No. 04-514

In The
Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PETITIONER

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CAPITAL CASE
QUESTION PRESENTED

Did the Sixth Circuit abuse its discretion by withdrawing its opinion affirming the denial of habeas corpus relief six months after Fed. R. App. P. 41(d)(2)(D) made issuance of the mandate mandatory, without notice to the parties or any finding that the court's action was necessary to prevent a miscarriage of justice, particularly where state judicial proceedings to enforce the inmate's death sentence had progressed in reliance upon the finality of the judgment in the federal habeas proceedings?

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The opinion of the court of appeals (Pet. App. 1) that is the subject of this case is published at 373 F.3d 688. The earlier opinion of the court of appeals affirming the district court's denial of habeas corpus relief (Pet. App. 117) is reported at 315 F.3d 566. The memorandum opinion of the district court dismissing respondent's petition for writ of habeas corpus is unreported. (Pet. App. 202)

JURISDICTION

The judgment and opinion of the court of appeals were entered on June 23, 2004. (Pet. App. 1) The petition for a writ of certiorari was filed on October 14, 2004,[1] and granted on January 7, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 41(d)(2), Federal Rules of Appellate Procedure, provides in pertinent part:

> (A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

[1] On September 17, 2004, Justice Stevens granted petitioner's application to extend the time to file a petition for writ of certiorari from September 21, 2004, until October 14, 2004. *Bell v. Thompson*, No 04A211.

* * *

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

STATEMENT OF THE CASE

In 1985, Gregory Thompson was convicted by a jury in Coffee County, Tennessee, for the first-degree murder of Brenda Blanton Lane on New Year's Day of that same year. Following a separate sentencing hearing, the jury sentenced Thompson to death for the murder. Thompson's conviction and sentence were affirmed on direct appeal, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990), and later upheld in state post-conviction proceedings. *Thompson v. State*, 958 S.W.2d 156 (Tenn. Crim. App. 1997) (app. denied Oct. 20, 1997). Thompson then sought a writ of habeas corpus in the federal district court, which summarily denied relief, and the Sixth Circuit affirmed that decision. (Pet. App. 117) On December 1, 2003, this Court denied Thompson's petition for a writ of certiorari (J.A. 91) and denied rehearing on January 20, 2004. (J.A. 92)

On February 25, 2004, the Tennessee Supreme Court set a date for Thompson's execution, thus setting in motion state judicial proceedings to carry out that execution in accordance with Tennessee state law. (Pet. App. 349-51, 383) But while state-court proceedings were ongoing – and unbeknownst to the parties in this action or the Tennessee Supreme Court – the Sixth Circuit was conducting a second *sua sponte* review of Thompson's federal habeas

appeal. (Pet. App. 2) And, on June 23, 2004, 18 months after its initial decision denying habeas corpus relief and 205 days after this Court denied certiorari, the Sixth Circuit, relying on its "inherent power over a case until [its] mandate issues," withdrew its previous judgment and opinion and remanded the case to the district court for an evidentiary hearing on Thompson's original habeas petition. (Pet. App. 6)

A. State Trial Proceedings

As summarized in the opinion of the Tennessee Supreme Court on direct appeal, the proof at Thompson's trial showed that, on December 29, 1984, Thompson and Joanne McNamara, a juvenile female, traveled by bus from Marietta, Georgia, to Shelbyville, in Bedford County, Tennessee. They presented themselves as a married couple at the home of Willa Mae Odum, an acquaintance of McNamara's family, who allowed them to stay there. When Ms. Odum learned the two were not married, she asked Thompson to leave, but he remained through the night of December 31, waiting for a relative to wire him some money. The following morning, January 1, 1985, Odum again insisted that Thompson leave, and she called the authorities to report McNamara as a runaway. This call apparently prompted the couple to depart Odum's home. Having little money and no transportation, the couple spent the afternoon at a nearby Wal-Mart store.

That same afternoon, January 1, after making several purchases at the Wal-Mart, Brenda Lane did not arrive home when expected. Shortly after midnight, Lane's automobile was reported on fire near an apartment building in Marietta, Georgia. Thompson and McNamara were

arrested on the night of January 2 in connection with the investigation of Lane's disappearance. A traffic ticket in Thompson's jacket showed that he had been cited for speeding while driving Brenda Lane's vehicle on Interstate 24 in Tennessee near the Georgia line. A Wal-Mart receipt and several items recovered from the vehicle indicated a purchase at the Shelbyville Wal-Mart at 5:51 p.m. on January 1. A button found in Lane's car matched those on Thompson's clothing.

A few hours after being taken into custody, Thompson admitted that he had abducted a woman at knifepoint from the Wal-Mart in Shelbyville and forced her to drive him and his companion in her car to a remote location outside Manchester, Tennessee. There, according to Thompson, he stabbed her, drove the car over her body, and left. Thompson drew a map illustrating the route from the town to the site of the stabbing and spoke with authorities by telephone to clarify certain aspects of his directions.

On January 3, 1985, following Thompson's directions, a search team found Brenda Lane's body at the location described in Thompson's statement. According to the pathologist, she had died from multiple stab wounds to the back and would have remained conscious five to ten minutes before bleeding to death. Apart from the stab wounds, there was no evidence of other injury or trauma to Lane's body. Thompson presented no proof in the guilt phase of trial, and the jury convicted him of the first-degree murder of Brenda Lane.

During the sentencing phase, Thompson called a number of witnesses, including former high school teachers, acquaintances, his grandparents, two siblings, and a

cousin, who presented a picture of him as non-violent, cooperative and responsible. Witnesses described in detail his childhood and family circumstances in Georgia until he left in 1979 to join the Navy. The Tennessee Supreme Court noted in its opinion on direct appeal that, "while [Thompson's] family was poor, it was also good and loving." *State v. Thompson*, 768 S.W.2d 239, 244 (Tenn. 1989).

Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, testified that she knew Thompson from December 1980 until June 1984. She described their relationship as good, one that she was "very proud to have experienced," and stated that Thompson was caring and sensitive. She related that Thompson had suffered a head injury when three of his fellow service members attacked him with a crowbar and that he became paranoid and unreasonably concerned about his and her personal safety thereafter. Cajulao was aware that Thompson was discharged from the Navy as a result of being court-martialed for shoving a petty officer and either dislocating the officer's shoulder or breaking his collar bone. She was also aware of other violent incidents involving Thompson and other Navy personnel. After leaving the Navy, Thompson returned to Georgia for a short time in 1983 and then in 1984 to look for work. Thompson's sister, Nora Jean Walton, and his brother-in-law testified about Thompson's activities in Georgia after he returned from the Navy, including his relationship with co-defendant Joanne McNamara.

Dr. George Copple, a clinical psychologist retained by the defense who interviewed and tested Thompson before trial, testified about Thompson's personality and aptitude for employment in prison. He opined that Thompson had an unusually strong need to nurture other people, which

may have led, in part, to the commission of the offense in this case. Dr. Copple further testified that Thompson exhibited strong remorse for the killing and did not have an adult anti-social personality disorder.

To rebut Dr. Copple's testimony, the State presented the deposition of Dr. Robert Glenn Watson, a clinical psychologist who participated in a staff evaluation of Thompson at Middle Tennessee Mental Health Institute (MTMHI) shortly after his arrest. Dr. Watson testified that Thompson showed little remorse and exhibited adult anti-social behavior. He further stated that, during the pre-trial evaluation period, Thompson appeared to fake schizophrenia by claiming to hear voices and also falsely claimed that he was unable to read. *Thompson*, 768 S.W.2d at 244.

