IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DONNIE E. JOHNSON	)	
	)	
Petitioner	)	
	)	No. 97-3052-BBD
v.	)	
	)	
RICKY BELL, Warden	)	
Riverbend Maximum Security	)	
Institution	)	
	)	
Respondent	)	

MOTION FOR EQUITABLE RELIEF IN THE
EXERCISE OF THIS COURT'S INHERENT ARTICLE III POWERS,
AND/OR FOR RELIEF FROM JUDGMENT

Pursuant to Article III of the United States Constitution, 28 U.S.C. §2243, Fed.R.Civ.P. 60(b), and all other applicable law, Petitioner Donnie E. Johnson respectfully moves this Court to grant him equitable relief and/or relief from its prior judgment denying habeas corpus relief. Exercising its inherent authority under Article III and Fed.R.Civ.P. 60(b), this Court should grant equitable relief on Claims 2, 15 & 16 in the Petition For Writ of Habeas Corpus.

Relief from judgment is warranted given intervening legal events and proof that this Court's judgment was tainted by fraud, misconduct, and/or misrepresentation: (1) The intervening decision of Cone v. Bell, 359 F.3d 785 (6th Cir. 2004) establishes clear error in this Court's prior denial of habeas relief on Claim 16, Donnie Johnson's vagueness challenge to the jury's application of the "heinous, atrocious, or cruel" aggravating circumstance; (2) Banks v. Dretke, 540 U.S ___ (2004) and proof that the state withheld evidence and presented false testimony to this Court requires equitable relief on Claim 2, Donnie Johnson's claim that, in violation of due process, the prosecution withheld exculpatory evidence and presented the false testimony of Ronnie McCoy; and (3) The

intervening decision of Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003) establishes clear error in the denial of relief on Claim 15, Donnie Johnson's challenge to jury instructions requiring juror unanimity at sentencing.

This motion is divided into 3 Sections. Section I discusses this Court's inherent Article III powers to grant equitable relief from judgment, as well as its powers pursuant to Fed.R.Civ.P. 60(b). Section II explains this Court's power to grant equitable relief from judgment in light of intervening legal developments, as well as fraud, misconduct, and/or misrepresentation. Section III discusses Donnie Johnson's entitlement to equitable relief given (1) Cone v. Bell, 359 F.3d 785 (6th Cir. 2004); (2) Banks v. Dretke, 540 U.S. ___ (2004), and proof that the state withheld exculpatory evidence, made misrepresentations to Johnson, the state court, and this Court, and presented false testimony to this Court; and (3) Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003).

I. THIS COURT HAS INHERENT ARTICLE III EQUITABLE POWERS WHICH IT MAY EXERCISE TO ENSURE JUSTICE, AS WELL AS POWERS UNDER FED.R.CIV.P. 60(b), WHICH ARE NOT AFFECTED BY THE AEDPA

This Court possesses plenary inherent Article III equitable powers to revise or amend a judgment in the interest of justice. This Court may exercise those powers through Fed.R.Civ.P. 60(b), and such powers cannot constitutionally be restricted by Congress.

A. This Court Has Inherent Power Under Article III To Reconsider And/Or Revise Its Prior Judgment And That Judicial Power Cannot Be Constrained By Congress

1. This Court Possesses Broad-Ranging Equitable Powers

This Court possesses inherent equitable powers under Article III which allow it to revisit and/or revise its own judgment in the interest of fundamental justice. This equitable power to grant relief is "founded in the inherent power of the court over its own judgments." Bronson v. Schulten,

104 U.S. (14 Otto) 410, 417 (1881). It derives from Article III itself. See U.S.Const. Art. III §2.

In a habeas case, a District Court's equitable power also derives from 28 U.S.C. §2243, which instructs District Courts to decide habeas cases "as law and justice require." Explicit since 1874,[1] this command confirms that habeas courts are endowed with the full panoply of equitable powers necessary to ensure justice. Under §2243:

> *All the freedom of equity procedure is thus prescribed*; and substantial justice, promptly administered, is ever the rule in habeas corpus.

Storti v. Massachusetts, 183 U.S. 138, 143, 22 S.Ct. 72, 74 (1901)(emphasis supplied).[2] "All the freedom of equity procedure" thus remains at the District Court's disposal here.

