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 THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MASSACHUSETTS, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit properly held, consistent with 28 U.S.C. § 2244 and the decisions of this Court, that a Rule 60(b) motion that seeks collateral review of a State criminal conviction, when the prisoner already has received an adjudication of a federal habeas application, constitutes a "second or successive" habeas application.

2. Whether the Sixth Circuit's decision should be affirmed on the alternative ground that it would have been an abuse of discretion for the district court to grant a Rule 60(b) motion seeking to revive a claim that the federal district court rejected as procedurally defaulted based upon a subsequent development in State procedural law that has no impact on the availability of review in State court.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

STATUTES

TABLE OF AUTHORITIES—continued

STATEMENT OF INTEREST

One of the principal objectives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and indeed of this Court's habeas corpus jurisprudence over the past 25 years, has been to reduce the incursion into State sovereignty that results when federal courts consider successive collateral attacks on a State court criminal judgment. In this case, the overarching issue is whether a State prisoner can circumvent the finality rules that Congress and this Court have adopted to limit such successive attacks by the simple expedient of a motion for relief from judgment under Federal Rule of Civil Procedure 60(b), or by analogous procedures intended to attack, directly or indirectly, the underlying State court judgment.

Although *amici curiae* take no position on petitioner's specific allegations of prosecutorial misconduct, amici have a keen interest in the proper application of AEDPA's finality requirements, which have been codified in 28 U.S.C. § 2244(b). Those requirements are designed to ensure that, absent extraordinary circumstances, States will not have to defend their criminal judgments against second or successive collateral attacks in federal court. The availability of repeated collateral attacks undermines both the finality and presumptive validity of those judgments and requires States to expend scarce societal resources.

Similarly, *amici* are keenly interested in ensuring that their State courts are afforded every reasonable opportunity to assess whether a criminal judgment is consistent with federal law before that issue is reviewed by a federal habeas court. Exhaustion of available State remedies promotes federal-State comity and is mandated by federal habeas corpus law. 28 U.S.C. § 2254(c).

If adopted by this Court, petitioner's arguments would undermine both of these interests. In so doing, those arguments would erode the significant progress reflected in

Congress's enactment of AEDPA and in the decisions of this Court on which AEDPA was built. Indeed, opponents of AEDPA have urged that Rule 60(b)—the procedural vehicle that petitioner has used in seeking to overturn his State court conviction—can and should be used to evade these statutory and judicial limitations on federal habeas petitions. See, *e.g.*, Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 774 (2002) (suggesting "creative use of motions under Rule 60(b)" to avoid limitations on the ability of courts to consider second and successive habeas petitions). Petitioner's own counsel has publicly stated that, if this Court rules that petitioner's Rule 60(b) motion must be entertained and adjudicated on the merits, such motions "would be[come] *the* vehicle with which to reopen" the State court criminal judgments of numerous State prisoners. *A Practitioner's-Eye View of the Court*, Legal Times, Aug. 12, 2002, at 18 (remarks of petitioner's counsel of record) (emphasis added).

STATEMENT OF FACTS

Amici agree with the statement in respondent's brief, but believe that a brief overview of the procedural history of this case in State and federal court will help to highlight the issues before the Court.

1. On February 17, 1986, petitioner and co-defendant Harold Miller entered the duplex of Patrick Daniels under the pretext of making a drug purchase. J.A. 103. Petitioner and Miller forced Daniels and his girlfriend Norma Norman to the floor. *Id.* Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes and mouth. *Id.* Petitioner stole Daniels bank card and forced Daniels to reveal his PIN number. *Id.* Petitioner then obtained a butcher knife from the kitchen "and stabbed Daniels six times in the chest." *Id.* "Prior to and during the stabbing, Daniels was crying and begging Petitioner not to hurt anyone. After

Daniels became motionless, Petitioner stabbed Norman in the back several times." *Id.* Petitioner left the knife inside Ms. Norman and fled the scene. *Id.* Daniels died as a result of his wounds; Norman survived. *Id.* at 103-04.

More than fifteen years ago, in July 1987, a Tennessee jury convicted petitioner of first-degree murder, assault with intent to commit first degree murder with bodily injury, and armed robbery. JA 102. The jury returned a death sentence on the murder charge and life sentences on each of the other convictions.

There can be no serious question of petitioner's actual guilt or his role in this crime. Petitioner's current claim of prosecutorial misconduct is predicated upon an argument that Miller, rather than petitioner, stabbed the victims. At the sentencing phase of his trial, however, petitioner repeatedly testified that the contrary was true. For example, he stated:

> "I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. . . . 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."

JA 65 (quoting Addendum I, at 1865). Elsewhere, petitioner responded to a question from counsel with the following admission:

> "Q. And you heard Mr. Miller testify from the very seat that you're in right now, that you were the man who stabbed Mr. Daniels to death. And you knew it when you were setting [sic] there, that that was true, didn't you.
>
> A. That I was the man, yes."

Id. In light of this testimony and other evidence, the jury returned a sentence of death because it found that (i) petitioner previously was convicted of second-degree murder and assault with a dangerous weapon; (ii) the murder

of Mr. Daniels was "especially heinous, atrocious or cruel"; and (iii) the murder of Mr. Daniels occurred in relation to another serious crime. *Id.* at 102-04. Against these aggravating factors, petitioner presented virtually no evidence in support of mitigation. *Id.* at 105.

On April 2, 1990, petitioner's conviction and sentence were affirmed on direct review by the Tennessee Supreme Court. 789 S.W.2d 545 (Tenn. 1990). The Tennessee Supreme Court denied petitioner's request for rehearing on May 14, 1990, and this Court denied certiorari. 498 U.S. 908 (1990).