The jury sentenced Thompson to death after finding three aggravating circumstances beyond a reasonable doubt: (1) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (2) that the defendant committed the murder for the purpose of avoiding or preventing his lawful arrest and prosecution; and (3) that the murder was committed while the defendant was engaged in committing robbery or kidnapping. Tenn. Code Ann. § 39-2-203(i)(5), (6), (7) (1982) (repealed). The Tennessee Supreme Court affirmed the judgment, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), and this Court denied certiorari. *Thompson v. Tennessee*, 497 U.S. 1031 (1990).

B. State Post-Conviction Proceedings

On post-conviction, Thompson contended, *inter alia*, that his trial counsel was ineffective for failing to investigate head injuries he had suffered prior to the murder. He

claimed that evidence of the head injuries could have been beneficial to his case in the penalty phase of his trial. The post-conviction court rejected Thompson's claims following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed the denial of the petition for post-conviction relief, finding that counsel's decision to "emphasize [Thompson's] positive qualities [at sentencing] rather than to suggest brain damage, while unsuccessful, was based upon adequate investigation." *Thompson v. State*, 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997). The court further found that Thompson had demonstrated no prejudice from counsel's alleged deficiencies, because he "failed to established that the head injuries had any effect upon his mental stability at the time of the murder" and "failed to demonstrate that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Id*. Thompson subsequently sought permission to appeal to the Tennessee Supreme Court pursuant to Rule 11, Tennessee Rules of Appellate Procedure, but that court denied his application on October 20, 1997.

C. Federal Habeas Corpus Proceedings

On June 12, 1998, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. On February 17, 2000, the district court entered an order summarily denying Thompson's claims for relief and dismissing his petition, concluding that Thompson had failed to demonstrate that the state court's adjudication of his ineffective assistance of counsel claim involved an unreasonable application of established federal law or an unreasonable determination of the facts in light of the evidence before the state court.

28 U.S.C. § 2254(d)(1). (Pet. App. 202, 271) The district court specifically found that Thompson had presented no competent evidence in response to the State's motion for summary judgment, by way of affidavit, deposition or otherwise, demonstrating that he was suffering from a significant mental disease at the time of the offense or at trial that should have been presented to the jury during the penalty phase of his trial as mitigation evidence. (Pet. App. 270) The court further noted that Thompson "had two different psychological evaluations [prior to trial] and both resulted in findings of competency at the time of the crime and at the time of trial." In addition, the state-court record supported the state post-conviction court's determination that trial counsel reasonably investigated Thompson's background and mental health history. (Pet. App. 270-71)

Thompson appealed the district court's decision to the Sixth Circuit on April 21, 2000. (J.A. 2) On March 1, 2001, while Thompson's appeal was pending in the Sixth Circuit, but before oral argument, Thompson filed a motion in the district court under Rule 60(b), Federal Rules of Civil Procedure, requesting the district court to "supplement" the record with additional evidence that had been developed through discovery in the federal habeas proceeding but had never been presented to the district court and, in light of that evidence, to "revisit [the court's] previous summary denial" of Thompson's habeas petition. (Pet. App. 337, 340-41)

Contemporaneous with the filing of his Rule 60(b) motion in the district court, Thompson filed a motion in the Sixth Circuit seeking to hold his appeal in abeyance pending the district court's disposition of the Rule 60(b) motion. (Pet. App. 333) The district court denied Thompson's Rule 60(b) motion on March 7, 2001 (Pet. App. 343), and the Sixth Circuit

denied Thompson's motion to hold his appeal in abeyance on March 21, 2001. (Pet. App. 345)

On January 9, 2003, the Sixth Circuit affirmed the district court's denial of habeas relief. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003). (Pet. App. 117) As to Thompson's ineffective assistance claim, the court observed that, because the Tennessee courts analyzed the claim under the appropriate standard established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the question to be decided was whether the state court unreasonably applied *Strickland* to the facts of Thompson's case under 28 U.S.C. § 2254(d). (App. 154) The court of appeals found that the state-court record reflected that counsel adequately investigated Thompson's mental health:

> [T]he [state-court] record reflects that trial counsel investigated Thompson's mental health and that he received expert assistance to attempt to establish valid mitigating factors. The record shows that trial counsel were aware from the outset of Thompson's prior head injuries and inappropriate behavior, and that they investigated possible mental illness or defect. They requested a competency evaluation. Thompson was evaluated for thirty days by a team of experts. The MTMHI team found no mental illness, mental defect, or insanity. Counsel also had [Dr. George] Copple, a clinical psychologist and former professor of psychology at Vanderbilt, evaluate Thompson. Copple found no evidence of mental illness.
>
> * * *
>
> [N]ot one of Thompson's post-trial experts have opined that Thompson suffered from organicity or mental illness at the time of the crime or trial.

[Dr. Gillian] Blair, Thompson's state post-conviction expert, also a clinical psychologist with ties to Vanderbilt, declined to give an opinion, stating simply that more information was needed. Significantly, she did not fault the testing procedures used by MTMHI or Copple, but merely stated that they were not extensive enough. Indeed, she performed many of the same tests. Similarly, neither Crown nor Sultan [Thompson's federal habeas experts] ever expressed an opinion that Thompson was mentally ill at the time of the crime.

* * *

As the Tennessee Court of Criminal Appeals held, there is no prejudice because, "[t]he petitioner has failed to establish that the head injuries had any effect upon [Thompson's] mental stability at the time of the murder. Further, he has failed to establish that any type of psychological impairment in general may have existed which would have been mitigating evidence." *Thompson*, 958 S.W.2d at 165.

* * *

Indeed, although the state court ruled on the prejudice prong of *Strickland*, its ruling is equally sustainable under the cause prong of *Strickland* because trial counsel's decision to employ a clinical psychologist at trial was not objectively unreasonable. Further, as the Tennessee Court of Criminal Appeals concluded, "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id*. Nor can there be prejudice because the jury was not deprived of any *actual evidence* of organicity or mental disease or defect at the time of the crime. Thus, the state court's decision holding

> that counsel were not ineffective under the Sixth Amendment is not an unreasonable application of *Strickland*.

(Pet. App. 158-59, 163-64)

Thompson filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Sixth Circuit. The panel reviewed the petition and, after finding that the issues raised were fully considered upon the original submission and decision of the case, denied rehearing on March 10, 2003. (Pet. App. 346) On March 24, 2003, the court of appeals stayed the issuance of its mandate pending the filing and disposition of a petition for writ of certiorari. (Pet. App. 347)

On August 6, 2003, Thompson filed a petition for writ of certiorari in this Court. The Court denied Thompson's petition on December 1, 2003. *Thompson v. Bell*, 540 U.S. 1051 (2003). (J.A. 91) The following day, December 2, 2003, Thompson filed a motion in the court of appeals to extend the stay of the mandate pending a petition for rehearing in this Court from the denial of his certiorari petition. (J.A. 8) This Court's order denying certiorari was filed with the clerk of the court of appeals on December 8, 2003. (J.A. 8) The Sixth Circuit granted Thompson's motion to extend the stay of the mandate on December 12, 2003, pending the filing of a petition for rehearing and "thereafter until the Supreme Court disposes of the case." (Pet. App. 348) Thompson filed a petition for rehearing in this Court on December 22, 2003. On January 20, 2004, the Court denied Thompson's petition for rehearing. *Thompson v. Bell*, 540 U.S. 1158 (2004). (J.A. 92) A copy of the Court's order denying rehearing was filed with the clerk of the court of appeals on January 23, 2004. (J.A. 8)

