications that are dismissed for failure to exhaust state remedies, then re-filed following exhaustion. In that circumstance, the subsequently filed petition is not "successive." 523 U.S. at 644. The Court concluded that a claim previously dismissed on procedural grounds such as prematurity "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies." *Id.* The critical fac-

tor for the Court was that "in both situations, the habeas petitioner *does not receive an adjudication of his claim*. 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 (emphasis added).

Slack posed the precise case that *Stewart* had contemplated analogically. Slack's 1991 federal habeas petition was dismissed for non-exhaustion. After exhausting his state remedies, Slack filed a (numerically) second federal habeas petition in 1995:

> The District Court dismissed claims Slack failed to raise in his 1991 petition based on its conclusion that Slack's 1995 petition was a second or successive habeas petition. This conclusion was wrong. A habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition.

Slack, 529 U.S. at 485-86.[16] And of course the very statutory text of AEDPA points to this conclusion: Congress consistently distinguished between "claims" and "applications" and proscribed only successive *applications*, which is to say by necessary implication that a habeas petitioner's presentation of a "claim" on two occasions does not, without more, trigger § 2244. See, *e.g.*, 28 U.S.C. § 2244(b)(1) ("A *claim* presented in a second or successive habeas *application* under section 2254 that was presented in a prior *application* shall be dismissed." (emphasis added)).

4. The Sixth Circuit's equation of a Rule 60(b) motion with a successive habeas application even though the motion

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[16] It is true that *Slack* was decided under pre-AEDPA law. But *Slack*'s reliance on the authority and reasoning of *Stewart*, coupled with *Slack*'s express statement that "we do not suggest the definition of second or successive would be different under AEDPA," 529 U.S. at 486, makes it quite clear that *Slack* would have reached the same conclusion under AEDPA.

raises only issues that were presented but unadjudicated in the original application for the writ would produce a result every bit as "far reaching and seemingly perverse" as that condemned in *Stewart*, 523 U.S. at 644. AEDPA's § 2244(b)(1) categorically requires that any claim presented in a second or successive habeas application that was presented in a prior application "shall be dismissed." The Sixth Circuit's equally categorical holding in petitioner's case, that every Rule 60(b) motion must be treated as a successive application within § 2244(b), means that *no* motions for relief from a habeas judgment can *ever* be granted, even though the judgment was entered through mistake, fraud, or any of the other fundamental (though limited) miscarriages of justice that invoke the traditional power of courts in the Anglo-American tradition "to vacate judgments whenever such action is appropriate to accomplish justice." *Klaprott* v. *United States*, 335 U.S. 601, 615 (1949).

Nothing in the text or legislative history of AEDPA suggests that Congress intended to produce a result so impractically fettering to the federal courts and profoundly unfair to the parties before them. To the contrary, Congress adopted AEDPA against the backdrop of this Court's consistent recognition that a federal court's refusal to consider claims presented in an initial habeas petition "is a particularly serious matter," for it requires denying 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). Due to the "importance of a first federal habeas petition," this Court has made clear that "it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." *Id.* at 330. AEDPA cannot be supposed to have upset these traditional understandings *sub silentio*. Under AEDPA, "[t]he writ of habeas corpus [still] plays a vital role in protecting constitutional rights. In [enacting the statute] . . . Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights . . . ." *Slack*, 529 U.S. at 483.

It is therefore not surprising that every other court of appeals to consider the question has rejected the Sixth Circuit's holding in this case that a Rule 60(b) motion is categorically forbidden as a successive habeas application. Other circuits hold that Rule 60(b) motions never constitute successive applications (see *Rodriguez* v. *Mitchell*, 252 F.3d 191 (CA2 2001)), or that such motions "may," in specific circumstances, be deemed successive applications (see, *e.g.*, *Thompson* v. *Calderon*, 151 F.3d 918, 923 n.3 (CA9 1998): "It suffices to say that a bright line rule equating all Rule 60(b) motions with successive habeas petitions would be improper."). The latter courts focus on whether the Rule 60(b) motion seeks to evade the prohibition against successive applications by (i) raising new claims or evidence, or (ii) relitigating claims that have already been decided on the merits. See *Thompson* v. *Calderon*, 151 F.3d at 921; *United States* v. *Rich*, 141 F.3d 550, 553 (CA5 1998); *Felker* v. *Turpin*, 101 F.3d 657, 660 (CA11 1996); *Mathenia* v. *Delo*, 99 F.3d 1476 (CA8 1996), *cert. denied*, 521 U.S. 1123 (1997); *Hunt* v. *Nuth*, 57 F.3d 1327, 1339 (CA4 1995). It is the approach of these cases, and the appropriate construction of AEDPA, that, so long as a petitioner's claims are entirely set forth in his or her initial "application," and s/he does not seek a second merits adjudication of the claims, "[t]here [is] only one application for habeas relief" (*Stewart*, 523 U.S. at 643-44), and Rule 60(b) consideration is available because the petitioner in those circumstances asks only that the district court "grant the original application" (*Carey* v. *Saffold*, 70 U.S.L.W. 4558, 4563 (June 17, 2002) (Kennedy, J., dissenting)).