This equitable power is broad. As Justice Story explained:

> [O]ne of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to *all the varieties of circumstances which may arise.*

Joseph Story, Commentaries On Equity Jurisprudence As Administered In England And America, §28, 14th ed. (Boston: Little, Brown & Co., 1918, W.H. Lyon, ed.) p. 24 (emphasis supplied). Faced with a request for equitable relief, a District Court has discretion to evaluate a situation in its entirety to reach a fundamentally just outcome:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

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[1] "Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require.' Rev.Stat. §761, superseded by 28 U.S.C. §2243." Preiser v. Rodriguez, 411 U.S. 475, 487, 93 S.Ct. 1827, 1835 (1973).

[2] Section 2243 is substantively identical to the 1874 version of Rev. Stat. §761 discussed in Storti. See Wingo v. Wedding, 418 U.S. 461, 468-469, 94 S.Ct. 2842, 2847 (1974).

Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 64 S.Ct. 587, 592 (1944). Put another way, "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." Meredith v. Winter Haven, 320 U.S 228, 235, 64 S.Ct. 7, 13 (1943).[3]

Recognizing an Article III tribunal's broad equitable powers, Chief Justice John Marshall acknowledged that a court may grant relief from judgment where a new matter "clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself" before judgment. Marine Ins. Co. of Alexandria v. Hodgson, 11 U.S. (7 Cranch) 332, 336 (1813). He further emphasized that an Article III court can grant relief where the "equity of the applicant [is] free from doubt," and where a judgment "*would be against conscience for the person who has obtained it to avail himself.*" Id. at 337 (emphasis supplied).

Donnie Johnson thus properly invokes this Court's equitable powers under Article III. In light of all the equities (further explicated *infra*), this Court may – in the exercise of its discretion – properly consider Donnie Johnson's grounds for relief under Article III. Under the circumstances, this Court should conclude, as John Marshall stated, that relief should be granted because the judgment denying habeas relief "would be against conscience." Hodgson, 11 U.S. (7 Cranch) at 337.

2. This Court May Also Grant Relief Under Fed.R.Civ.P. 60(b)

While this Court has inherent Article III powers to ensure the fundamental justice of its judgments, it likewise can grant relief from an unjust judgment under Fed.R.Civ.P. 60(b). Rule 60(b) provides that a United States District Court may grant relief from judgment for:

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[3] This helps to explain why a district court's decision on a motion for relief from judgment is reviewed solely for abuse of discretion. See Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefit Fund, 249 F.3d 519 (6th Cir. 2001).

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b).

"In simple English," Rule 60(b) vests power in courts "adequate to enable them to vacate judgments *whenever such action is appropriate to accomplish justice*." Klaprott v. United States, 335 U.S. 601, 615, 69 S.Ct. 384, 390 (1949)(emphasis supplied). The Rule is "simply the recitation of pre-existing judicial power" to set aside judgments which are unfair. Plaut v. Spendthrift Farm Inc., 514 U.S. 211, 234-235 (1995). "Rule 60(b) . . . reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." Plaut v. Spendthrift Farm, Inc., 514 U.S. at 233-234, quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944).

Although the Sixth Circuit has held in McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996) that "We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition," (citing cases), *McQueen* does not foreclose the use of 60(b) to reopen habeas corpus proceedings. In fact, *McQueen* is currently under reconsideration by the *en banc* Sixth Circuit in Abdur'Rahman v. Bell, 6th Cir. Nos. 02-6547, 02-6548, which is pending decision.

Relief under Rule 60(b) must be available when proceedings before the United States District

Court have been tainted by misconduct and/or where intervening legal developments establish that a District Court's habeas judgment is erroneous. Justice Stevens agrees. As he has explained, a Rule 60(b) motion is proper when the petitioner does not "purport to set forth the basis for a second or successive challenge to the state-court judgment of conviction," but instead "seek[s] relief from the final order entered by the federal court in the habeas proceeding." Abdur'Rahman v. Bell, 537 U.S. 88, 96, 123 S.Ct. 594, 598 (2002) (Stevens, J., dissenting).

Other courts of appeals agree that motions under Rule 60(b) are permissible when there has been unfairness in the process leading to the entry of the federal habeas judgment. See e.g., Rodriguez v. Mitchell, 252 F.3d 191, 199 (2d Cir. 2001)(considering 60(b) motion in habeas case based on allegations of unfairness in federal habeas proceedings: "[A] motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)."); Shortt v. Roe, 64 Fed.Appx. 655 (9th Cir. 2003)(Rule 60(b) motion not a second or successive application for habeas corpus relief if it does not "challenge the integrity of the state criminal trial but rather challenge[s] the integrity of the federal habeas proceeding." See also Gonzalez v. Secretary, 366 F.3d 1253 (11th Cir. 2004)(en banc); Banks v. United States, 167 F.3d 1082, 1083 (7th Cir. 1999) ("allegations seriously challenging the integrity of [a] first habeas proceeding" proper basis for relief from judgment under Rule 60(b)).