2. In May 1993, a Tennessee trial judge conducted a three-day evidentiary hearing, and thereafter issued a memorandum opinion rejecting petitioner's request for post-conviction relief. Two years later, the Court of Criminal Appeals of Tennessee considered petitioner's claim that the prosecutor allegedly failed to provide certain exculpatory *Brady* materials during the sentencing phase, but found "no merit in the [petitioner's] claim of prosecutorial misconduct" because "[n]one of the [this] evidence was favorable to the defense." See *Jones* v. *State*, No. 01C01-9402-CR-00079, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995). The Court of Criminal Appeals rejected all of petitioner's remaining claims. See *id.*

Petitioner then filed a petition for discretionary review to the Tennessee Supreme Court. Petitioner concedes that he abandoned the "the bulk of his prosecutorial misconduct claims," Pet. Br. 25, the very claims upon which he predicates his request for relitigation in federal court. The Tennessee Supreme Court denied discretionary review seven years ago, on August 28, 1995, and this Court again denied certiorari. 516 U.S. 1122 (1996).

3. On April 23, 1996, petitioner filed a federal petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee. J.A. 1. Petitioner raised numerous claims of prosecutorial misconduct, among other

claims. *Id.* at 56-60. The District Court determined that petitioner had properly exhausted two prosecutorial misconduct claims with respect to alleged *Brady* violations, *id.* at 59, 69, but concluded that there was no merit to either of these properly exhausted claims, *id.* at 69-74.

The district court further held that petitioner's remaining claims, including the prosecutorial misconduct claims at issue here, had not been exhausted before the State courts. JA 59, 69. Relying upon this Court's decision in *Gray* v. *Netherland*, 518 U.S. 152 (1996), the district court explained that federal law requires a "habeas corpus petitioner to exhaust the remedies available to him in state court before raising claims in federal court" and "[i]f the petitioner has no remedy currently available in state court . . . the exhaustion requirement is satisfied." J.A. 50. Nevertheless, "[a]lthough a claim may be fully exhausted" in the sense that a petitioner has no remaining avenue for State court review, "the petitioner's failure to assert the claim in state court may constitute procedural default" that "bars the petitioner from raising claims in a federal habeas corpus proceeding that he failed to raise in state court." *id.* at 51. As applied here, the district court determined that "petitioner had failed to exhaust" the prosecutorial misconduct claims at issue in this case because he failed to seek discretionary review of them before the Tennessee Supreme Court. *Id.* at 59. Further, the district court determined that petitioner could "no longer present those claims to the state court . . . because they would be barred by the statute of limitations." *Id.* (citing Tenn. Code Ann. § 40-30-202). As a result, the district court concluded that these claims were "procedurally defaulted." *Id.* at 60.[1] The district court, however, did grant habeas relief

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[1] The District Court catalogued petitioner's defaulted claims. *See* JA 57-58 & 57 n.8. As indicated above, prior to petitioner's seeking review from the Tennessee Supreme Court, the Tennessee Court of Criminal Appeals previously had reviewed and rejected petitioner's claims of

with respect to certain of petitioner's ineffective assistance of counsel claims and vacated his death sentence. *Id.* at 100.

On appeal to the United States Court of Appeals for the Sixth Circuit, petitioner concedes that he "did not challenge" the district court's holding that petitioner's prosecutorial misconduct claims had been procedurally defaulted. JA 155. He did, however, cross-appeal the district court's determinations regarding numerous issues. *Id.* at 123, 127.

On September 13, 2000, the Sixth Circuit vacated the district court's order granting habeas relief. JA 19. Subsequently, the Sixth Circuit granted petitioner's motion to "stay [the] mandate pending petition for writ of certiorari." *Id.* at 21. On May 21, 2001, after several extensions, petitioner filed a petition for certiorari with the Court. JA 21-22 (Petition No. 00-1742). This Court denied certiorari for a third time on October 9, 2001, as to those issues petitioner had preserved and appealed in his first habeas petition. 122 S. Ct. 386 (2001).

4. On November 2, 2001, petitioner filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure in the District Court. In his motion, petitioner sought relief from the District Court's April 8, 1998 judgment with respect to the procedurally defaulted claims of prosecutorial misconduct based upon Tennessee Supreme Court Rule 39, which was adopted June 28, 2001. JA 40. The district court determined that it lacked jurisdiction to consider the Rule 60(b) motion because it "presents a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court over three years after this Court's Judgment" and therefore was a "second or successive habeas petition." *Id.* at 42.

The Sixth Circuit then denied petitioner's application for a certificate of appealability. It concluded that petitioner's Rule

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prosecutorial misconduct. See *Jones* v. *State*, No. 01C01-9402-CR-00079, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995).

60(b) motion was the equivalent of a successive habeas petition, and that petitioner had failed to meet the gateway criteria of Section 2244(b)(2). J.A. 36. The Sixth Circuit also denied petitioner's related motions to withhold mandate, grant a rehearing en banc, and remand. *Id.* at 35.

SUMMARY OF ARGUMENT

Recognizing the importance of finality of State criminal proceedings, Congress and this Court have developed standards through which to ensure that State court judgments may not be challenged, absent extraordinary circumstances, in second and successive habeas corpus petitions. See 28 U.S.C. § 2244(b); *Coleman* v. *Thompson*, 501 U.S. 722, 731-32 (1991). Similarly, Congress and this Court have adopted standards requiring habeas petitioners to exhaust claims that they might have in State court before asking a federal court to set aside a State court criminal conviction. See 28 U.S.C. § 2254(c); *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 839 (1999). Petitioner's arguments reflect a significant attack on both of these requirements which, if accepted, could seriously erode the important limitations that this Court and Congress have developed over the past 25 years.