5. Under § 2244, as interpreted by this Court in *Stewart*, petitioner's attempts to secure relief on his unadjudicated claims (the "TSCR 39 Claims") are not prohibited "successive" habeas applications. Petitioner relies not upon the technical form of his requests—*i.e.*, the labels "petition for rehearing" in the court of appeals and "Rule 60(b) motion" in the district court—but upon their substance. Petitioner seeks an adjudica-

tion only of his claims of prosecutorial misconduct set forth in his original habeas petition, which the district court never considered on the merits. The factual predicate for those claims was stated in the original petition and developed at the evidentiary hearing on that petition. Nothing petitioner seeks now to have adjudicated *either* (i) goes beyond "the claims presented in his earlier, undoubtedly reviewable, application," *Stewart*, 523 U.S. at 643, or (ii) has yet been adjudicated on the merits in federal court, compare *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998).

The only arguable distinction between this case and *Stewart* is that here the district court, after determining that petitioner's TSCR 39 claims were not exhausted, denied petitioner relief on those claims rather than dismissing them "without prejudice." This distinction wholly lacks substance. Once again, it is essential to look behind labels and to view the parallel rulings in petitioner's case and in *Stewart* in the context of commonplace, customary federal habeas corpus practice.

Ordinarily, a petition that contains at least one unexhausted claim must be dismissed without prejudice to permit exhaustion. *Rose* v. *Lundy*, 455 U.S. 509 (1982). In petitioner's case, the district court held that petitioner's TSCR 39 claims were not properly exhausted. But the court also recognized that "[p]etitioner may no longer present those claims to the state court . . . because they would be barred by the statute of limitations." Given that "[p]etitioner ha[d] no remedy currently available in state court," the district court deemed the TSCR 39 claims to be procedurally defaulted; it dismissed them outright (*id*.); and it proceeded on to consider petitioner's other challenges to his death sentence, one of which it sustained. In support of this practical approach, the district court cited and followed the Sixth Circuit's holding that "[i]f a prisoner fails to present his claims to the state courts and he is now barred from pursuing relief there, his petition should not be dismissed for lack of exhaustion because there are simply no remedies avail-

able for him to exhaust." *Hannah* v. *Conley*, 49 F.3d 1193, 1195-96 (1995).

Nothing about this treatment of the TSCR 39 claims converts petitioner's later requests for *one* merits ruling on them into "successive applications" under the logic of *Stewart*. To the contrary, the ruling denying the TSCR 39 claims because they were unexhausted, and because no state procedures for exhausting them remained open, produced the precise result, for essentially the same reason, as the dismissal without prejudice in *Stewart*: "[I]n both situations, the habeas petitioner [did] . . . not receive an adjudication of his claim." *Stewart*, 523 U.S. at 645.

6. Petitioner's right to an adjudication of his TSCR 39 claims is all the more apparent when this case is viewed within the broader context of the historic role of federal habeas corpus and the aim of the exhaustion doctrine in relation to that role. Federal habeas corpus exists to correct federal constitutional violations that the state courts have failed or declined to correct. The exhaustion doctrine, in turn, "protect[s] the state courts' role in the enforcement of federal law and prevent[s] disruption of state judicial proceedings." *Rose*, 455 U.S. at 518-19. Thus, this Court has recently confirmed that exhaustion "serves AEDPA's goal of promoting 'comity, finality, and federalism,' by giving state courts 'the first opportunity to review [a] . . . claim,' and to 'correct' any 'constitutional violation in the first instance.'" *Carey*, 70 U.S.L.W. at 4560 (quoting *Williams* v. *Taylor*, 529 U.S. 362, 436 (2000)).

In furtherance of these objectives, the federal habeas statute leaves it to the states to define the post-conviction procedures that a prisoner must exhaust as a predicate to pursuing federal habeas relief. *E.g.*, *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991) (a habeas petitioner must satisfy "the State's procedural requirements" for presenting federal constitutional claims); cf. *Carey*, 70 U.S.L.W. at 4560 ("it is the State's interests that [AEDPA's] . . . tolling provision seeks to protect, and the State, through its Supreme Court decisions or legislation,

can explicate timing requirements more precisely should that prove necessary"). Consequently, as this Court held in *O'Sullivan*, a federal habeas petitioner is required to invoke "one complete round of the State's established appellate review process" (526 U.S. at 845), but, concomitantly, federal law does *not* require "the exhaustion of any specific state remedy when a state has provided that that remedy is unavailable" (*id.* at 847).