As the Second Circuit explained in *Rodriguez*, Rule 60(b) is designed to remedy unfairness in the *federal habeas proceedings*, not to allow a second challenge to the underlying *state court proceedings*. A proper Rule 60(b) motion thus involves allegations that the ultimate judgment of the federal district court was distorted because of some error or unfairness in the federal court process. It is for this reason that Rule 60(b) specifically allows for relief for errors in the process leading to

the entry of the federal judgment. Rodriguez v. Mitchell, 252 F.3d at 199.

Importantly, as a matter of policy, this interpretation of Rule 60(b) is necessary to allow federal courts to vindicate justice in habeas cases. Especially where Donnie Johnson's life is at stake, Rule 60(b) -- like Article III -- provides this Court ample power to remedy the inequity that has occurred in the proceedings before this Court. This Court must therefore consider the motion and grant relief.[4]

3. The AEDPA Does Not Affect This Court's Inherent Article III Judicial Power To Grant Equitable Relief Which Also Finds Expression In Rule 60(b) And 28 U.S.C. §2243

It is also important to note that the AEDPA does not restrict this Court's Article III equitable powers. First, with Donnie Johnson having filed a motion for relief from judgment under Article III and Rule 60(b), 28 U.S.C. §2244 does not, by its terms, apply. Its provisions only pertain to habeas claims "presented in a second or successive habeas corpus application under section 2254." See 28 U.S.C. §2244(b)(1) & (b)(2). Section 2244 is thus inapplicable to the motion which is filed under Article III and Rule 60(b), and which raises *grounds for equitable relief*, not claims for habeas relief under §2254. See Calderon v. Thompson, 523 U.S. 538 (1998)(§2244 inapplicable by its terms to *sua sponte* recall of mandate).[5] See also Rodriguez v. Mitchell, *supra* (fact that after reopening of judgment habeas relief may ultimately be granted does not affect district court's ability to reopen

[4] By filing this motion for Article III equitable relief and/or relief from judgment pursuant to Fed.R.Civ.P. 60(b), Donnie Johnson expressly does not file a second or successive petition for habeas corpus relief. He objects to any potential recharacterization of his motion as an second or successive application for habeas corpus relief.

[5] Moreover, there is a significant difference between a district court motion for relief from judgment and a motion to recall a mandate. When a district court acts on a motion for relief from judgment, it acts upon its own judgment; an appellate court, in deciding a motion to recall a mandate, does not affect the initial judgment itself, which remains intact.

judgment in habeas proceeding).

Second, Donnie Johnson seeks relief directly under Article III and through Rule 60(b), which is simply a vehicle for the expression of inherent Article III equitable powers. No statute (including the AEDPA), can abrogate such inherent Article III judicial powers which exist independent of any statute, and which are fully confirmed by 28 U.S.C. §2243, which predates AEDPA by more than a century and remains in full force here, having never been repealed.[6]

Third, §2244(b)(1) is unconstitutional for at least two reasons:

(1) It violates Article III and the separation of powers for Congress to "prescribe[] a rule of decision in a case pending before the courts." United States v. Sioux Nation of Indians, 448 U.S. 371, 404, 100 S.Ct. 2716, 2735 (1980); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).[7] Exactly like the unconstitutional statute in Klein, §2244(b)(1) dictates the judicial act of dismissal as the outcome of a judicial proceeding. Under Klein, therefore, §2244(b)(1) is unconstitutional.[8]

(2) §2244(b)(1) also violates due process because it imposes – for the first time in the

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[6] The Eleventh Circuit thus clearly erred in Gonzalez v. Secretary, 366 F.3d 1253 (11th Cir. 2004)(en banc). The Eleventh Circuit believed that Rule 60(b) could not trump the AEDPA. In reality, the question is whether the AEDPA can trump inherent Article III powers, which merely find *expression* in Rule 60(b). Congress can not. Moreover, Congress has never explicitly repealed 28 U.S.C. §2243's 130-year-old mandate which acknowledges that habeas courts possess complete equitable powers. See e.g., p. 3, *supra*. Congress also has never clearly expressed any intent to repeal Rule 60(b) in habeas cases. It hasn't, presumably, because it constitutionally cannot do so.

[7] See Plaut, 514 U.S. at 225, 115 S.Ct. at 1456 (Congress cannot "direct[] what particular steps shall be taken in the progress of a judicial inquiry.")