D. Events Subsequent to Initial Habeas Disposition

On February 25, 2004, the Tennessee Supreme Court ordered that Thompson's death sentence be carried out on August 19, 2004. In addition, finding that Thompson had sufficiently raised the issue of his present competency to be executed through his Notice of Incompetency to be Executed and supporting exhibits, the court remanded the case to the trial court where Thompson was originally convicted and sentenced for an "expeditious determination" of Thompson's competence for execution under the procedures established in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).[2] (App. 349-51)

On March 1, 2004, Thompson filed a "Petition Providing Notice of Incompetency to Be Executed, Requesting a Hearing on Competency to Be Executed, and Requesting an Order Finding Gregory Thompson Incompetent to Be Executed and Issuance of a Reprieve" in the state trial court. Accompanying his petition were, *inter alia*, three mental health experts' reports, all dated after this Court's denial of certiorari, opining as to Thompson's present competence. On March 8, 2004, the trial court denied Thompson's competency petition without a hearing, and, following expedited review, the Tennessee Supreme Court affirmed the judgment of the trial court in an opinion filed on May 12, 2004. *Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004). (Pet. App. 352)

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[2] In *Van Tran*, the Tennessee Supreme Court adopted the standard of competency for execution in Tennessee and established state-court procedures to enable state prisoners to assert last-minute claims of incompetence under *Ford v. Wainwright*, 477 U.S. 399 (1986).

On June 14, 2004, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee, asserting a claim of incompetency for execution under *Ford v. Wainwright*, 477 U.S. 399 (1986). On June 21, 2004, the district court granted a "brief stay" of Thompson's execution, with the stay to expire automatically upon issuance of an order of the court denying habeas relief but to remain in place upon issuance of an order granting the writ. The district court further ordered that the Warden file a response to Thompson's *Ford* petition within ten days of the date of the order.

On June 23, 2004, nearly seven months after this Court denied certiorari from the Sixth Circuit's January 2003 decision, that court issued an opinion vacating the district court's February 2000 order dismissing Thompson's initial habeas petition, supplementing the record on appeal with a deposition that had been attached to Thompson's March 2001 motion to hold his appeal in abeyance but never presented in the habeas proceedings in the district court, and remanding the case to the district court for a "full evidentiary hearing" on Thompson's initial habeas petition. (Pet. App. 5-6) The court reasoned that a discovery deposition of a mental health expert, taken by counsel during the federal habeas proceedings but never submitted to the district court for consideration in connection with the warden's motion for summary judgment, was "extremely probative" in assessing Thompson's mental state at the time of the crime and, thus, relevant to his claim of ineffective assistance of counsel at sentencing. (Pet. App. 2) While acknowledging that the deposition was outside the record of the district court, the court of appeals nevertheless considered it in rendering its opinion pursuant

to the court's "equitable power to supplement the record on appeal," finding that the deposition was "apparently negligently omitted" by Thompson's habeas counsel.[3]

> Because the evidence here was apparently negligently omitted, because the evidence is so probative of Thompson's mental state at the time of the crime, because there is no surprise to [the Warden] as it was his counsel who took the deposition, and because this is a capital case, we believe that the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal, despite the omission of the deposition from the District Court record. We therefore vacate the grant of summary judgment, and remand the case to the District Court for a full evidentiary hearing.

(Pet. App. 5-6) The court made no finding that Thompson was not at fault in failing to develop mental health evidence in state court or that the limitations set forth in 28 U.S.C. § 2254(e)(2) were satisfied in order to justify its directive for a "full evidentiary hearing." Indeed, the court's previous opinion indicated to the contrary. (App. 169-70) In justifying its action, the court invoked its "inherent power to reconsider [its] opinion prior to the issuance of the mandate." (App. 6)

[3] In his concurring/dissenting opinion, Judge Suhrheinrich found habeas counsel's explanation for the omission of the deposition to be "implausible, if not intentionally false," and thus justified the court's late intervention on grounds of a fraud upon the district court. (App. 82, 89-107) The panel majority, however, declined to join in that conclusion. (App. 2)

SUMMARY OF THE ARGUMENT

The Sixth Circuit's decision withdrawing its final judgment affirming dismissal of Thompson's habeas corpus petition and permitting him to relitigate the merits of his case is an extraordinary act equivalent to a recall of the mandate. In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court held that, given a State's strong interest in the finality of its criminal convictions, a federal court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas relief to a state prisoner unless it acts to avoid a miscarriage of justice. *Calderon*, 523 U.S. at 557-58. Although acknowledging *Calderon*'s restrictions on a court of appeals' ability to recall an already issued mandate, the Sixth Circuit in this case saw no such restriction of its ability to reconsider the merits of Thompson's appeal, even after this Court had denied certiorari review, because of its "power over a case" until issuance of the appellate mandate. (Pet. App. 6)

But the Sixth Circuit's rationale fails for two reasons. First, the court's actions violate the plain language of Fed. R. App. P. 41(d)(2)(D), which requires that the mandate issue "immediately" upon the filing of the order of this Court denying certiorari. Because the Sixth Circuit had no discretion to withhold issuance of the mandate beyond the filing of this Court's order denying certiorari, the court's subsequent withdrawal of its judgment denying federal habeas relief – in reliance upon its improperly withheld mandate – was an extraordinary act equivalent to a recall of the mandate. And in the federal habeas context, where a prisoner seeks relief from a criminal judgment entered by a state court, this Court has made clear that a decision to

recall a mandate must be measured against the statutory and jurisprudential limits applicable in habeas cases.

Aside from its clear violation of Rule 41(d)(2)(D), the Sixth Circuit's withdrawal of its judgment after finality had attached – premised upon the notion that it retained unfettered discretion to reconsider its decision before issuance of the mandate – is inconsistent with the principles of finality and comity underlying *Calderon*. Indeed, applying those principles, this Court's denial of certiorari – the point at which "finality" attached to the Sixth Circuit's judgment – triggered *Calderon*'s miscarriage of justice standard as a prerequisite to any reconsideration by the Sixth Circuit of the merits of the petition, irrespective of whether the appellate court mandate had in fact issued. Issuance of the mandate is a purely ministerial function unrelated to the adjudication of an appeal. And where, as in this case, the court of appeals' judgment of affirmance required no further action in the district court save filing of the judgment in the court below, the finality of federal habeas corpus proceedings is not contingent upon the performance of that residual ministerial function. Indeed, the State's strong interest in the "assurance of finality" beyond that point is indistinguishable from that which *Calderon* sought to protect. *Calderon*, 523 U.S. at 558.

When viewed under the appropriate standard, the Sixth Circuit's decision to withdraw its prior final judgment constitutes a grave abuse of discretion. In *Calderon*, this Court held that a court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief "unless it acts to avoid a miscarriage of justice as defined by [this Court's] habeas corpus jurisprudence." *Calderon*, 523 U.S. at 549-50. If the petitioner asserts his actual innocence of

the underlying crime, he must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id*. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). If the petitioner challenges his death sentence, he must show by clear and convincing evidence that "no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Id*. at 559-60 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992)). Neither standard is satisfied under the facts of this case.

First, the evidence upon which the Sixth Circuit based its decision – additional mitigation evidence relevant to the jury's decision to impose a death sentence – can never meet *Sawyer*'s "innocence of the death penalty" standard. While such evidence may be potentially relevant to the jury's selection of the appropriate penalty, it in no way undercuts the defendant's eligibility for the death penalty, which was conclusively determined at the point of Thompson's conviction for a death-eligible offense, *i.e.*, first-degree murder, and by the existence of at least one statutory aggravating circumstance. In this case, there were three.