1. Petitioner first asks the Court to sanction a procedure through which habeas petitioners may evade the finality requirements of AEDPA by labeling an effort to obtain a second adjudication of a request for federal habeas relief as something other than a habeas corpus application. That argument, if accepted, would allow petitioners to circumvent the requirements Congress adopted in Section 2244(b) to prohibit federal habeas petitioners from filing repeated federal habeas challenges to State court criminal judgments. Not surprisingly, this Court already has held that the requirements of Section 2244(b) cannot be eroded through creative labeling of what, in substance, constitutes a second adjudication of federal habeas claims. See *Calderon* v. *Thompson*, 523 U.S. 538, 547 (1998). Petitioner's contrary argument would make

a mockery of the finality requirements enacted by Congress in Section 2244(b). At a minimum, a petitioner should not be permitted to evade the requirements of Section 2244(b) by filing a Rule 60(b) motion that seeks a second adjudication, either directly or indirectly, based upon an intervening development of law or fact given that Section 2244(b) was designed specifically to limit such efforts.

2. Even if petitioner's Rule 60(b) motion were not considered a second or successive habeas application, petitioner's request that this Court permit him to relitigate his prosecutorial misconduct claim through a Rule 60(b) motion should be rejected. First, that motion is futile as a matter of law because, under the exhaustion requirement of Section 2254(c), the adoption of a State court rule that does not affect the *availability* of procedures for seeking relief is irrelevant to the question of exhaustion under federal law. In *O'Sullivan* v. *Boerckel*, this Court ruled that the exhaustion required under Section 2254(c) "turns on an inquiry into what procedures are 'available' under state law" and that "the creation of a discretionary review system does not, without more, make review in [a State supreme court] unavailable." 526 U.S. at 847-48.

Here, petitioner failed to satisfy Section 2254(c) because he was entitled to, but did not, present his claims to the Tennessee Supreme Court. The Tennessee Supreme Court's subsequent adoption of Rule 39 in no way affects that conclusion because Rule 39 does not purport to alter "what procedures are 'available' under state law." *O'Sullivan*, 526 U.S. at 847. Simply put, both before and after the enactment of Rule 39, a petitioner *could* have sought discretionary review before the Tennessee Supreme Court in precisely the same way as the petitioner whose claims this Court held were procedurally defaulted in *O'Sullivan*. Because petitioner did not, his claims were procedurally defaulted long ago and cannot be revived for federal habeas purposes by subsequent changes in State procedural law.

Second, even if petitioner's Rule 60(b) motion were not futile, granting it would nevertheless be an abuse of discretion because it would contravene the policies underlying AEDPA. In *Calderon*, this Court explained that, even in cases to which AEDPA does not apply directly, courts must exercise their discretion "in a manner consistent with the objects of [AEDPA]" and "must be guided by the general principles underlying our habeas corpus jurisprudence." 523 U.S. at 554.

Under these standards, relief is inappropriate because petitioner has failed to identify circumstances that would justify reconsideration of his prosecutorial misconduct claims. Indeed, Congress has explained that second or successive habeas corpus applications with respect to new legal issues may be considered only when there has been, unlike here, a change in constitutional law that has been made retroactive by this Court. See 28 U.S.C. § 2244(b)(2)(A). Here, the "change" in State law relied upon by petitioner bears no relation to the types of changes that Congress has deemed sufficient to justify relitigation of procedurally defaulted claims.

ARGUMENT

I. SECTION 2244(b)'S RESTRICTIONS ON "SECOND OR SUCCESSIVE" HABEAS APPLICATIONS APPLY TO PETITIONER'S RULE 60(b) MOTION AND ANY OTHER FEDERAL FILINGS THAT SEEK, DIRECTLY OR INDIRECTLY, TO OBTAIN COLLATERAL REVIEW OF A CRIMINAL CONVICTION WHERE THE PRISONER HAS ALREADY RECEIVED A FULL ADJUDICATION OF ONE FEDERAL HABEAS APPLICATION.

The core principle underlying 28 U.S.C. § 2244(b) is that, absent extraordinary circumstances, a federal habeas petitioner should have only one opportunity to adjudicate a

federal habeas challenge to a State court criminal judgment in federal court. Petitioner's efforts to circumvent this specific limitation through a general rule of civil procedure should be rejected. Specifically, as shown below, Section 2244(b) cannot be evaded based upon the label given to a filing that seeks directly or indirectly to obtain a second adjudication of a federal habeas challenge to a State court judgment. That is particularly true of a motion that seeks to litigate a matter implicated by one of the express exceptions to Section 2244(b)'s ban on second or successive applications.

A. Under AEDPA, Any Federal Court Filings That Seek, Directly Or Indirectly, A Second Adjudication Of The Right To Federal Habeas Relief Constitute "Second Or Successive Applications" Subject To AEDPA's Limitations.

The key question of statutory interpretation in this case is what constitutes a "second or successive application" within the meaning of Section 2244(b). Under the language of that provision, as correctly interpreted in *Calderon*, 523 U.S. at 552-54, and under this Court's pre-AEDPA habeas jurisprudence, a prisoner who has already received one adjudication of an application for habeas relief may not circumvent habeas finality requirements through creative labeling of federal-court filings that again seek, directly or indirectly, to overturn the prisoner's State criminal conviction. Adoption of petitioner's contrary arguments would elevate form over substance.[2]

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[2] Petitioner contends that AEDPA does not apply to his Rule 60(b) motion because it relates back to his first habeas corpus petition, which was filed before AEDPA took effect. Pet. Br. 27. But that argument merely assumes the answer to the question presented—whether his Rule 60(b) motion is properly treated as a second or successive habeas corpus application. If it is a second or successive habeas corpus application, because petitioner's Rule 60(b) motion was filed on November 2, 2001, well after the effective date of AEDPA (April 24, 1996), there can be no question that the requirements of AEDPA would apply.