[8] In Klein, the Supreme Court struck down the Act of July 12, 1870, ch. 251 which ordered the courts to dismiss certain appeals: "We are directed to dismiss the appeal, if we find that the judgment must be affirmed." Klein, 80 U.S. (13 Wall.) at 146-147. Striking down Congress' mandate of dismissal (a judicial prerogative) as violating the Separation of Powers, Chief Justice Chase explained: "Can we [dismiss the appeal] without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?" Id.

history of the Nation – an absolute *res judicata* bar on habeas claims raised in a second §2254 petition. Since the writ was first employed in 1305,[9] "All the authorities agree that *res judicata* does not apply to applications for habeas corpus." Darr v. Burford, 339 U.S. 200, 214-215, 70 S.Ct. 587, 596 (1950). This is so, because "The courts *must be kept open to guard against injustice through judicial error*." Id. (emphasis supplied). Because §2244(b)(1) imposes an absolute *res judicata* bar to successive §2254 claims, it violates due process: It "offends a principle of justice that is deeply rooted in the traditions and conscience of our people." Cooper v. Oklahoma, 517 U.S. 348, 362, 116 S.Ct. 1373, 1380 (1996).

Despite any claims to the contrary, the AEDPA cannot and does not apply. It does not affect this Court's inherent Article III equitable powers or its equitable powers under §2243 and Rule 60(b).

II. THIS COURT MAY PROPERLY GRANT EQUITABLE RELIEF IN LIGHT OF INTERVENING LEGAL EVENTS AND PROOF OF MISCONDUCT, MISREPRESENTATION AND/OR FRAUD

A. Equitable Relief Is Available In Light Of Intervening Legal Developments

Article III and Rule 60(b) are properly invoked to permit relief from judgment in a habeas proceeding when intervening appellate decisions establish the error in the prior federal court judgment. See e.g., Overbee v. Van Waters, 765 F.2d 578, 580-581 (6th Cir. 1985)(granting relief from judgment in light of intervening court decision); Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989)(change in relevant case law by Supreme Court warrants relief under Rule 60(b)(6)). It is "particularly appropriate" to employ Rule 60(b)(6) when intervening

[9] This first known instance of the use of the writ was in 1305, the "thirty-third year of Edward I." Fay v. Noia, 372 U.S. 391, 400, 83 S.Ct. 822, 828 (1963).

legal developments call into question the validity of the habeas judgment – whether in favor of the petitioner or the state. See Cornell v. Nix, 119 F.3d 1329, 1332 (8th Cir. 1997); Matarese v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986); Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987).

Indeed, as Judge Tjoflat has stated, Rule 60(b)(6) is "*tailor made*" for considering intervening legal developments in habeas proceedings. Gonzalez v. Secretary, 366 F.3d 1253, 1309 (11th Cir. 2004)(en banc)(Opinion of Tjoflat, J.). In fact, Judge Tjoflat described Rule 60(b) as the "*perfect vehicle*" for reconsidering a judgment in light of intervening law. Id.

Thus, for example, an intervening decision favorable to the state has been used to reverse a judgment granting habeas relief, when the prior grant of relief was based on an erroneous legal premise. See Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987)(based on intervening court decision, granting state's Rule 60(b) motion and denying habeas relief after petitioner had secured relief on appeal and state's certiorari petition had been denied). Similarly, district courts have granted relief from judgments denying habeas relief where intervening legal developments establish that a district court's prior judgment denying habeas corpus relief was in error. See e.g., Henderson v. Collins, No. C1-94-106 (S.D.Ohio Jul. 10, 2003)(Exhibit 1)(Attached)(granting 60(b) relief in death penalty case following intervening Sixth Circuit decision in Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003), *appeal pending* 6th Cir. Nos. 03-3988, 03-4054, 03-4080; Reinoso v. Artuz, 1999 U.S.Dist.Lexis 7768 (S.D.N.Y. 1999)(granting rule 60(b)(6) motion and reinstating habeas petition where intervening Second Circuit decision in Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998) which in effect overruled prior decision in Peterson v. Demskie, 107 F.3d 92 (2d Cir. 1997) upon which district court relied in initially denying relief).

B. Equitable Relief Is Available Where There Has Been Misconduct, Misrepresentation And/or Fraud

In addition, equitable relief from judgment is permitted under Article III and Fed.R.Civ.P. 60(b) when a federal habeas judgment has been tainted by fraud, misconduct, and/or misrepresentation during proceedings in the United States District Court. The *en banc* Eleventh Circuit has held as much in Gonzalez v. Secretary, 366 F.3d 1253 (11th Cir. 2004)(en banc)(fraud on court provides basis for relief from judgment in habeas cases).