Nor can Thompson meet *Schlup*'s "actual innocence" standard. Neither the initial nor subsequent opinion of the Sixth Circuit contains any suggestion that Thompson is "innocent" of first-degree murder, a result that is hardly surprising, since Thompson himself confessed to the crime and made no appreciable effort to contest his guilt at trial. Aside from the overwhelming evidence of guilt, the evidence on which the Sixth Circuit actually based its decision itself contains a concession of guilt by Thompson and thus, on its face, defeats any claim of "actual innocence." In sum, the evidence in this case falls far short of

the showing necessary to disturb the State of Tennessee's "all but paramount" interest in finality. Because Thompson has already had extensive review of his claims in both state and federal courts, "the State's interests in finality outweigh [his] interest in obtaining yet another opportunity for [federal habeas] review," *Calderon*, 523 U.S. at 557, and the Sixth Circuit's surprise reconsideration of its earlier decision – disturbing that finality interest in the absence of a threatened miscarriage of justice – constitutes a grave abuse of discretion.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION TO WITHDRAW ITS FINAL JUDGMENT AFFIRMING THE DISMISSAL OF THOMPSON'S FEDERAL HABEAS PETITION IS AN EXTRAORDINARY ACT EQUIVALENT TO A RECALL OF THE MANDATE UNDER *CALDERON V. THOMPSON*.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court held that, given a State's strong interest in the finality of its criminal convictions, a federal court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas relief to a state prisoner, unless it acts to avoid a miscarriage of justice. *Calderon*, 523 U.S. at 557-58. Finality, the Court reasoned, is not only "essential" to both the retributive and deterrent functions of criminal law but serves to "preserve the federal balance." *Id*. at 555. In the context of federal habeas review of state convictions, finality gains added significance because the proceeding, by its very

nature, "frustrates" the State's independent authority to execute its moral judgment.[4] *Id*. at 555-56. For this reason, *Calderon* restricted the ability of a court of appeals to recall a mandate denying federal habeas relief – a power that had historically been viewed as "inherent" – in order to ensure that the "merits of concluded criminal proceedings" not be revisited in the absence of a strong showing of actual innocence. *Id*. at 558.

In this case, however, the Sixth Circuit attempted to distinguish *Calderon* on the ground that the court had not yet issued its mandate when it withdrew its initial judgment 18 months after entry in order to allow Thompson to relitigate the merits of his petition in the federal district court. (Pet. App. 6) The Sixth Circuit's effort to defeat the finality of its judgment by withholding its mandate fails for two reasons. First, its action violates the plain language of Fed. R. App. P. 41(d)(2)(D), which requires, without exception, that the mandate issue "immediately" upon the filing of the order of this Court denying certiorari. Because the rule allows no discretion to withhold the mandate beyond that point, the Sixth Circuit's action was extraordinary and tantamount to a recall of the mandate. Second, the Sixth Circuit's withdrawal of its judgment –

[4] Recognizing that federal challenges to state convictions "entail greater finality problems and special comity concerns," *Engle v. Isaac*, 456 U.S. 107, 134 (1986) (Burger, C.J., concurring), the decisions of this Court in the federal habeas context impose significant limits on the discretion of federal courts to grant relief. *Calderon v. Thompson*, 523 U.S. at 554-55 (citations omitted). Those jurisprudential limitations reflect the Court's "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Id*. at 555. Likewise, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is grounded in "respect for the finality of state criminal judgments." *Id*. at 558.

an action indicative of a narrow, mandate-based view of finality – is inconsistent with an unbroken line of this Court's decisions holding that finality attaches at the point of "final adjudication" and is not contingent upon the performance of residual ministerial functions.

Where, as here, nothing remained to be done in the district court save filing of the Sixth Circuit's judgment affirming its decision, issuance of the mandate did not have the significance imputed to it by the Sixth Circuit; it was a purely ministerial function unrelated to the adjudication of the merits of the appeal. Instead, as *Calderon* makes clear, the central concern of AEDPA and this Court's habeas precedents is a State's assurance of "real finality" of its criminal convictions. *Id.* at 556-58. The Sixth Circuit's decision cannot be reconciled with these principles and should be reversed.

A. Because the Sixth Circuit had no discretion to withhold issuance of the mandate beyond the filing of this Court's order denying certiorari, the court's subsequent withdrawal of its judgment denying federal habeas relief was an extraordinary act equivalent to a recall of the mandate.

Following its initial disposition of Thompson's habeas appeal in January 2003, the Sixth Circuit denied rehearing and a suggestion for rehearing *en banc* on March 10, 2003, but stayed the issuance of the mandate pending a petition for writ of certiorari. (Pet. App. 346-47) The Court denied Thompson's certiorari petition on December 1, 2003, *Thompson v. Bell*, 540 U.S. 1051 (2003) (No. 03-5759) (J.A. 91); a copy of this Court's order denying certiorari was filed with the Clerk of the Sixth Circuit on

December 8, 2003. (J.A. 8) Instead of issuing the mandate "immediately," as required by Fed. R. App. P. 41(d)(2)(D), the Sixth Circuit entered an order on December 12, 2003, "extending the stay" to allow Thompson to file a petition for rehearing from the denial of the writ of certiorari and "thereafter until the Supreme Court disposes of the case." (Pet. App. 348; J.A. 8) On January 20, 2004, this Court denied Thompson's petition for rehearing. (J.A. 92) A copy of this Court's order denying rehearing was filed with the Clerk of the Sixth Circuit on January 23, 2004. (J.A. 8)

Rule 41, Federal Rules of Appellate Procedure, governs the procedures relating to the issuance and stay of a court of appeals' mandate.[5] Sub-section (b) of the rule provides that the mandate "must issue" seven calendar days after expiration of the time for filing a petition for rehearing, unless a petition is filed or a different time is set by order.[6] Once a petition for rehearing is filed, Rule

[5] The mandate of an appellate court establishes the law binding further action in the litigation by another body subject to its authority. *Finberg v. Sullivan*, 658 F.2d 93, 97 n.5 (3d Cir. 1981). Functionally, the mandate is the formal vehicle for conveying the terms of an appellate court's disposition to the lower court. *Clarke v. United States*, 915 F.2d 699, 716 (D.C. Cir. 1990); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came").

[6] Rule 41(b) allows the time for issuance to be shortened or enlarged by court order. *See, e.g., Wolfel v. Bates*, 749 F.2d 7, 8 (6th Cir. 1984) (under Rule 41(b), court may "delay the date of the issuance of the mandate until the court determines whether to grant, deny, or remand to the district court the movant's request for attorney's fees"); *Perales v. INS*, 575 F.2d 1293, 1295 (9th Cir. 1978) (court ordered mandate affirming denial of reopening by Board of Immigration Appeals issued forthwith in case involving eight years of effort to avoid deportation).

41(b) automatically extends the time for issuing the mandate to seven days after entry of the order denying rehearing, unless otherwise ordered by the court.