1. In enacting AEDPA, "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams* v. *Taylor*, 529 U.S. 362, 386 (2000) (opinion of Stevens, J.); see also *id.* at 404 (O'Connor, J., for the Court). Congress further sought to limit "abuse of the statutory writ of habeas corpus, and to address the acute problem[] of unnecessary delay . . . in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944. As President Clinton explained, "For too long, and in too many cases, endless death row appeals have stood in the way of justice being served." President William Jefferson Clinton's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996); *accord* 142 Cong. Rec. S3465 (daily ed. Apr. 17, 1996) (statement of Sen. Warner) (stating that reform was needed to stop "the charade of habeas corpus appeals" and to preclude "death row inmates [from] drag[ging] out their appeals for several decades").

To accomplish these goals, Congress adopted restrictions on federal habeas petitioners who seek to raise claims after having previously received an adjudication of an application for federal habeas relief. 28 U.S.C. § 2244(b).

In doing so, Congress limited efforts to relitigate claims that already had been presented in a prior application as well as efforts to raise new claims. As to the former, Congress explained that a "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *Id.* § 2244(b)(1) (emphasis added).

As to the latter, Congress provided two exceptions to the general rule of finality. First, with respect to new legal developments, Congress dictated that the adoption of a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" could be presented in a second or successive

habeas petition if that claim "was not presented in a prior application." *Id.* § 2244(b)(2).

Second, Congress also provided a limited avenue of review with respect to new factual developments bearing on actual innocence. Specifically, claims that were not presented in a prior application may be presented in a second or successive habeas corpus when (i) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and (ii) such facts, "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 the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.*

2. In determining whether a federal habeas petitioner's motion constitutes a "second or successive habeas application" under Section 2244(b), the Court has adopted a functional approach, refusing to allow State prisoners to elevate form over substance. Accordingly, a federal court is required to examine the substance of a habeas petitioner's court filing, rather than its label, to determine whether it is, in fact, a second or successive application. This approach ensures that habeas petitioners cannot, though creative labeling, "evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Calderon*, 523 U.S. at 553; see also *Slack* v. *McDaniel*, 529 U.S. 473, 486 (2000) (noting that the "phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases").

Indeed, this functional approach is necessary given the procedural gamesmanship often associated with efforts to obtain multiple adjudications of requests for federal habeas relief. Such abuses have been well catalogued by this Court. They include, for example, abandoning weaker claims either during State post-conviction proceedings or after an initial

habeas loss before a federal district court, and then attempting to revive them later if all else failed. See, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 489-90 (1991). Given these experiences, Congress and this Court adopted restrictions on efforts to obtain a second bite at the federal habeas apple as a way of imposing "limits on the discretion of federal courts to grant habeas relief." *Calderon*, 523 U.S. at 555; see also, *e.g.*, *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-38 (1993); *McCleskey*, 499 U.S. at 487; *Teague* v. *Lane*, 489 U.S. 288, 308-10 (1989) (plurality); *Wainwright* v. *Sykes*, 433 U.S. 72, 90-91 (1977).

Such a functional approach is also necessary to effectuate the language and purposes of Section 2244(b). The ability to avoid the substantive impact of Section 2244(b) through mislabeling would create a massive loophole that would permit habeas corpus petitioners to mount, with impunity, two or more collateral attacks on State criminal judgments. It would, in short, allow State prisoners to control the availability of federal court proceedings based solely on the form, and not the substance, of their federal-court filings. Section 2244(b) thus reflects the broad principle that, absent exceptional circumstances, a federal habeas petitioner should not be permitted more than one opportunity to have a request for federal habeas relief adjudicated by a federal court.

The Court's analysis in *Calderon* v. *Thompson* is instructive. There, after Thompson's federal habeas petition had been denied, Thompson filed a motion to recall the mandate in the court of appeals and a Rule 60(b) motion in the district court. 523 U.S. at 546. The district court denied the Rule 60(b) motion, reasoning (correctly) that petitioner "'must not be permitted to utilize a Rule 60(b) motion to make an end-run around the requirements' of AEDPA." *Id.* at 547. The court of appeals, however, sua sponte voted to recall its prior mandate. *Id.*

This Court reversed the Ninth Circuit's decision to recall its mandate. In doing so, the Court first explained that, in

determining whether a pleading is an "application" for purposes of Section 2244(b), a "motion to recall the mandate . . . can be regarded as a second or successive application for purposes of § 2244(b)." *Id.* at 553. "Otherwise," the Court explained, "petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Id.* Although the Court ultimately determined that AEDPA did not apply because the court of appeals acted *sua sponte*, *Calderon* makes clear that any motion, pleading or other filing that seeks to relitigate old claims, or present new claims after a first federal habeas application already has been adjudicated, is subject to the requirements of Section 2244(b) regardless of the label adopted by the petitioner.