Tennessee, for its part, has long chosen not to provide a right of appeal to its state supreme court in post-conviction matters. Instead, it has opted for a system in which the state's highest court reviews applications for permission to appeal and grants them only in limited classes of cases involving important legal issues. Litigants and lawyers are advised of these limits and expected to respect them. See TRAP 11. Prior to this Court's decision in *O'Sullivan*, Tennessee had never explicitly articulated the state's view of the relationship between its discretionary application-for-permission process and the federal exhaustion requirement. In response to *O'Sullivan*, however, the state clarified that an application for permission to appeal is not an "available" remedy for purposes of preserving claims for federal habeas corpus review. Rather, a defendant "exhaust[s] all available state remedies . . . when the claim has been presented to the Court of Criminal Appeals." TSCR 39. And, rather than adopting a new rule with prospective application, the state pointedly declared that TSCR 39 reflects existing law, applicable to "all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967." *Id.*

Through rules such as TRAP 11 and TSCR 39, Tennessee seeks to channel "the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Coleman*, 501 U.S. at 749 (quoting *Reed* v. *Ross*, 468 U.S. 1, 10 (1984)). In particular, Tennessee has now made plain that its long-standing system of screening putative appeals can best achieve its aim—to preserve the resources of its supreme court—by discouraging lawyers from filing applications for permission to appeal that do not come

within the restricted categories of TRAP 11. And its promulgation of TSCR 39 on June 28, 2001, has made particularly plain that its procedures are designed to discourage the filing of applications simply for the purpose of federal exhaustion—applications that waste the time of the Tennessee Supreme Court in reviewing claims that even the lawyers who tender them do not believe meet the requirements of TRAP 11.

The clarification of Tennessee law effected by TSCR 39 established explicitly, authoritatively, and unequivocally that the ground on which the district court had previously refused to consider petitioner's TSCR 39 claims was misguided. Petitioner thereupon advised the courts below of the supervening promulgation of TSCR 39, and requested adjudication of the merits of his federal claims that TSCR 39 had clarified were exhausted. The ensuing persistence of the courts below in enforcing an exhaustion rule contrary to Tennessee's clear pronouncement of the way it wants its own postconviction system to work is an affront to that state's self-determination and a subversion of its interests. This is "a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer* v. *Black*, 503 U.S. 222, 235 (1992).

Without the support of any state interest—and, indeed, in the face of the Tennessee Supreme Court's declaration that it *contravenes* an important interest of the State of Tennessee—the theory of exhaustion on which the district court refused to consider petitioner's TSCR 39 claims can no longer be thought to justify denying him a federal habeas corpus determination of the merits of those claims. This Court has said repeatedly that "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence" and remains "a bulwark against convictions that violate 'fundamental fairness.'" *Engle* v. *Isaac*, 456 U.S. 107, 126 (1982). See, *e.g.*, *Slack*, 529 U.S. at 483; *Smith* v. *Bennett*, 365 U.S. 708, 712 (1961). Petitioner has properly preserved and pleaded claims of egregious violations

of fundamental fairness, and he should have a federal court's adjudication of those claims.

III. PETITIONER IS ENTITLED TO AN ADJUDICATION OF THE MERITS OF HIS PROSECUTORIAL MISCONDUCT CLAIMS.

What we have said so far argues for reversal of the Sixth Circuit's rulings rejecting petitioner's Rule 60(b) motion and his appellate remand motion on the grounds that these are successive habeas applications barred by AEDPA's § 2244(b). If this Court decides no more than this, then it will presumably remit the case to the two lower courts in which the respective motions were presented, with appropriate instructions for those courts to consider the remaining procedural issues in the first instance—whether the court of appeals should remand the initial appeal to the district court, and whether the district court should signify to the court of appeals its inclination to entertain the Rule 60(b) motion. But we believe that this record affirmatively establishes petitioner's entitlement to a merits adjudication of his TSCR 39 claims, and we urge this Court to so hold, on either or both of the following grounds: First, because petitioner promptly sought relief in the court of appeals before the mandate issued on appeal following denial of his 2001 Certiorari Petition, the Sixth Circuit was obliged to modify its judgment and to remand the case in light of the Tennessee Supreme Court's controlling pronouncement of state law in TSCR 39. Second, under Fed. R. Civ. P. 60(b) petitioner is entitled to "relief from [the] judgment" of the district court dismissing his prosecutorial misconduct claims without consideration of their merits.