In fact, the state has conceded that fraud provides a proper basis for relief from judgment during oral argument in Alley v. Bell, 6th Cir. No. 04-5596 (Argued June 16, 2004). This concession is wise, especially in light of the Sixth Circuit's unanimous agreement that fraud upon the court provides a proper basis for reopening a habeas case: "[W]hen the prosecution fails to reveal exculpatory evidence to the defense" before a final habeas judgment is rendered, there arises a "fraud upon the court . . . that calls into question the very legitimacy of a judgment."Workman v. Bell, 227 F.3d 331, 335 (6th Cir. 2000)(Merritt, J., for equally divided court)(allegations of fraud sufficient for hearing where witness allegedly committed perjury at trial and state agents withheld exculpatory evidence during federal habeas proceedings).

The availability of relief from judgment under such circumstances is made clear by the Sixth Circuit's decision in Abrahamsen v. Trans-State Express Inc., 92 F.3d 425 (6th Cir. 1996). In *Abrahamsen*, the Sixth Circuit concluded that a party in a district court may not withhold evidence which it is under a duty to disclose, nor may a party present evidence which is false. When such misconduct occurs, a party has "a valid basis for obtaining relief from judgment under Rule 60(b)." Id. at 429. Because such misconduct and fraud has occurred here (See pp. 25-27, *infra*), this Court

has power under Article III and Fed.R.Civ.P. 60(b) to grant relief from judgment, exactly as occurred in *Abrahamsen.* See also Dixon v. Commissioner, 316 F.3d 1041 (9th Cir. 2003)(where attorneys withheld evidence and failed to disclose pertinent information during course of federal proceedings, relief from judgment granted under Rule 60(b)).

III. THIS COURT SHOULD GRANT EQUITABLE RELIEF FROM JUDGMENT IN LIGHT OF INTERVENING LEGAL DEVELOPMENTS AND PROOF OF MISCONDUCT, MISREPRESENTATION AND/OR FRAUD

Given this Court's equitable powers, this Court should grant equitable relief from judgment on Claims 2, 15 & 16, given intervening legal developments and proof of fraud and misconduct which has tainted this Court's judgment denying habeas corpus relief.

A. This Court Should Grant Equitable Relief On Claim 16 In Light Of *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004).

Cone v. Bell, 359 F.3d 785 (6th Cir. 2004) establishes that this Court's prior denial of habeas corpus relief was clearly erroneous. Accordingly, this Court should grant Donnie Johnson equitable relief from this Court's prior erroneous judgment, reopen proceedings, and ultimately grant him habeas corpus relief.

1. Jury Instructions And The Jury's Finding That The Offense Was "Heinous, Atrocious, Or Cruel"

The jury was instructed that it could impose the death sentence if it found that the offense was "heinous, atrocious, or cruel in that it involved torture or depravity of mind." Doc. No. 7, Addendum 1, R. 565 (Jury Charge)(Attached as Exhibit 2). The jury received additional instructions on the meaning of "heinous," "atrocious," and "cruel," which provided:

> Heinous - 'Grossly wicked or reprehensible; abominable; odious; vile.'
> Atrocious: 'Extremely evil, or cruel; monstrous; exceptionally bad; abominable.'

> Cruel: 'Disposed to inflict pain or suffering; causing suffering; painful.'
> Torture: 'The infliction of severe physical pain as a means of punishment or coercion; the experience of this; mental anguish; any method or thing that causes such pain or anguish; to inflict with great physical or mental pain.'
> Depravity: 'Moral corruption; wicked; or a perverse act.'

Doc. No. 7, Addendum 1 at R. 565. Afterwards, the jury was instructed that, to find the aggravating circumstance, the jury merely had to find that the offense was "cruel" and "depraved," which included the tautology that the offense was from a "depraved mind" if the state of mind was "depraved":

> The State must prove beyond a reasonable doubt that the death of Connie Johnson was especially cruel and was a result of the depravity of the mind of the defendant, Donnie Edward Johnson. The jury may rely on the manner of death to determine as to whether or not the defendant exhibited a depravity of mind or the jury may draw an inference that the depraved state of mind of the defendant existed at the time of the killing. To constitute a depraved mind, it must be shown that the defendant's state of mind at the time of the killing must be shown to have been depraved.

Doc. No. 7, Addendum 1 at R. 565. The jury was later reminded that "torture or depravation of mind are in the disjunctive and only one or the other is necessary to constitute an aggravated circumstance." Doc. No. 7, Addendum 1 at R. 565. Ultimately, when imposing the death sentence, the jury found that "The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Doc. No. 7, Addendum 1 at R. 570.