Although Rule 41 permits the court of appeals to stay issuance of the mandate pending the filing of a petition for writ of certiorari, the unequivocal language of Rule 41(d)(2)(D) makes issuance mandatory upon the denial of certiorari: "The court of appeals *must issue the mandate immediately* when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." (emphasis added) By its terms, the rule leaves no room for the exercise of discretion by the court. In addition, unlike sub-section (b), there is no provision under sub-section (d)(2)(D) authorizing a delay in the issuance of the mandate following the denial of certiorari. Indeed, even the Sixth Circuit's own rules expressly forbid it.[7] Rather, the issuance of the mandate upon receipt of an order of this Court denying certiorari is a ministerial act leaving no discretion or power to adopt some other course of action. In this case, that act should have been performed *immediately* upon the filing of this Court's order with the clerk of the court of appeals on December 8, 2003. Any further stay

[7] Rule 41(c), Rules of the United States Court of Appeals for the Sixth Circuit, provides: "A stay of the mandate pending application to the Supreme Court for a writ of certiorari *shall not be effective* later than the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. § 2102 or Rule 13 of the Supreme Court Rules, as applicable. If during the period of the stay there is filed with the clerk a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate *shall issue immediately*." (emphasis added)

of the mandate would have been justified only under the same exceptional circumstances permitting recall of the mandate. The Sixth Circuit, however, extended the stay of the mandate, in violation of Rule 41(d)(2)(D) and its own rules, pending the filing of a petition in this Court for rehearing of the denial of certiorari. Even assuming the court of appeals was authorized to enter such an order, the extended stay expired by its own terms when this Court disposed of respondent's petition for rehearing. (Pet. App. 348)

For reasons never explained by the court of appeals, however, the mandate was never issued. The Sixth Circuit entered no order further staying issuance of the mandate, let alone justifying a stay. The mandate simply did not issue. Five months later, on June 23, 2004, the Sixth Circuit suddenly withdrew its initial opinion and issued a second opinion, this time remanding the case to the district court for a "full evidentiary hearing" on respondent's federal habeas petition. The Sixth Circuit's only acknowledged source of authority for withdrawing its earlier opinion was its "inherent power to reconsider [the] opinion prior to issuance of the mandate." (Pet. App. 6) But while federal courts are undoubtedly vested with certain inherent authority over their proceedings and judgments, that authority may not be invoked to circumvent either federal statutes or federal rules. *Degen v. United States*, 517 U.S. 820, 823 (1996) (inherent powers of courts may be controlled or overridden by statute or rule); *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (scope of "inherent power" does not include power to circumvent federal rules); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (same).

Because Rule 41(d)(2)(D) allows no discretion in the issuance of the mandate, the filing of this Court's order denying certiorari with the Clerk of the Sixth Circuit on December 8, 2004, operated, as a matter of law, to dissolve the Sixth Circuit's March 24, 2003, stay of the mandate. *See also* 16A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3987.1, p. 744 (3d ed. 1999) (If the Supreme Court denies certiorari, "the stay is automatically dissolved and the rule directs that the court of appeals 'must issue the mandate immediately' when a copy of a Supreme Court order denying the petition for writ of certiorari is filed"). Therefore, any further stay of the mandate or other action disturbing the finality of the court's prior decision following denial of certiorari is an extraordinary act tantamount to a decision of the court of appeals to recall the mandate. *See, e.g.*, *Adamson v. Lewis*, 955 F.2d 614, 620-21 (9th Cir.) (en banc), *cert. denied*, 505 U.S. 1213 (1992) (continuing stay of mandate following denial of certiorari justified only upon the same exceptional circumstances permitting recall of the mandate); *see also Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990) (Rule 41(b)'s express direction makes threshold showing of "exceptional circumstances" necessary before mandate may be stayed after denial of certiorari); *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 982 (2005) (same). And in the federal habeas context, where a prisoner seeks relief from a criminal judgment entered by a state court, this Court has made clear that a decision to recall a mandate must be measured against the statutory and jurisprudential limits applicable in habeas cases. *Calderon*, 523 U.S. at 553. The June 2004 decision of the Sixth Circuit to withdraw its January 2003 opinion came 198 days after Rule 41(d)(2)(D) made issuance of the mandate mandatory and 152 days after the Sixth Circuit's "extension" of the

stay expired and should, therefore, be deemed the equivalent of a decision by the Sixth Circuit to recall the mandate subject to the discretionary limitations imposed by *Calderon*.

B. A federal habeas judgment becomes "final" when the court of appeals fully resolves the appeal and is subject to no further review or correction by this Court, even if the mandate of the court of appeals has not yet issued.

Although acknowledging *Calderon*'s restrictions on a court of appeals' ability to withdraw an already issued mandate, the Sixth Circuit asserted that it retained the "inherent power" to reconsider its judgment because the mandate had "not yet issued in this case." (Pet. App. 6) But issuance of the mandate, which ordinarily is nothing more than "a certified copy of the judgment, a copy of the court's opinion, if any, and any directions about costs," Fed. R. App. P. 41(a), does not have such talismanic significance. It is a purely ministerial act required by Rule 41, performed by the clerk, and it is wholly separate from an appellate court's adjudication of the merits of a case.[8] *See Finberg*, 658 F.2d at 96 n.5 ("[T]he extent of a Court's supervision of a case between entry of judgment and issuance of the mandate should not be overstated"). While issuance of the mandate may be evidence of the finality of

[8] The Third Circuit has expressly recognized the "minimal role" of a court between the filing of its decision and the issuance of a mandate. *See, e.g., Humphreys v. DEA*, 105 F.3d 112, 117 (3d Cir. 1996) (declining to vacate decision as moot due to death of party after decision was filed, but before mandate issued).

an appellate court's judgment, it is not necessary to achieve it.

Undoubtedly, a federal court of appeals retains jurisdiction over a case and, thus, the power to alter or modify the judgment prior to issuance of its mandate. *Wilson v. Ozmint*, 357 F.3d 461, 463 (4th Cir. 2004) (court may amend "what it previously decided" before issuance of the mandate); *First Gib. Bank v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995) ("[b]ecause the mandate is still within our control, we have the power to alter or to modify our judgment"); *Finberg v. Sullivan*, 658 F.2d 93, 102 (3d Cir. 1981) ("[t]his Court unquestionably may change its judgment before the mandate becomes effective"); *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir.), *cert. denied*, 439 U.S. 958 (1978) (as long as appellate court retains its mandate, it maintains its jurisdiction over the case and the power to alter the mandate); *Burget v. Robinson*, 123 F. 262, 264 (1st Cir. 1903) (effect of order staying mandate after judgment indefinitely is to retain jurisdiction of the cause in that court and the power to grant rehearing, even after the term). However, the mere existence of jurisdiction in the court of appeals does not *per se* negate the finality of its judgment. "[F]inality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment." *Market St. Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).

This Court has long recognized the strong finality concerns implicated when the jurisdiction of one sovereign is invoked to upset a decision of another. Indeed, this Court has described the requirement of finality as "an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Given the "realm of potential conflict

between the courts of two different governments" created in that circumstance, the Court, since 1789,[9] has been constrained in its power to intervene in State litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree." *Radio Station WOW, Inc.*, 326 U.S. at 124. The current federal statute regulating the Court's jurisdiction to review state-court decisions, codified at 28 U.S.C. § 1257(a), retains that original "firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).

To be reviewable by this Court, a state-court judgment must be final in two respects: (1) it must be subject to no further review or correction in any other state tribunal; and (2) it must be final as an effective determination of the litigation and not merely interlocutory. In other words, "[i]t must be the final word of a final court." *Market St. Ry. Co.*, 324 U.S. at 551. Finality for purposes of § 1257(a) is not contingent upon the issuance of an appellate court mandate. For this Court has made clear that the mere fact that residual ministerial acts are to be performed on remand to a lower court, such as "entering the judgment which the appellate court had directed," does not defeat the finality of a state-court judgment for purposes of certiorari review. *Dep't of Banking v. Pink*, 317 U.S. 264, 267 (1942); *see also* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, ch. 3.5, p. 144 (8th ed. 2002) ("The literal approach [to § 1257(a)] does ascribe finality to a state court judgment that leaves only ministerial acts to be performed on remand to the lower state court"); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S.

[9] Judiciary Act of 1789, § 25, 1 Stat. 85.