A. The court of appeals erred in refusing to modify its judgment and remand the case to the district court for further consideration in the light of TSCR 39

Before the Sixth Circuit issued its mandate on appeal, the Tennessee Supreme Court had promulgated TSCR 39, and petitioner moved the court of appeals to modify the judgment to take account of TSCR 39. It is hornbook law that until the

mandate is issued, the case "remains within the jurisdiction of the court of appeals" (WRIGHT, ET AL., FEDERAL JURISDICTION 2d § 3987 (1999)) and the judgment is not "final" (*id.* § 3987.1). An appellate court's ruling is ineffective if "no mandate was ever issued thereon" (*Forman* v. *United States*, 361 U.S. 416, 426 (1960)), for the mandate has "controlling significance, for appellate purposes" (*Commissioner* v. *Estate of Bedford*, 325 U.S. 283, 285-86 (1945)). See, *e.g.*, *Mary Ann Pensiero, Inc.* v. *Lingle*, 847 F.2d 90, 97 (CA3 1988) ("An appellate court's decision is not final until its mandate issues."). And the fact that the mandate has not issued takes on even greater significance in the context of federal habeas corpus, because it is upon the issuance of the mandate that the state is "entitled to the assurance of finality." *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998).[17]

Given that the mandate had not issued at the time petitioner sought relief in the court of appeals, and furthermore that no judgment had been entered against petitioner by the district court, the Sixth Circuit was obliged to give effect to TSCR 39. It is a basic principle of appellate procedure that "a court is to apply the law in effect at the time it renders its decision." *Bradley* v. *Richmond Sch. Bd.*, 416 U.S. 696, 711-12 (1974). "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 n.16 (1801) (Marshall, C.J.); see *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 312-14 (1964) (citing cases). This Court, for example, will vacate and remand a decision of a court of appeals to give effect to an intervening change in state law, rec-

[17] In consideration of the state's interest in finality, *Calderon* held that a petitioner must make a "strong showing of 'actual innocence'" in order to justify a court of appeals recalling its mandate to "revisit the merits of its earlier decision denying habeas relief." 523 U.S. at 557. That standard is inapposite here for the double reason that the mandate in petitioner's case had not issued and petitioner does not seek reconsideration of a prior merits adjudication.

ognizing that "a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." *Lords Landing Village Condo. Council of Unit Owners* v. *Cont. Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam). See also *Thomas* v. *Am. Home Prods.*, 519 U.S. 913 (1996) (per curiam).

Because of the controlling significance of the appellate mandate, it makes no difference that petitioner requested that the court of appeals amend its judgment after this Court had denied the 2001 Certiorari Petition. During the period in which a petition for certiorari is pending in this Court, the lower courts are powerless, or at the least very unlikely, to grant such a request for relief. Petitioner properly moved the Sixth Circuit to amend the judgment as soon as this Court denied certiorari. In these circumstances, the courts of appeals uniformly recognize that the denial of certiorari does not affect their power and duty to modify their judgments to account for intervening legal developments. See, *e.g.*, *Sargent* v. *Columbia Forest Prods.*, 75 F.3d 86 (CA2 1996); *First Gibraltar Bank* v. *Morales*, 42 F.3d 895 (CA5 1995); *Bryant* v. *Ford Motor Co.*, 886 F.2d 1526 (CA9 1989), *cert. denied*, 493 U.S. 1076 (1990); *Zipfel* v. *Halliburton Co.*, 861 F.2d 565 (CA9 1988); *Alphin* v. *Henson*, 552 F.2d 1033 (CA4) (per curiam), *cert. denied*, 434 U.S. 823 (1977).

Manifestly, in the unique circumstances of this case, the court of appeals erred in not amending its judgment to permit the district court to consider the TSCR 39 claims. The promulgation of TSCR 39 after the district court's rejection of those claims for non-exhaustion but before the appellate mandate had issued in petitioner's case nullified completely, decisively, and by a black-letter rule of unmistakable meaning and applicability, the entire premise for the non-exhaustion ruling. With his first and only federal habeas proceeding not yet final, petitioner

was entitled to the benefit of the Tennessee Supreme Court's correction of the fundamentally wrong premise upon which he had been denied consideration of compelling evidence that his death sentence was the product of unconscionable prosecutorial contrivance in violation of due process.

B. Petitioner was entitled to consideration of his now demonstrably exhausted prosecutorial misconduct claims under Fed. R. Civ. P. 60(b)

Even if the court of appeals was not obliged to amend its judgment, petitioner was entitled under Fed. R. Civ. P. 60(b) to relief from the district court's misguided ruling that his TSCR 39 claims were unexhausted, once the state law error underlying that ruling was demonstrably established by a definite pronouncement of the state's highest court.