3. This Court's decisions in *Slack* v. *McDaniel*, 529 U.S. 473 (2000), and *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), bolster the conclusion that any effort in federal court to attack collaterally a prisoner's conviction constitutes a "second or successive application" where the prisoner has already had one complete round of federal habeas review. In those cases, because the federal district court dismissed a federal habeas petition without prejudice to allow exhaustion or further development of claims in State court, there was never a first adjudication of the federal habeas claims. Indeed, those decisions "contemplated that the prisoner could return to federal court after the requisite exhaustion." *Slack*, 529 U.S. at 486; *Stewart*, 523 U.S. at 644. It follows that where, by contrast, a federal district court has already adjudicated a petitioner's initial habeas petition, the prisoner's subsequent effort to overturn his conviction, whether direct or indirect, and regardless of how it is labeled, constitutes a second or successive petition that must satisfy the requirements of Section 2244(b).

4. This principle is dispositive here. It is undisputed that the petitioner is seeking to overturn his State criminal

judgment through the vehicle of his Rule 60(b) motion. Specifically, petitioner seeks to overturn the district court's prior determination that his "prosecutorial misconduct" claims were procedurally defaulted, so that he can then have those claims addressed "on the merits." For reasons explained above, the fact that he is not immediately seeking to have those claims resolved on the substantive merits does not diminish the fact that he is using a federal procedural device to attack collaterally the State court judgment against him. Thus, his 60(b) motion clearly constitutes an "application" for federal habeas relief.

Petitioner's Rule 60(b) motion also constitutes a "second or successive" application within the meaning of Section 2244(b) because he has already received one complete adjudication of a request for federal habeas relief. That adjudication did not reach the substantive merits of certain of petitioner's prosecutorial misconduct claims, but only because the district court found that petitioner had procedurally defaulted them. There can be no serious question that a determination of procedural default constitutes an "adjudication" of a federal habeas claim. As this Court explained in *McCleskey* v. *Zant*, 499 U.S. 467 (1991), "[t]he prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." *Id.* at 490. Similarly, *Coleman* v. *Thompson*, 501 U.S. 722 (1991) held that, "in all cases in which a state prisoner has defaulted his federal claims in state court . . . federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Id.* at 750.

In short, petitioner has already received one full adjudication of a federal habeas application. The decision petitioner received from the district court on his earlier habeas

application concluded that his properly preserved prosecutorial misconduct claims did not entitle him to relief and the remainder were procedurally defaulted. There can thus be no question that the district court's decision was an adjudication that makes his subsequent Rule 60(b) motion a "second or successive" application within the meaning of the statute. A contrary conclusion in this case would effectively allow any habeas petitioner to avoid the statutory restriction simply by calling his request for relief from a State court conviction a Rule 60(b) motion rather than an application for habeas corpus.

B. A Rule 60(b) Motion Seeking A Second Adjudication Of A Request For Federal Habeas Relief Predicated On A Change In The Law Or New Facts Constitutes A "Second Or Successive Application" Subject To The Limitations Of Section 2244(b).

At a minimum, a Rule 60(b) motion based on new law or facts as to the underlying State court adjudication should be considered a second or successive petition subject to the limitations of Section 2244(b).

1. As noted above, Section 2244(b)(2)(A) permits review, in a second or successive application, of new claims based upon intervening developments of federal constitutional law to which this Court has given retroactive application. These intervening developments have been determined by Congress to permit a federal habeas petitioner to raise a new claim in a second or successive habeas application. Under the principle of *expressio unius, exclusio alterius*, Congress's recognition of certain legal developments as warranting consideration in a second or successive application presupposes that other legal developments—including those based on changes or clarifications of State law—do not merit similar treatment. See, *e.g.*, *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86-87 (1994) (Congress's creation of special federal rules to govern various issues in connection with litigation against those

associated with failed S&Ls was a clear indication that Congress did not intend a federal rule with respect to other matters arising in that litigation).

Indeed, it would make no sense to allow claims that Congress expressly permitted to be considered in a second or successive petition to be treated equally to those Congress that omitted. For example, Congress's determination that only claims based upon new rules of constitutional law recognized and made retroactive by this Court can be considered in a second or successive habeas petition would be undermined if a habeas petitioner could use a Rule 60(b) motion to seek habeas relief based on a new rule this Court determined would not merit retroactive application on collateral review. The same is true of, for example, a "new rule of constitutional law" recognized by an intermediate State appellate court, but not by this Court.

Similarly, Section 2244(b)(2)(B) carves out a category of factual claims—newly discovered facts bearing on actual innocence—of sufficient magnitude to be permitted late entry into a federal habeas court even though they were not raised in the initial application. Here as well, Congress's recognition of certain factual claims as warranting belated consideration presupposes that other post-decision factual claims do not merit similar treatment. And it would make no sense for factual developments that Congress believed to warrant a second bite at the federal habeas corpus apple be treated equally with other factual developments that Congress did not believe required similar treatment.

For all these reasons, a Rule 60(b) motion for relief from judgment based on an intervening State law development cannot be permitted to evade Congress's determination that such legal developments do not warrant a second adjudication of a federal habeas petitioner's challenge to a State court judgment.

2. Here, it is undisputed that petitioner's Rule 60(b) motion seeks relief based on a recent legal development with respect to a State court rule of appellate procedure. This State law development plainly is not "a new rule of constitutional law . . . by the Supreme Court." It is, rather, a procedural rule newly promulgated by the Tennessee Supreme Court. Indeed, according to petitioner's characterization, it is not even a "new rule" at all, but rather a "clarification" of an existing rule. Pet. Br. 6, 35. But there is no disputing that the promulgation of Rule 39 is the "new" legal development on which petitioner's Rule 60(b) motion rests.