2. The Tennessee Supreme Court's Review On Direct Appeal

On direct appeal, the Tennessee Supreme Court upheld Donnie Johnson's death sentence, specifically stating that it was "affirm[ing] the conviction and sentence" "*[a]fter reviewing . . . the entire record*." State v. Johnson, 743 S.W.2d 154, 155 (Tenn. 1987)(emphasis supplied). The Tennessee Supreme Court also affirmatively concluded that the "heinous, atrocious, or cruel" aggravating circumstance was established by the evidence. State v. Johnson, 743 S.W.2d at 157.

3. Despite The Substance Of This Claim, This Court Denied Habeas Relief On Initial Submission By Concluding That The Claim Was Procedurally Defaulted

In habeas proceedings before this Court, Donnie Johnson asserted that it violated the Eighth Amendment for the jury to weigh this aggravating circumstance, because it was unconstitutionally vague. Doc. No. 1: Petition For Writ Of Habeas Corpus, Claim 16, p. 43. Despite concluding that Donnie Johnson presented "serious substantive claims" concerning the constitutionality of this aggravating circumstance, this Court declined to assess the claim on its merits. Doc. No. 84: Memorandum And Order On Respondent's Motion For Partial Summary Judgment at 232-233. Notwithstanding the Tennessee Supreme Court's discussion of the heinousness circumstance on direct appeal coupled with that Court's express statement that it had reviewed "the entire record," this Court concluded that Donnie Johnson's vagueness challenge to the heinousness circumstance was procedurally defaulted. Doc. No. 84: Memorandum And Order On Respondent's Motion For Partial Summary Judgment at 231-233. In reaching this conclusion, this Court rejected Johnson's contention that "the state courts considered this issue pursuant to the mandatory review provisions of Tenn. Code Ann. §39-2-205(c)." Doc. No. 84: Memorandum And Order On Respondent's Motion For Partial Summary Judgment at 231.[10]

4. In Light Of *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004), It Is Now Apparent That This Court Clearly Erred In Denying Johnson's Claim

In light of the Sixth Circuit's recent decision in Cone v. Bell, 359 F.3d 785 (6th Cir. 2004), it now clearly appears that this Court's denial of habeas relief was in error. Contrary to this Court's

[10] In later denying a certificate of appealability on this claim, this Court reiterated that "the constitutional claim is substantial," but also stated its belief that Johnson had not raised a substantial issue about whether the claim is procedurally defaulted. R. 84, pp. 247 -248 & n. 170.

denial of relief, *Cone* establishes not only that Donnie Johnson is entitled to federal review of his claim, but also that his claim is meritorious, and that he is entitled to habeas corpus relief.

a. *Cone* Clearly Establishes That Donnie Johnson's Vagueness Challenge To The Heinousness Aggravating Circumstance Is Not Procedurally Defaulted

When considering this claim on initial submission, this Court believed that Johnson's vagueness challenge to the "heinous, atrocious, or cruel" aggravating circumstance was not reviewed by the Tennessee Supreme Court on direct appeal under Tenn.Code Ann. §39-2-205. In *Cone*, however, the Sixth Circuit has held directly to the contrary. Cone, 359 F.3d at 790-794. Rather, as the Sixth Circuit explained in *Cone*, under Tennessee law, the Tennessee Supreme Court *does* review challenges to aggravating circumstances not explicitly raised on direct appeal.

As explained in *Cone*, this is apparent from cases such as State v. West, 19 S.W.3d 753 (Tenn. 2000), in which the Tennessee Supreme Court reviewed challenges to aggravating circumstances not specifically raised by the appellant. Cone, 359 F.3d at 791-792. It is also apparent from the language of the Tennessee mandatory review statute, which specifically "mandates supreme court review to assure that no death sentence is 'imposed in any arbitrary fashion.'" Cone, 359 F.3d at 793, quoting Tenn.Code Ann. §39-2-205(c)(1). See also Cone, 359 F.3d at 799-800 (Merritt, J., concurring)(*citing* State v. Harris, 839 S.W.2d 54 (Tenn. 1992); State v. Middlebrooks, 840 S.W.2d 317, 335, 341-347 (Tenn. 1992)(addressing constitutionality of felony-murder aggravating circumstance "[a]lthough the defendant has not directly raised the issue.").