1. Rule 60(b) is the modern embodiment of the federal courts' inherent authority under Article III of the Constitution to exercise "power over [their] own judgments" (*United States* v. *Ohio Power Co.*, 353 U.S. 98, 99 (1957) (per curiam)), including the power to correct those judgments. As such, the Rule "does not provide a new remedy at all," but rather is "simply the recitation of pre-existing judicial power." *Plaut* v. *Spendthrift Farm*, 514 U.S. 211, 234-35 (1995).

This immemorial judicial power is traditionally flexible and sufficiently resilient to take account of unforeseen contingencies. "In simple English," the Rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klaprott* v. *United States*, 335 U.S. 601, 614-15 (1949). As this Court recently confirmed, the Rule "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.'" *Plaut*, 514 U.S. at 233-24 (quoting *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). See also *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988).

2. Rule 60(b) applies in habeas cases. The habeas jurisdiction is essentially an equity forum (see, *e.g.*, *Schlup* v. *Delo*, 513 U.S. 298, 319 (1995); *Gomez* v. *United States District Court*, 503 U.S. 653, 653-54 (1992)), and it is inconceivable that courts exercising such jurisdiction would *not* have the inherent power traditionally possessed by all other courts to correct their own judgments to avert injustice. Nothing in AEDPA (or any other habeas statute enacted by Congress) restricts the district courts' authority to apply Rule 60(b). Instead, when enacting AEDPA, Congress crafted specific restrictions on the presentation of "successive" habeas applications, which are not applicable to petitioner's case. See Part II, *supra*.[18] In addition, this Court has limited the retroactive application of supervening judicial decisions by the doctrine of *Teague* v. *Lane*, 489 U.S. 288 (1989), which provides that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced" (*id*. at 310). This Court has accordingly stated that it is the *Teague* doctrine that constrains the application of Rule 60(b) in habeas cases. *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997). Cf. *Browder* v. *Director*, 434 U.S. 257 (1978) (expressly holding that Fed. R. Civ. P. 52 and 59 apply on habeas and suggesting that Rule 60(b) applies as well).

Nor is habeas a forum in which judgments are uniquely immune from subsequent correction. To the contrary, it is a "familiar principle that *res judicata* is inapplicable in habeas proceedings," for "[a]t common law, the denial by a court or judge of an application for habeas corpus was not *res judicata*."

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[18] Indeed, because Rule 60(b) embodies the federal courts' inherent power under the Constitution to correct erroneous and inequitable judgments, the suggestion that Congress implicitly restricted the power in habeas cases would raise a substantial constitutional question. Under the doctrine of constitutional avoidance (see, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 299-304 (2001); *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000)), AEDPA could not properly be construed as imposing such a restriction in the absence of an explicit and clear statement to that effect. And of course AEDPA contains no such thing.

Sanders v. *United States*, 373 U.S. 1, 7-8 (1963) (collecting cases). Except to the extent expressly provided by Congress and this Court's jurisprudence, "[c]onventional notions of finality of litigation" do not constrain the writ. *Id.* at 8. This Court's decisions accordingly "preclude application of strict rules of res judicata" in habeas (*Schlup*, 513 U.S. at 319) and instead embrace rules having the necessary flexibility to "accommodate[] both the systemic interests in finality, comity and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case'" (*id*. at 322).

Thus, although Rule 60(b) may not be applied so as to circumvent the restrictions on successive applications or the *Teague* doctrine, the Rule indisputably applies in habeas. That has been the uniform conclusion of every court of appeals to consider the question other than the Sixth Circuit in this case. And that conclusion makes good practical sense. District courts confront a wide variety of circumstances necessitating modifications to their judgments in habeas corpus cases, whether in favor of the state or the petitioner. The broad authority conferred by Rule 60(b) provides essential flexibility to adapt to these circumstances. To take only the most obvious examples, it cannot reasonably be disputed that a district court must retain the power to correct a "mistake" in its judgment (Fed. R. Civ. P. 60(b)(1)) or to modify or reverse a judgment that rests on outright fraud (*id.* 60(b)(3)). But the Sixth Circuit's holding in this case would deem even those most basic applications of the Rule prohibited "successive" applications.

3. A comprehensive review of the lower courts' decisions applying Rule 60(b) in habeas proceedings demonstrates both the need for the Rule in this context and the extraordinary responsibility with which the courts have exercised the power that the Rule embodies. Courts have warily scrutinized claims that intervening changes in the law justify relief from judg-

ment.[19] They have also enforced stringent requirements to assure that meritorious Rule 60(b) motions are filed promptly.[20]

In one case, a district court granted Rule 60(b) relief because its decision was erroneous and, by dismissing the petition "without prejudice," deprived the petitioner of any opportunity to appeal. *Whitmore* v. *Avery*, 179 F.R.D. 252 (D. Neb. 1998). In another, the court granted 60(b) relief to further consider the habeas petitioner's claims in light of evidence developed at a hearing for a co-defendant. *Montalvo* v. *Portuondo*, No. 97 Civ. 3336 (RWS), 2001 U.S. Dist. LEXIS 10,686 (S.D.N.Y. July 30, 2001). It is settled, however, that the grant of habeas relief to a co-defendant is not a sufficient ground to justify relief under Rule 60(b). *E.g.*, *High* v. *Zant*, 916 F.2d 1507 (CA11 1990).