In short, the petitioner's Rule 60(b) motion seeks to attack collaterally the petitioner's State criminal judgment, it must be treated as an "application" for habeas relief under the statute. And because that motion seeks relief based on a type of legal development that is not contemplated by the statute, it must be treated as a "second or successive" application and therefore governed by the restrictions in Section 2244(b). To hold otherwise would not only contravene AEDPA's language and history, it would undermine Congress's carefully crafted restrictions on multiple habeas applications.

II. EVEN IF NOT CONSIDERED A HABEAS APPLICATION, PETITIONER'S RULE 60(b) MOTION MUST BE DENIED, BOTH BECAUSE IT IS LEGALLY FUTILE AND BECAUSE GRANTING RULE 60(b) RELIEF WOULD CONTRAVENE THE POLICIES UNDERLYING AEDPA.

Even if this Court were to hold that petitioner's Rule 60(b) motion was not a second or successive application, the Sixth Circuit's judgment should be affirmed because granting petitioner's Rule 60(b) motion would have been a clear abuse of discretion. That is because (i) petitioner's application is futile as a matter of law under other provisions of AEDPA and this Court's decision in *O'Sullivan*, and (ii) granting the motion would contravene the policies underlying AEDPA.

A. Petitioner's Motion Is Futile Because, Under AEDPA And This Court's Decision In *O'Sullivan*, New State Court Rules Or Declarations That Do Not Affect The Availability Of A State Court Procedure Have No Bearing On Whether A Claim Has Properly Been Exhausted For Purposes Of Federal Habeas Law.

The heart of petitioner's Rule 60(b) motion is that the promulgation of Tennessee's Rule 39 is a sufficient basis for reopening the district court's earlier finding of procedural default. And the largely unexamined premise of that argument is that, if the procedural default question were to be answered anew, Rule 39 might produce a different outcome.

This premise should be assessed with care because, upon closer examination, it is clear that this argument is contrary to the reasoning in *O'Sullivan* and, if accepted, would have a potentially broad impact nationwide. Indeed, a number of States now have rules or policies similar to Rule 39,[3] and

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[3] In addition to Tennessee, courts in at least four States have indicated that although State discretionary review is available, it need not be utilized for a prisoner to be deemed to have exhausted State court remedies. *See State* v. *Sandon*, 777 P.2d 220, 221 (Ariz. 1989) (concluding that defendants need not petition for discretionary review before Arizona Supreme Court to exhaust State remedies); Ark. Sup. Ct. R. 1-2(h) (stating that, in criminal appeals or post-conviction relief matters, "appellant shall not be required to petition for . . . review in the Supreme Court following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error"); *In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1, (Pa. May 9, 2000) (per curiam) (declaring "that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error"); *State* v. *McKennedy*, 559 S.E.2d 850, 854 (S.C. 2002) (holding that in criminal and post-conviction appeals, "petitions for . . . certiorari following an adverse Court of

other State supreme courts could well adopt such rules in the future. As shown below, State court rules such as Tennessee's Rule 39 are irrelevant to the questions of exhaustion and procedural default as a matter of federal law when they do not affect the "availability" of discretionary appellate review under State law.

1. There can be no serious question that the district court's original finding of procedural default was correct at the time it was made. Indeed, this Court's subsequent decision in *O'Sullivan* v. *Boerkel*, 526 U.S. 838 (1999), confirms this conclusion.

In *O'Sullivan*, this Court addressed the question of "whether a prisoner must seek review in a state court of last resort when that court has discretionary control over its docket" in order "to satisfy the federal exhaustion requirement." *Id.* at 843. The Court began its analysis by examining the statutory language of the exhaustion requirement: "Section 2254(c) provides that a habeas petitioner 'shall not be deemed to have exhausted the remedies available in the court of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.'" *Id.* at 844 (omission in original). Interpreting this language, the *O'Sullivan* Court held that a prisoner properly exhausts his claims when he resorts to the normal measures that constitute "one complete round of the State's established appellate review process." *Id.* at 845. Thus, where State procedure gives prisoners "'the right . . . to raise' their claims through a petition for discretionary review in the State's highest court," the prisoner must include claims in such a petition before presenting them in a federal habeas proceeding. *Id.* (omission in original).

Under *O'Sullivan*, petitioner plainly failed to exhaust his claims of prosecutorial misconduct. During State post-

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Appeals' decision are not required in order to exhaust all available state remedies").

conviction relief proceedings, petitioner did present those claims to the State trial court and court of criminal appeals. The courts both rejected his claims. Petitioner then had a right to seek review of those claims in the Tennessee Supreme Court. Petitioner, however, abandoned many (but not all) of his prosecutorial misconduct claims when he petitioned that court for review. J.A. 36. Under *O'Sullivan*, therefore, the federal district court was correct in concluding that petitioner's claims were procedurally defaulted because he did not exhaust them in State court.

2. Tennessee Rule 39 does not affect this conclusion.[4] As noted above, *O'Sullivan* was predicated upon the language of 28 U.S.C. § 2254(c), which states that a habeas "applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, *by any available procedure*, the question presented." *Id.* (emphasis added). The *O'Sullivan* Court held that federal habeas petitioners must properly exhaust their claims by applying for discretionary State high court relief where such relief is a normal part of the appellate process. See 526 U.S. at 845 (noting discretionary review was part of "Illinois' established,

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[4] That provision, which was adopted three years after the district court concluded that petitioner procedurally defaulted the prosecutorial misconduct claims he raises here, states:

> "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. . . . 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."

J.A. 278-79.

normal appellate review procedure" and was "a normal, simple, and established part of the State's appellate review process" (emphasis added)). Thus, this Court ruled that "any available procedure" in Section 2254(c) means any remedy that is part of the normal appellate process and that the normal appellate process includes petitioning for discretionary appellate review when available. *Id.* at 844-47.