62, 68 (1948) (if nothing more than mere ministerial act remains to be done, such as entry of judgment upon a mandate, decree is regarded as concluding the case and is immediately reviewable); *Cole v. Violette*, 319 U.S. 581, 582 (1943) (order of highest state court deemed "final" where it finally disposed of all issues in case, leaving nothing to be done but the ministerial act of entering judgment in the trial court); *Tower v. Fletcher*, 114 U.S. 127, 128 (1885) ("The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered").[10]

The same principles of comity and federalism driving this Court's definition of "finality" in the context of § 1257(a) also inform the definition of "finality" for purposes of retroactivity analysis. Under *Teague v. Lane*, 489 U.S. 288 (1989), judicial decisions announcing new rules of criminal procedure do not apply to cases in which the conviction becomes "final" before the new rules are announced. *Teague*, 489 U.S. at 310. Applying that analysis, this Court's decisions establish that a judgment not reviewed by this Court becomes "final" when "the time for filing a petition for a writ of certiorari has elapsed or a

[10] Nor do any of the time limits for seeking review by this Court run from the issuance of the mandate. Indeed, Sup. Ct. R. 13.3 expressly provides otherwise: "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate." *See also* Sup. Ct. R. 18.1 (appeal from district court commenced by filing notice of appeal with the clerk of the district court within the time provided by law "after entry of the judgment sought to be reviewed"); 28 U.S.C. § 2101 (time for appeal runs from entry of judgment or decree).

timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).[11]

Likewise, AEDPA does not impose a mandate-based definition of finality. In fact, none of the limitations periods contained in the Act run from issuance of the mandate of the appellate court. Rather, "finality" is determined with reference to the exhaustion of available avenues of review. Under 28 U.S.C. § 2244(d)(1), a state prisoner must initiate federal habeas corpus proceedings within one year from the latest of "the date on which the judgment became final *by the conclusion of direct review* or the expiration of the time for seeking such review." (emphasis added) Under 28 U.S.C. § 2263, which provides the statute of limitations for habeas petitions filed by prisoners subject to capital sentences in states that qualify for expedited collateral review procedures, an application for habeas corpus relief under § 2254 must be filed in the appropriate district court within 180 days "after final *State court affirmance* of the conviction and sentence on direct review or the expiration of the time for seeking such review." (emphasis added) Thus, although the terms of AEDPA do not speak specifically to the question raised in this case, its provisions "certainly inform [this Court's] consideration" of it. *Calderon*, 523 U.S. at 558 (quoting *Felker v. Turpin*, 518 U.S. 651, 663 (1996)).

[11] *See also Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"); *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982) (same); *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965) (same).

Similarly, in *Clay v. United States*, 537 U.S. 522 (2003), the Court addressed finality in the context of the one-year limitation provision under 28 U.S.C. § 2255, specifically rejecting the views of two federal courts of appeals that had adopted a mandate-based definition of finality.[12] The relevant provision of the statute required the initiation of federal post-conviction proceedings within one year of "the date on which the judgment of conviction *becomes final*." 28 U.S.C. § 2255, ¶6(1) (emphasis added). The Court held that the judgment of conviction is "final" when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."[13] *Clay*, 537 U.S. at 527. The Court's ruling in *Clay* is particularly instructive here, since it involved application of the same rules of appellate procedure at issue in this case, including the mandate requirement of Fed. R.

[12] The Court expressly overruled the decisions of the Fourth and Seventh Circuits in *United States v. Torres*, 211 F.3d 836 (4th Cir. 2000), and *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998), *cert. denied*, 526 U.S. 1113 (1999), which held that the judgment of conviction for federal post-conviction purposes becomes final on the date the court of appeals issues its mandate on direct review. *See also Johnson v. United States*, 246 F.3d 655, 657 (6th Cir. 2001) ("finality" for purposes of § 2255 not delayed pending appellate resolution of post-trial motion under Fed. R. Crim. P. 33 based on new evidence).

[13] Congress has dictated this same point of finality in other contexts as well. *See, e.g.*, 26 U.S.C. § 7481(a)(2)(B) (decision of the Tax Court becomes final "[u]pon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals"); 38 U.S.C. § 7291(a)(2) (decision of the United States Court of Appeals for Veterans Claims "shall become final . . . upon the denial of a petition for certiorari, if the decision of the Court of Appeals for Veterans Claims is affirmed or the appeal is dismissed by the United States Court of Appeals for the Federal Circuit").

App. P. 41.[14] *See also United States v. Craigo*, 993 F.2d 1086 (4th Cir. 1993) (court's stay of its mandate to allow government to seek certiorari left judgment within the court's control subject to modification, even though the *judgment became final* when the government failed to file certiorari petition) (emphasis added).

As the discussion above illustrates, in determining the point of finality in the context of both direct and collateral review – state and federal – both Congress and this Court have consistently applied the same definition of finality – one that is practical, workable, and not dictated or controlled by the particular practices of the rendering courts – that the judgment at issue be "the final word of a final court." Federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *O'Neal v. McAninch*, 513 U.S. 432, 448 (1995). When a court of appeals enters a final judgment denying habeas relief and then denies rehearing of that decision, it has had its "final word," subject only to review

[14] In those limited situations in which a mandate-based definition of finality has been employed, the rationale is not based upon any general view that the mandate is necessary to achieve "real" finality. For certain determinations under the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq*., and the former version of Fed. R. Crim. P. 33 (motion for new trial based on newly discovered evidence), for example, some courts have held that finality attaches upon issuance of the appellate court's mandate. *Clay*, 537 U.S. at 537. But since both require further action in the district court, a mandate-based definition of finality in those contexts is entirely reasonable. Issuance of the mandate is necessary to transfer jurisdiction back to the district court to permit it to proceed either with a retrial of the defendant or disposition of a motion. As the Second Circuit reasoned in *United States v. Reyes*, 49 F.3d 63 (2d Cir. 1995), it would be anomolous to include within the pertinent time period an interval during which the lower court had no jurisdiction to act. *Reyes*, 49 F.3d at 68.

by this Court. If, as in *Teague*, *Clay* and *Caspari*, denial of certiorari is of significant enough import, in itself, to establish finality of a judgment of conviction for purposes of retroactivity and collateral review, then surely that event should carry at least as much significance in the federal habeas context, which this Court has long recognized as collateral and secondary in importance to the direct review proceedings. *See Williams v. United State*s, 401 U.S. 667, 682-83 (1971); *see also Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) ("Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature"). Indeed, the Tennessee Supreme Court specifically looks to that event as the point at which a death-sentenced prisoner has completed "the standard three-tier appeals process" for purposes of setting an execution date.[15] Moreover, this view is entirely consistent with the mandatory language of Rule 41(d)(2)(D), requiring the clerk of the court of appeals to issue the mandate immediately upon the filing of a copy of this Court's order denying certiorari.

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[15] Tenn. Sup. Ct. R. 12.4(A) provides: "After a death-row prisoner has pursued at least one unsuccessful challenge to the prisoner's conviction and sentence through direct appeal, state post-conviction, and federal habeas corpus proceedings, the State Attorney General shall file a motion requesting that this Court set an execution date. The motion shall include a brief summary of the procedural history of the case demonstrating that the prisoner has completed the standard three-tier appeals process. The motion shall be considered premature if filed prior to the expiration of the time for filing a petition for writ of certiorari or a petition to rehear the denial of a petition for writ of certiorari in the United States Supreme Court."