Only two classes of cases have recurred:

- District courts sometimes discover that their dismissal of a habeas petition rested on a legally erroneous standard, such as an unduly stringent statute of limitations. When the error becomes apparent, the court may reinstate the petition under Rule 60(b), although it will carefully examine whether the petitioner delayed in seeking relief.[21]
- Habeas petitioners sometimes fail to receive notice that their petitions have been dismissed. District courts scrutinize such claims carefully but, if satisfied that the peti-

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[19] See, *e.g.*, *Jones* v. *Murray*, 976 F.2d 169 (CA4 1992); *United States* v. *Hernandez*, 158 F. Supp. 2d 388 (D. Del. 2001).

[20] See, *e.g.*, *Rodriguez* v. *Mitchell*, 252 F.3d 191 (CA2 2001).

[21] This scenario occurred when the Second Circuit joined the other courts of appeals in holding that habeas petitioners were entitled to a one-year grace period to comply with AEDPA's statute of limitations. *Ross* v. *Artuz*, 150 F.3d 97 (1998). District courts that, based on prior circuit precedent, had previously applied a more stringent timeliness standard to dismiss habeas petitions, vacated their dismissals for petitioners who promptly sought relief under Rule 60(b). See *Matos* v. *Portuondo*, 33 F. Supp. 2d 317 (S.D.N.Y. 1999); see also *Robles* v. *Senkowski*, No. 97 Civ. 2798 (MGC), 1999 U.S. Dist. LEXIS 11,565 (S.D.N.Y. July 30, 1999) (following *Ross* v. *Artuz*, 150 F.3d 97 (CA2 1998)).

tioner is truly without fault, will apply Rule 60(b) to vacate and re-enter a judgment in order to restart the petitioner's time to appeal.[22]

As a general provision of civil procedure, Rule 60(b) is, of course, equally available to habeas respondents and petitioners. Both state and federal government attorneys have successfully availed themselves of the rule to *reinstate* criminal judgments that federal habeas courts had improvidently overturned. In *Ritter* v. *Smith*, the Eleventh Circuit had previously held that an Alabama statute imposing a mandatory death sentence was unconstitutional, and the court had issued its mandate. See 811 F.2d 1398, 1399-1400 (1987). The district court accordingly entered an order requiring Alabama to resentence Ritter within 180 days. *Id.* at 1400. One week later, this Court granted certiorari to resolve a conflict between the Eleventh Circuit's decision invalidating the statute and a decision of the Alabama Supreme Court upholding the statute. After this Court issued its opinion holding that the statutory scheme was not facially unconstitutional (*Baldwin* v. *Alabama*, 472 U.S. 372 (1985)), the state—which had received an extension of the time to resentence Ritter—moved under Rule 60(b)(6) for relief from the district court's judgment on the basis of *Baldwin*. The district court granted the motion and the Eleventh Circuit affirmed. The court of appeals explained that "the circumstances [were] sufficiently extraordinary to warrant relief under Rule 60(b)(6)" (811 F.2d at 1401), not only because of the intervening change in the law, but also because "the previous, erroneous judgment of this court had not been executed" (*id.*), "there was only minimal delay between the finality of the judgment and the motion for Rule 60(b)(6) relief" (*id.* at 1402), there was a "close

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[22] Compare *Elmore* v. *Henderson*, No. 85 Civ. 0579, 1989 U.S. Dist. LEXIS 8742 (S.D.N.Y. July 28, 1989) with *Greenawalt* v. *Stewart*, 105 F.3d 1268 (CA9 1997) (per curiam) (finding no extraordinary circumstances that would justify vacating district court order denying habeas petition for failure to exhaust all claims when *pro se* petitioner received timely notice of order but failed to appeal).

relationship" between petitioner's case and *Baldwin* (*id.*), and "considerations of comity argue for the relief urged by the state" (*id.* at 1403). In rejecting Ritter's argument that states are not entitled to Rule 60(b)(6) relief, the court observed that "[w]ere the roles in this case reversed, it is clear that [petitioner] could have received the benefit of an intervening favorable Supreme Court ruling." *Id.* at 1404.[23]

Similarly, in *United States* v. *Ginsburg*, 705 F. Supp. 1310, 1325 (N.D. Ill. 1989), the district court had previously granted relief on Ginsburg's § 2255 motion, but the government filed a motion to reconsider—which the district court construed as a motion under Rule 60(b)(6)—in light of subsequent, directly contrary Seventh Circuit precedent. The district court acknowledged that post-judgment changes in law generally do not warrant re-opening a case pursuant to Rule 60(b)(6). But emphasizing that "'this is not an inexorable rule'" (quoting 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2864, at 223 (1973)), the court vacated its earlier order and dismissed Ginsburg's petition on the merits. Manifestly, if Rule 60(b)(6) were to be held inapplicable in the habeas context, that would undermine state and federal interests as well as petitioners'.