As in *Cone* and *West*, only Tennessee's mandatory review procedure under Tenn. Code Ann. §39-2-205 can possibly explain what the Tennessee Supreme Court did in this case. In fact, as noted *supra*, the Tennessee Supreme Court was explicit in stating that it was affirming the death sentence

only "[a]fter reviewing . . . the entire record." State v. Johnson, 743 S.W.2d at 155. This is exactly what was required under Tenn. Code Ann. §39-2-205. For indeed, as in *Cone*, one cannot determine whether a death sentence "was imposed in any arbitrary fashion" (Tenn. Code Ann. §39-2-205(c)(1)) without reviewing the entire record – which is exactly what the Court said it did here. To conclude that the Tennessee Supreme Court did not consider Donnie Johnson's claim would not only flout the very terms of the Tennessee statute, *but also the very words of the Tennessee Supreme Court in this case*. As the Sixth Circuit stated in *Cone*, this is not permissible.

Under the direct authority of *Cone*, this claim *was*, in fact, considered on direct appeal in this case. In light of *Cone*, this Court's prior judgment denying habeas relief on the basis of procedural default was, therefore, plainly in error. This Court may therefore properly grant equitable relief, because *Cone* establishes that the denial of habeas relief based on a finding of procedural default was clearly in error. This Court may reopen the proceedings to consider the claim on the merits. When the Court does so, it is apparent that Donnie Johnson's claim is clearly meritorious.

b. In Light Of *Cone*, It Is Also Apparent That Donnie Johnson Is Entitled To Habeas Corpus Relief On The Merits Of His Claim

In *Cone*, as here, the jury sentenced the petitioner to death by finding that the murder was "heinous, atrocious, or cruel in that it involved torture or depravity of mind." See Cone, 359 F.3d at 788, 794; Compare Doc. No. 7, Addendum 1 at R. 570. In *Cone*, the Sixth Circuit held that this aggravating circumstance was unconstitutionally vague and granted habeas corpus relief. In reaching this conclusion, the Sixth Circuit explained:

(1) Godfrey v. Georgia, 446 U.S. 420 (1980) represents "a 'clearly established' Supreme Court precedent dictating that Tennessee's HAC aggravator is unconstitutionally

vague." Cone, 359 F.3d at 796-797.

(2) Stringer v. Black, 503 U.S. 222 (1992) held that *Godfrey* is not a "new rule" of law, and *Stringer* made *Godfrey* fully applicable to cases post-dating *Godfrey*. Cone, 359 F.3d at 795-797.

(3) The Tennessee Supreme Court's review of the vague heinousness aggravating circumstance did not somehow "save" the jury's finding of the vague circumstance, because the Tennessee Supreme Court "did not apply, or even mention, any narrowing interpretation" of the HAC circumstance. Cone, 359 F.3d at 797.

(4) Consequently, in light of the jury's finding and the Tennessee Supreme Court's failure to "save" the jury's vague finding on direct appeal:

> [T]his decision by the Tennessee Supreme Court was contrary to clearly established U.S. Supreme Court precedent as announced in *Maynard* and *Shell*, and made applicable to Cone's case via the rule of retroactivity explained in *Stringer*.

Cone, 359 F.3d at 797.

Exactly as in *Cone*, Donnie Johnson's claim is meritorious. The Tennessee Supreme Court's failure to grant relief was contrary to *Godfrey* and its progeny, the Tennessee Supreme Court never "cured" the jury's error.

Indeed, in this case, absent the vague HAC circumstance, there remains only one aggravating circumstance – unlike *Cone*, in which 2 aggravating circumstances remained. Moreover, exactly as in *Cone*, the prosecutor emphasized this aggravating circumstance when arguing for death, specifically arguing the vague terms that the offense was "cruel" and "depraved." See e.g., Doc. No. 7, Addendum 2 at R. 81, 90 (prosecution argument that the offense was "especially cruel" and "did

. . . involve depravity of mind.") Further, jurors focused on the HAC circumstance but received supplemental, erroneous instructions concerning the vague circumstance. See Doc. No. 7, Addendum 1 at R. 534-539 (allowing the jury to find HAC aggravating circumstance by merely finding depravity).

5. This Court Should Grant Equitable Relief In Light Of *Cone*

The Sixth Circuit's decision in *Cone* establishes an intervening decision which demonstrates patent error in this Court's prior judgment denying habeas corpus relief. *Cone* establishes that Donnie Johnson's claim is not defaulted and meritorious. Notwithstanding his meritorious claim, however, Donnie Johnson will be executed in violation of the law if this Court fails to intervene. There could be no greater injustice than to allow Donnie Johnson to be executed when *Cone* establishes clear error in this Court's prior judgment. Under these circumstances, this Court has both the power and duty to grant equitable relief.