There is no logical justification for departing from this Court's "long-recognized, clear meaning" of finality in the post-conviction relief context, *Clay*, 537 U.S. at 527, and imposing a mandate-based definition, especially where, as in this case, the judgment of the court of appeals affirmed the summary dismissal of a habeas petition, requiring no further action in the district court save the filing of the judgment in the court below. The decision of the court of appeals lacked none of the attributes of an adjudication. All that remained to be done following this Court's denial of certiorari – issuance of the mandate by the clerk of court – is properly characterized as merely "ministerial." Thus, the fact that the court of appeals retained some "latent power" to modify its judgment while it controlled the mandate did not defer or defeat the finality of its judgment. *Market St. Ry. Co.*, 324 U.S. at 551 ("finality is not deferred by the existence of some latent power in the rendering court to reopen or revise its judgment").

Because finality of the Sixth Circuit's judgment attached when this Court denied respondent's petition for a writ of certiorari, the court's subsequent withdrawal of that judgment was an event of considerable significance and demanded an extraordinary justification, particularly given the State of Tennessee's strong interest in the finality of its criminal convictions. As we now show, the Sixth Circuit's action lacked any such justification and should be overturned by this Court.

II. THE SIXTH CIRCUIT'S DECISION TO WITHDRAW ITS FINAL JUDGMENT AND PERMIT THOMPSON TO RELITIGATE THE MERITS OF HIS UNDERLYING HABEAS CORPUS PETITION CONSTITUTES AN ABUSE OF DISCRETION.

While the courts of appeals are recognized to possess inherent power to reconsider *sua sponte* the merits of an earlier decision that has become final, the power must be exercised only in "extraordinary circumstances." *Calderon*, 523 U.S. at 549-50 (addressing *sua sponte* recall of the mandate) (citing 16A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3938, p. 712 (2d ed. 1996)). In the context of federal habeas review of a state criminal conviction, that power is even further circumscribed by the comity concerns underlying this Court's habeas precedents. Thus, in *Calderon*, this Court held that a court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief "unless it acts to avoid a miscarriage of justice as defined by [this Court's] habeas corpus jurisprudence." *Id.* at 558. "[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence." *Id.* at 559 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). If the petitioner asserts his actual innocence of the underlying crime, "he must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. . . .' " *Id.* at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). If the petitioner challenges his death sentence, "he must show 'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Id.* at 559-60 (quoting *Sawyer*, 505 U.S. at 348).

Because the Sixth Circuit failed to perceive its action as the equivalent of a recall of the mandate, it made no attempt to justify its decision under either standard. It is clear, however, that the evidence on which the court based its remand – the discovery deposition of Faye E. Sultan, Ph.D. – meets neither criterion. The deposition addressed only potential mitigation evidence available to defense counsel and in no way undermined the jury's determination of Thompson's guilt. The Sixth Circuit itself viewed it as probative in analyzing Thompson's claim of ineffective assistance of counsel at sentencing, since it could have demonstrated available mitigating evidence related to his mental state at the time of the crime. Judge Suhrheinrich characterized the Sultan deposition as "powerful mitigating evidence that should have been presented to the trier of fact at sentencing."[16] (Pet. App. 86) Indeed, Dr. Sultan's opinion was specifically couched in the language of the statutory mitigating circumstance under Tenn. Code Ann. § 39-2-203(j)(8) ("The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect . . . ."):

> It is my opinion that . . . Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he was convicted and sentenced. *This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.*
>
> Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect.

[16] The panel majority specifically approved Judge Suhrheinrich's summary of the probative value of the Sultan deposition. (Pet. App. 2)

> His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. *There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.*

(J.A. 20) (emphasis added).

On its face, the potential relevance of this evidence was limited to the sentencing phase of Thompson's trial; it suggested that there might have been additional mitigating information available to defense counsel that he did not present. The Sixth Circuit was thus authorized to revisit its prior decision only if that evidence established Thompson's "innocence of the death penalty" under *Sawyer*. *Calderon*, 523 U.S. at 560 (quoting *Sawyer*, 505 U.S. at 348).[17] To prevail on such a claim, a petitioner must demonstrate "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found . . . [him] *eligible* for the death penalty under the applicable state law," *Sawyer*, 505 U.S. at 336, or, in other words, "that there was *no aggravating circumstance* or that some other condition of eligibility had not been met." *Id*. at 345 (emphasis added). That showing simply cannot be made on this record.

At the time of Thompson's offense, first-degree murder in Tennessee was punishable by death or imprisonment for

[17] *Sawyer*'s "actual innocence of the death penalty" exception is limited to "the context of an alleged error at the sentencing phase of a capital trial." *Sawyer*, 505 U.S. at 340 (quoting *Smith v. Murray*, 477 U.S. 527, 537 (1986)).

life. Tenn. Code Ann. § 39-2-202(b) (1982). Once convicted of the crime, a defendant is eligible for imposition of the death penalty if the jury finds "at least one statutory aggravating circumstance" beyond a reasonable doubt. Tenn. Code Ann. § 39-2-203(g) (1982). The jury in this case found three such aggravators: (1) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (2) that the defendant committed the murder for the purpose of avoiding or preventing his lawful arrest and prosecution; and (3) that the murder was committed while the defendant was engaged in committing robbery or kidnapping. Tenn. Code Ann. § 39-2-203(i)(5), (6), (7) (1982) (repealed). The Sultan deposition does not undercut the applicability of any of these factors to Thompson's crime.

The "heinous, atrocious or cruel" aggravator in effect at the time of Thompson's trial was established by the circumstances of the murder itself. The proof at trial (as affirmed in the opinion of the Tennessee Supreme Court on direct appeal) demonstrated "a particularly senseless killing indicative of depravity of mind." *Thompson*, 768 S.W.2d at 252. Brenda Lane was abducted at knifepoint from the parking lot of a Wal-Mart store and driven some distance into rural Tennessee, where she was stabbed multiple times and left alive, conscious and alone to die on a winter night. *Id*. As noted in the opinion of the Tennessee Supreme Court, it is highly probable that Lane knew her fate in advance; there is evidence that she was crying as she rode with Thompson and his juvenile accomplice to her death. *Id*. Moreover, the fact that the murder was committed while Thompson was engaged in committing kidnapping and robbery – supporting application of the "felony murder" aggravator – has never been disputed.

Thompson's own statement to police established that he abducted Lane at knifepoint and took her vehicle after murdering her.[18] Finally, the Tennessee Supreme Court concluded that there was ample evidence to support the jury's determination that the murder was committed to prevent the lawful apprehension of Thompson and his juvenile accomplice. They were both on the run from authorities, and Lane undoubtedly "could have identified the twosome and raised an alarm after the theft of her car." *Id*. Because these factors remain unaffected by the evidence on which the Sixth Circuit relied to withdraw its opinion – or any other record evidence in this case – Thompson cannot satisfy *Sawyer*'s miscarriage of justice exception because he cannot demonstrate that he is ineligible for the death penalty.

Instead, as even the concurring opinion demonstrates, the Sultan deposition would be relevant only to the jury's *selection* of the appropriate penalty. Even in view of multiple aggravating circumstances, whether a defendant in fact receives a capital sentence depends upon the weighing of individual mitigation evidence against the statutory aggravator or aggravators found, *i.e.*, the selection stage. *See, e.g., Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) (distinguishing between eligibility and selection phases of capital sentencing process); *Tuilaepa v. California*,

[18] Under Tennessee law at the time of Thompson's offense, "kidnapping" was committed when a person "forcibly or unlawfully confines, inveigles, or entices away another, with the intent to cause him to be secretly confined, or imprisoned against his will." Tenn. Code Ann. § 39-2-302 (1982). "Robbery" was defined as the "felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear." Tenn. Code Ann. § 39-2-501 (1982).

512 U.S. 967, 972-73 (1994) (same). Thus, by its very nature, the new evidence upon which the Sixth Circuit based its decision – additional mitigation evidence – can never meet *Sawyer*'s miscarriage of justice standard. *See Sawyer*, 505 U.S. at 345 (rejecting argument that "innocence of the death penalty" should be extended beyond elements of the capital sentence to include additional mitigation evidence).