4. Although "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief" under Rule 60(b) (*Agostini* v. *Felton*, 521 U.S. 203, 239 (1997)), petitioner's case is truly extraordinary. Not only are the equities exceptional, but the circumstances—a state supreme court's promulgation of a definitive procedural rule that unquestionably demonstrates the error of a federal habeas court's decision barring consideration of the merits of a manifestly substantial and otherwise properly preserved constitutional claim—will rarely recur.

The district court's dismissal of petitioner's TSCR 39 claims was "ruled by state law" (*Lords Landing*, 520 U.S. at

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[23] Compare *Booker* v. *Singletary*, 90 F.3d 440 (CA11 1996) (affirming denial of state's Rule 60(b)(6) motion, based on intervening change in law, when the state had not demonstrated "extraordinary circumstances").

896) in the strong sense of depending entirely upon the federal judge's interpretation of the applicable state rule. The district judge interpreted the state law rule to be that an application for permission to appeal was an available remedy under Tennessee law for purposes of the exhaustion doctrine because the state courts had not expressly delineated the limitations of that remedy or their implications for exhaustion. Unfortunately, the district judge got Tennessee law exactly wrong. Recognizing the possibility of such mistakes and seeking to avert their burdensome and harmful consequences under *O'Sullivan*, the Tennessee Supreme Court has now acted to make them impossible. TSCR 39 is a categorical and unambiguous pronouncement by the state's highest legal authority in its rulemaking capacity that an application for permission to appeal is not, and never has been, an available remedy under Tennessee postconviction procedure.

Accordingly, this is not a case in which a federal habeas applicant seeks to reopen a decision on the merits of any of his claims or even to reopen a procedural preclusion ruling on the basis of some supervening state court decision that requires close reading and analysis to collate with previous state court caselaw. To the contrary, TSCR 39 provides the rare kind of "clear guidance from state law" that completely obviates the need for complex or protracted "federal litigation." *Carey*, 70 U.S.L.W. at 4564 (Kennedy, J., dissenting). Cf. *Kirby Forest Indus.* v. *United States*, 467 U.S. 1, 18-19 (1984) (holding 60(b) relief appropriate in light of the straightforward nature of a change in circumstances).

This case presents additional extraordinary circumstances that are generally absent when a losing party invokes an intervening legal development as a basis for relief under Rule 60(b). In combination, these circumstances justify relief under even the most stringent standard of what "is appropriate to accomplish justice." *Klaprott*, 335 U.S. at 615. Petitioner is sentenced to death, and the judgment that he seeks to reopen is one which—erroneously, as is now clear—foreclosed his single op-

portunity to demonstrate in federal court that that sentence is the product of a gross violation of due process. The state, by contrast, would suffer little harm from the reopening of the judgment. The only cost to the state—litigating petitioner's claims of prosecutorial misconduct once on the merits in federal court, and on a record already made[24]—is the minimum cost that attends every habeas petition, and is one that the federal habeas statutes deem acceptable in order to enforce federal constitutional rights when, as in this case, the petitioner has complied with his responsibility to properly present his claims to the state and federal courts.

Equally important and unusual, institutional interests weigh heavily in favor of granting petitioner Rule 60(b) relief. Whatever interest the prosecution may have in enforcing petitioner's death sentence without federal adjudication of its constitutionality, that interest is counterbalanced by the *state* interest that TSCR 39 and its explicit application to pre-promulgation cases like petitioner's were designed to promote. As we have noted above, the enforcement of the district court's errant non-exhaustion ruling in this case disserves the very comity interests that the ruling was supposed to serve when made. The district court sought only to protect the Tennessee Supreme Court's opportunity to adjudicate petitioner's federal constitutional claims in the first instance. But TSCR 39 has now made clear that the Tennessee Supreme Court regards that opportunity as a *disadvantage*—as a profligate expenditure of the time and labor it requires state supreme court justices to spend culling claims that do not meet the state's criteria for securing permission to appeal.