In so holding, this Court expressly rejected the argument that requiring discretionary review for exhaustion purposes may have the unwanted consequence of encouraging petitions to State supreme courts for discretionary review. See *id.* at 845-47. The Court acknowledged that a requirement that prisoners present claims in petitions for discretionary appellate relief "has the potential to increase the number of filings in state supreme courts," and "that this increased burden 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." *Id.* at 847. Nonetheless, the Court held that a prisoner, to properly exhaust a claim and avoid procedural default, must still present that claim in all normal State appellate proceedings:

> Section 2254(c) . . . directs federal courts to consider whether a habeas petitioner has "the right *under the law of the State to raise, by any available procedure*," the question presented. . . . The exhaustion doctrine, in other words, turns on an inquiry into what procedures are "available" under State law.

Id. at 847-48. Thus, as long as a procedural remedy such as discretionary review remains available, the federal statutory exhaustion provision requires that a habeas petitioner avail himself of that remedy before bringing his claims in federal court.

In response to *O'Sullivan*, the Tennessee Supreme Court did not alter its procedures for seeking discretionary review.

The Tennessee Supreme Court left Rule 11—which provides the standards governing the grant of discretionary review—unchanged. Indeed, the advisory committee for the Tennessee Rules explained that (i) "The Tennessee Supreme Court adopted Rule 39 in response to *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999)," but (ii) "Rule 39, Rules of the Tennessee Supreme Court, . . . *works no change* to Tenn.R.App.P. 11 itself." Tenn. R. App. Proc. 11, 1999 Ad. Comm'n Cmt. (emphasis added); see Tenn. R. App. P. 11(a).[5]

Instead of making relief unavailable, as both Section 2254(c) and *O'Sullivan* require, the Tennessee Supreme Court in Rule 39 simply declared exhausted all claims that were not presented for discretionary review. The Tennessee Supreme

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[5] Tennessee's procedures governing the availability of discretionary review are virtually identical to those of Illinois, which were at issue in *O'Sullivan*. *See* 526 U.S. at 843 (explaining that appeals from the intermediate appellate court are granted as "'a matter of sound judicial discretion'" and setting forth similar factors that "'indicate the character'" of those considered in exercising discretion). Nor is discretionary review of claims presented in a Rule 11 petition only "occasionally employed" in "truly extraordinary cases." *Id.* at 850 (Souter, J., concurring). Recent statistics indicate that approximately 7% to 10% of requests for discretionary review are granted by the Tennessee Supreme Court. *See Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 1999-2000*, at 9 (2000) (reporting that review was granted in 83 cases and denied in 714 cases (10.4% granted)); *Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2000-01*, at 39 (2001) (reporting that review was granted in 69 cases and denied in 878 cases (7.3% granted)). Thus, discretionary review before the Tennessee Supreme Court appears to be even more "available" than such review was before the Illinois Supreme Court at the time this Court decided *O'Sullivan*. *See* Resp. Br. at *6 n.2, *O'Sullivan* v. *Boerckel*, No. 97-2048 (U.S. filed Jan. 28, 1999), *available at* 1999 WL 61669 (noting that the Illinois Supreme Court grants review in approximately 3% of cases); Tr. Oral Arg. at *25, *O'Sullivan*, 97-2048 (U.S. argued Mar. 30, 1999), *available at* 1999 WL 200680 (same).

Court's adoption of Rule 39 cannot change the requirements of federal law as construed by this Court in *O'Sullivan*.[6]

B. Reopening The District Court's Prior Conclusion Of Procedural Default Would Contravene The Policies Underlying AEDPA And This Court's Habeas Jurisprudence.

Even if petitioner's Rule 60(b) motion were not futile as a matter of law under Section 2254(c) and *O'Sullivan*, granting that motion would be a plain abuse of discretion because it would contravene the policies underlying both AEDPA and this Court's habeas jurisprudence. In the closely analogous context presented in *Calderon*, this Court directed that a district court's discretion to reopen habeas proceedings must be exercised "in a manner consistent with the objects of [AEDPA]" and "must be guided by the general principles underlying [this Court's] habeas corpus jurisprudence." 523 U.S. at 554. Indeed, in *Calderon*, although this Court concluded that AEDPA did not apply directly to a court of appeals' decision to recall its mandate sua sponte, the Court concluded that AEDPA's provisions and underlying policies

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[6] In fact, Rule 39 goes well beyond an attempt, in effect, to overturn *O'Sullivan*, which dealt with the availability of remedies subject to discretionary review. It also runs contrary to the broader exhaustion requirement first announced in *Ex parte Royal*, 117 U.S. 241 (1886), which also requires a defendant to exhaust any claims he may have through remedies available as a matter of right on direct review in the State court system. Rule 39's pronouncement of exhaustion is not restricted to claims that were not presented for discretionary review. Rule 39 also deems exhausted claims that a criminal defendant has an absolute right to have reviewed on the merits by the Tennessee Supreme Court. According to Rule 39, "[o]n automatic [direct] 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." J.A. 279. None of the opinions in *O'Sullivan* supports the view that Rule 39 may declare exhausted, as a matter of federal law, claims which a habeas petitioner never challenged on direct review which is available as a matter of right.

"'certainly inform [this Court's] consideration' of whether the Court of Appeals abused its discretion." *Id.* at 558 (quoting *Felker* v. *Turpin*, 518 U.S. 651, 663 (1996)).