Thompson's ability to meet the less stringent *Schlup* standard fares no better. While *Schlup*'s miscarriage of justice exception is met by the lower "more likely than not" standard, this Court has explicitly tied the exception to a petitioner's "actual innocence" of the crime. Thus, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him" in light of newly discovered evidence. *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring). The evidence in support of an assertion of actual innocence should be reliable, concrete and verifiable. *Schlup*, 513 U.S. at 234. In addition, this Court has made clear that the miscarriage of justice exception under *Schlup* does not extend to "prisoners whose guilt is conceded or is plain." *Schlup*, 513 U.S. at 321 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986)).

Neither the initial nor subsequent opinion of the Sixth Circuit contains any suggestion that Thompson did not kill Brenda Lane or that he is otherwise "innocent" of her murder, a result that is hardly surprising, since Thompson himself confessed to the crime and made no appreciable

effort to contest his guilt at trial.[19] *Thompson*, 768 S.W.2d at 243. It was Thompson's own statement that led authorities to Lane's body, *id*., and as recently as January 19, 2004, Thompson accepted full responsibility for her murder, as noted in the Tennessee Supreme Court's May 2004 opinion. *Thompson*, 134 S.W.3d at 181. Indeed, according to Thompson's own mental health expert in state competency proceedings, Thompson "readily admitted that he 'killed Brenda Lane.' " (Pet. App. 373)

Aside from the overwhelming evidence of guilt at trial, the Sultan deposition itself supports Thompson's guilt, as demonstrated by the following exchange:

> Q. What did Mr. Thompson tell you about the offense, as best you can recall?
>
> A. As best I recall, Mr. Thompson talked about his relationship with the young girl that he was with for the days and weeks prior to this.
>
> Q. Joanne McNamara?
>
> A. Yes. . . . What he told me was that they were thrown out of the place that they had been staying

[19] Indeed, in closing argument, defense counsel all but admitted Thompson's guilt: "We elected, for our benefit and for your benefit, to not enter a plea of guilty and not enter a plea of not guilty. . . . If a guilty plea had been entered, you all would not have seen the step-by-step situation of what happened. . . . We didn't put on any witnesses. What else is there to say? You have seen the video tape of Mr. Thompson talking with Attorney General Charron not long after this happened. . . . I think that is the clearest evidence that could be presented. . . . I noticed in the video tape that General Charron asked him there at the Wal-Mart parking lot, 'What did you want from her?' He said, 'Nothing.' We had two desperate people that I believe only wanted a ride away from the situation that they had been unable to handle." (R. 5, Add. 1H, Vol. 16, pp. 85-86, 92)

> when it was discovered that they were not in fact married. I don't know who it was who portrayed them as a married couple to the people that they were staying with, but that the truth of it was discovered, that someone contacted Joanne McNamara's mother – or parents, I don't know which; I think mother – to let her know that this child was in her home, the person they were staying with, that Mr. Thompson forced the victim in this case into her car at knifepoint. . . . *[H]e knew that he had in fact killed her.*

(J.A. 41-42) (emphasis added).

Nor can it be argued that Thompson's new evidence meets the *Schlup* standard on the theory that it might have supported an insanity defense. First, this Court has made clear that, for purposes of the miscarriage of justice analysis under *Schlup*, "actual innocence" is different from "legal innocence." *Calderon*, 523 U.S. at 558; *see also Bousley v. United States*, 523 U.S. 614, 615 (1998) ("Actual innocence means factual innocence"). The clear example of actual innocence is "the case where the State has convicted the wrong person of the crime." *Sawyer*, 505 U.S. at 339-40. An insanity defense cannot satisfy the concept of "actual innocence," because it concedes the act, but invokes a bar to legal responsibility for it. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 76 (1992) (An insanity verdict "establishes two facts: (i) the defendant committed an act that constitutes a criminal offense; and (ii) he committed the act because of mental illness"). This prerequisite of

guilt is incompatible with the requirement of actual innocence necessary to establish a miscarriage of justice.[20]

Second, even if potential evidence of insanity is an appropriate consideration for determining whether there has been a miscarriage of justice, the Sultan deposition fails to meet even that threshold for consideration because Dr. Sultan's testimony fails to establish the defense under Tennessee law. Consistent with the language of the statutory mitigating circumstance, Dr. Sultan specifically opined that Thompson's ability to conform his conduct to the requirements of the law was "substantially impaired" as a result of mental illness. (J.A. 20) But that mitigator, by definition, does not amount to legal insanity, since it specifically provides that the mental impairment of which it speaks is "insufficient to establish a defense to the crime." Tenn. Code Ann. § 39-2-203(j)(8) (1982). By contrast, an insanity defense under Tennessee law at the time of Thompson's crime required more than a showing of mere impairment; a defendant was required to demonstrate that he lacked the substantial *capacity* to conform his conduct to the requirements of the law. *Graham v. State*, 547 S.W.2d 531, 543 (Tenn. 1977). Finally, the testimony at Thompson's trial of both the defense and State mental health expert witnesses clearly established Thompson's sanity at the time of the offense. (J.A. 264-66) Dr. Sultan's testimony would thus provide nothing more than impeachment evidence in the form of an alternative opinion on the subject of Thompson's sanity. And this Court has made clear that impeachment evidence provides

[20] As this Court has stated, "the quintessential miscarriage of justice is the execution of a person who is *entirely* innocent." *Schlup*, 513 U.S. 324-25 (emphasis added).

no basis for finding a miscarriage of justice. *Calderon*, 523 U.S. at 563 (citing *Sawyer*, 505 U.S. at 348). In sum, the evidence on which the Sixth Circuit based its decision falls far short of the showing necessary to justify the extraordinary act of withdrawing an already final decision.

After the courts of the State of Tennessee affirmed Thompson's conviction and sentence on direct appeal and then refused to disturb it on state collateral review, the State waited five and one-half years for federal habeas proceedings to run their course. When the district court denied Thompson's federal habeas petition, the Sixth Circuit affirmed that decision and this Court denied both certiorari and rehearing. The courts of Tennessee then took the steps necessary to enforce Thompson's death sentence. In the period between this Court's final disposition of Thompson's request for certiorari in January 2004 and the Sixth Circuit's second decision in June 2004, the Tennessee Supreme Court set a new execution date, ordered expedited competency proceedings in the trial court, disposed of numerous procedural motions seeking to delay execution of the judgment, and issued a detailed opinion following expedited appeal proceedings affirming the trial court's denial of Thompson's claim of incompetence for execution. In short, the State marshaled the full force of its judicial machinery in what should have been the final step toward execution of its judgment. This case, like *Calderon*, illustrates the extraordinary costs associated with a federal court of appeals' reconsideration of its judgment in a habeas case after finality has attached.

The State's finality interests in this case are no different from those that *Calderon* sought to protect. Those interests are "all but paramount, without regard to whether the court of appeals predicates the recall on a

procedural misunderstanding or some other irregularity occurring prior to its decision." *Calderon*, 523 U.S. at 557. Because Thompson has already had extensive review of his claims in both state and federal courts, absent a strong showing of actual innocence, "the State's interests in finality outweigh the prisoner's interest in obtaining yet another opportunity for review." *Id*. The Sixth Circuit's surprise reconsideration of its January 2003 decision frustrates the State's "all but paramount" interest in finality and constitutes a grave abuse of discretion.

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CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to reinstate its January 9, 2003, judgment affirming the district court's denial of habeas corpus relief.

Respectfully submitted,

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