Even absent such exceptional circumstances, when a federal ruling turns upon state law, the courts of appeals have generally recognized that a federal court's misapprehension of the

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[24] Because the record is complete, there is no risk that delayed fact-finding will adversely affect the quality of the evidence bearing on petitioner's TSCR 39 claims, to the detriment of either party or the inconvenience of the courts.

applicable state law rule may be remedied under Rule 60(b) if it becomes apparent only after the ruling—especially when, as here, the state event which makes the error manifest occurs before the federal judgment has become final. *Sargent* v. *Columbia Forest Products, Inc.*, 75 F.3d 86 (CA2 1996) (Winter, J.); *Overbee* v. *Van Waters & Rogers*, 765 F.2d 578 (CA6 1985); *Lairsey* v. *Advance Abrasives Co.*, 542 F.2d 928 (CA5 1976) (Godbold, J.); *Pierce* v. *Cook & Co.*, 518 F.2d 720 (CA10 1975) (en banc); *see also Cincinnati Ins. Co.* v. *Fritzbeyers*, 151 F.3d 574 (CA6 1998); *McGrath* v. *Potash*, 199 F.2d 166 (CADC 1952) (Prettyman, J.); *Manhattan Cable Television, Inc.* v. *Cabledoctor, Inc.*, 824 F. Supp. 34 (S.D.N.Y. 1993). On the other hand, if substantial time has passed after the federal judgment became final, the equities may tip in favor of denying Rule 60(b) relief. See, *e.g.*, *DeWeerth* v. *Baldinger*, 38 F.3d 266 (CA2 1994).

The timeliness of petitioner's Rule 60(b) motion thus takes on considerable significance in demonstrating his entitlement to relief. There is a stark contrast between this case and those in which a Rule 60(b) movant seeks relief "years beyond" a final judgment (*Agostini*, 521 U.S. at 256 (Ginsburg, J., dissenting)). Less than forty-eight hours after this Court denied petitioner's 2001 Certiorari Petition, he obtained a status conference and advised the district court of his intention to file a Rule 60(b) motion. And the motion itself was filed only three weeks later—*before* the court of appeals issued its mandate; *before* the district court entered any final judgment; and *before* this Court's denial of rehearing of its order denying certiorari, an event that has special significance in Tennessee death penalty jurisprudence because, under Tennessee law, it marks the first time at which the state may set an execution date. See Tenn. S. Ct. R. 12.4; *Coe* v. *State*, 17 S.W.3d 191, 192 (Tenn. 1999).

CONCLUSION

From the time petitioner's postconviction counsel discovered the unethical and unconstitutional machinations that prosecuting attorney John Zimmermann used to procure peti-

tioner's death sentence, they have brought these violations of due process to the attention of the state and federal courts in compliance with the rules of postconviction procedure of each court system, and with unflagging diligence. The failure of the federal district court to consider the merits of petitioner's claims of prosecutorial misconduct was a result of that court's misunderstanding of Tennessee postconviction procedure. The Tennessee Supreme Court has since acted to eliminate any possible basis for such a misunderstanding; and under this Court's precedents—principally, *Stewart* v. *Martinez-Villareal*—there remains time to rectify the consequences of the misunderstanding before they become fatal. This Court should instruct the courts below to do so.

Respectfully submitted,

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July 10, 2002

RELEVANT STATUTORY PROVISION AND RULES

28 U.S.C. § 2244. Finality of determination

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appeal-

able and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

Fed. R. Civ. P. 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Tenn. App. Proc. Rule Rule 11. Appeal by Permission from Appellate Court to Supreme Court.

(a) Application for Permission to Appeal; Grounds. -- An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

Advisory Commission Comments.

* * *

Pursuant to Rule 39, Rules of the Tennessee Supreme Court, an appellant in a criminal case will be deemed to have exhausted all available state remedies respecting a claim of error following an adverse decision by the Court of Criminal Appeals without the necessity of filing a petition to rehear or an application for permission to appeal under Tenn.R.App.P. 11(a). The Tennessee Supreme Court adopted Rule 39 in response to *O'Sullivan v. Boerckel* , 526 U.S. 838 (1999), in which the U.S. Supreme Court held that in order to satisfy the exhaustion requirement of collateral federal review under 28 U.S.C. § 2254, a state prisoner must present his or her claims to the state supreme court for discretionary review absent a state court rule or decision to the contrary. This Advisory Commission Comment is to alert attorneys to Rule 39, Rules of the Tennessee Supreme Court, which works no change to Tenn. R. App. P. 11 itself.

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

IN RE: ORDER ESTABLISHING RULE 39, RULES OF THE SUPREME COURT OF TENNESSEE: EXHAUSTION OF REMEDIES

In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power, Tenn. R App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.

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

the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

FOR THE COURT:

Riley Anderson, Chief Justice