Elsewhere, this Court has noted that the limitations imposed upon federal habeas proceedings reflect a proper respect for the interests of "comity, finality and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). As shown below, granting a motion such as petitioner's Rule 60(b) application would contravene these interests, as well as Congress's specific judgments as to the circumstances in which new legal developments and newly discovered facts may be a basis for a second collateral attack on a State criminal judgment.

1. There can be no doubt that granting the kind of relief petitioner seeks under the guise of Rule 60(b) would undermine "the respect that federal courts owe the States and the States' procedural rules." *Coleman*, 501 U.S. at 726. As this Court has noted, as a general matter, "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Calderon*, 523 U.S. at 555-56 (internal quotations omitted). Accordingly, this Court has explained that the federal habeas power must be invoked sparingly to "preserve the federal balance" and to give a proper respect "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* (internal quotation omitted).

Concerns regarding "comity," moreover, are not "limited to the judicial branch of a state government." *Id.* at 552. Federal habeas courts must not unduly "frustrate the interests of a State . . . in enforcing a final judgment" by unduly interfering with the State's legislative and executive branches. *Id.*

Here, in furtherance of comity, Congress has already given States a means to waive the exhaustion requirement.

Specifically, Congress provided that States may waive an exhaustion defense at the option of their *executive* officials appearing in court: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). This express congressional allocation of the waiver power should not be supplanted by a new rule effectively permitting State supreme courts to engage, intentionally or not, in wholesale waiver of the federal requirement that habeas petitioners exhaust all "available" State court remedies.

2. As this Court has noted, the exhaustion doctrine is also informed by federalism concerns. *Williams*, 529 U.S. at 436. In Section 2254(c), Congress has provided a rule of law that, in its judgment, strikes the proper federal-State balance. As explained above, that rule provides that a habeas petitioner must exhaust all remedies normally "available" in State court. 28 U.S.C. § 2254(c).

This rule not only embodies a judgment that State prisoners should respect State court error-correction processes, but it also helps ensure that State courts have a full opportunity to confront all claims of federal constitutional error in their criminal trials before the scarce resources of the federal judiciary are called upon to correct any remaining error. Allowing petitioner, or others like him, to reopen prior findings of procedural default on the basis of provisions such as Rule 39 would disserve these policies.

3. Except in unusual circumstances, moreover, successive collateral attacks on State criminal judgments undermine the federal courts' "enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system." *Calderon*, 523 U.S. at 555 (internal quotation omitted). Finality "is essential to both the retributive and the deterrent functions of criminal law," *id.*, for "[n]either innocence nor just punishment can be

vindicated until the final judgment is known." *McCleskey*, 499 U.S. at 491. Moreover, "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309.

Obviously, granting petitioner's Rule 60(b) motion would undermine the finality of his own criminal judgment. It would also cast doubt on the finality of many other State criminal convictions around the country. Indeed, if this Court were to adopt petitioner's position, the Illinois Supreme Court would be free to make a pronouncement similar to that in Rule 39 and thereby permit the habeas petitioner in *O'Sullivan* to file a Rule 60(b) motion for the very relief that this Court previously denied. Such a revival of stale claims in Rule 60(b) motions threatens to overwhelm the resources, not only of the lower federal courts, but also the State attorneys who would have to oppose those motions.[7]

4. In this case, moreover, granting petitioner's Rule 60(b) motion would effectively allow the petitioner to flout Congress's judgment that, once a prisoner has had one full

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[7] Even if this Court were to permit Tennessee Supreme Court Rule 39 to control the federal exhaustion inquiry in cases arising from Tennessee, Rule 39 should be given only prospective effect. First, the Tennessee Supreme Court lacks any interest in the retroactive application of Rule 39. As that court explained, Rule 39 seeks to discourage the "routin[e] petition[ing] . . . for permission to appeal . . . in order to exhaust all available state remedies for purposes of federal habeas corpus litigation." J.A. 278. Rule 39, however, advances this interest only insofar as it operates to curtail future petitioning for discretionary review.

Second, retrospective application of Rule 39 could have grave consequences for the States and the federal district courts. Such a ruling would permit all habeas claims since 1967 that were held procedurally defaulted for failure to exhaust in a petition for discretionary review to be the subject of Rule 60(b) motions for reconsideration based on any post-1967 legal development. The effects would be particularly acute in States such as South Carolina and Arizona, whose supreme courts have taken positions similar to that of Tennessee, *see O'Sullivan*, 526 U.S. at 847, and all other States whose supreme courts may opine similarly in the future. *See*, *supra*, n.3.

adjudication of a habeas application, the only legal developments that can provide a basis for relief from the State criminal judgment are new rules of constitutional law adopted (and made retroactive) by this Court. Here, as noted above, Section 2244(b) specifies that the only change in law that might permit a petitioner a second adjudication of a request for federal habeas relief is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). Yet here, the only purported change in the law was the Tennessee Supreme Court's adoption of a Rule 39, a procedural provision that petitioner contends "clarified" existing Tennessee procedural law. Pet. Br. 9. Under *Calderon*, adoption of Rule 39 is not an appropriate basis for granting petitioner's Rule 60(b) motion because it plainly is not a pronouncement by this Court of "a new rule of constitutional law."

* * * * *

In sum, to grant a Rule 60(b) motion on the basis of Rule 39 would be both futile under Section 2254(c) and contrary to the purposes underlying AEDPA and this Court's habeas jurisprudence. Granting such a motion would, therefore, be a plain abuse of discretion. The judgment below can be affirmed on that ground even if the Court were to conclude that petitioner's Rule 60(b) motion does not constitute a "second or successive application" within the meaning of Section 2244(b).

CONCLUSION

For these reasons and those in respondent's brief, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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