In fact, despite valid constitutional claims, capital defendants have been executed simply because the courts have issued erroneous judgments and failed to correct them. For example, according to the Supreme Court, the Fifth Circuit "made a serious mistake" in denying relief to both Connie Ray Evans[11] and Edward Earl Johnson,[12] who challenged Mississippi's vague "heinous, atrocious, or cruel" aggravating circumstance. See Stringer v. Black, 503 U.S. 222, 237, 112 S.Ct. 1130, 1140 (1992). "The consequence of the Fifth Circuit's 'serious mistake' is that both Connie Ray Evans and Edward Earl Johnson were executed." Clarke, *Procedural Labyrinths And The Injustice Of Death: A Critique Of Death Penalty Habeas Corpus (Part Two)*, 30 U.Rich.L.Rev. 303, 318 n.

[11] Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987).

[12] Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986).

84 (1996).[13]

The lesson from these cases is clear: This Court has the power to act now, and it should do so. Individuals with admittedly meritorious claims have been executed. Donnie Johnson, too, has valid claims: In fact, like Connie Ray Evans and Edward Earl Johnson, he has a meritorious challenge to a vague "heinous, atrocious, or cruel" aggravating circumstance. Thankfully, such error has come to light while this Court still has the power to act. Evans and Johnson were wrongly executed. For them, it is too late. In this case, however, this Court still has the time to act. It should do so. This Court should exercise its inherent and equitable powers to grant relief from judgment. See Henderson v. Collins, No. C1-94-106 (S.D.Ohio Jul. 10, 2003)(Spiegel, J.), pp. 7-8 (Attached as Exhibit 1)(granting relief from judgment stating that "This Court will not take part in the grave miscarriage of justice that may result from its previous denial" of relief).

In sum, therefore, in light of *Cone*, this case presents a case in which, as John Marshall stated, it would be "against conscience to execute a judgment."Marine Ins. Co. of Alexandria v. Hodgson, 11 U.S. (7 Cranch) at 336. In light of *Cone*, this Court's judgment denying relief must not stand. This Court should grant equitable relief pursuant to its power under Article III and Fed.R.Civ.P. 60(b). It should grant relief and/or a certificate of appealability.

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[13] It is also worth noting that Justice Scalia – who cast the deciding vote for the 5-4 majority in Walton v. Arizona, 497 U.S. 639 (1990) – 12 years later acknowledged that he erred by holding in *Walton* that a judge may find an aggravating circumstance to make a defendant death-eligible. Having "acquired new wisdom" and having "discarded old ignorance," Justice Scalia concurred in striking down Timothy Ring's death sentence – based on the identical claim he had earlier rejected in *Walton*. See Ring v. Arizona, 536 U.S. 584, 610-613, 122 S.Ct. 2428, 2444-2445 (2002)(Scalia, J., concurring). The "discarded old ignorance" of *Walton*, however, was not without cost: Between 1990 and 2002, twenty-two (22) persons in Arizona were executed following the now-discredited decision in *Walton*. See NAACP Legal Defense & Educational Fund Inc., "Death Row USA," Winter 2004 (22 executions in Arizona in modern era).

B. This Court Should Grant Equitable Relief On Mr. Johnson's Claim That The State Withheld Evidence It Had A Deal With Its Star Witness While Having That Witness Testify That No Deal Existed

This Court should also grant equitable relief on Claim 2, given the Supreme Court's intervening decision in Banks v. Dretke, 540 U.S. ___ (2004) and proof that the state withheld exculpatory evidence and presented false and misleading testimony both at trial and before this Court.

1. Ronnie McCoy Was The Critical Witness Against Donnie Johnson, And While McCoy Admitted His Involvement, He Claimed That Johnson Was The Murderer While He And The Prosecution Asserted That McCoy Had No Reason To Lie And Received No Benefit For "Turning State's Evidence"

Donnie Johnson's trial was a finger pointing contest between Mr. Johnson and Ronnie McCoy. While the two acknowledged that they disposed of Connie Johnson's body after she was dead, each claimed that the other killed her.

McCoy told the jury that he left Mr. and Ms. Johnson alone in a sales office, and when he returned Mr. Johnson showed him Ms. Johnson's dead body. McCoy testified that he thereafter helped Mr. Johnson clean up the office and dispose of the body because he was scared of Johnson. At sentencing, Johnson testified that McCoy was the one who killed Connie Johnson. He explained that he left Ms. Johnson and McCoy alone in the sales office and when he returned McCoy was standing at a desk. Johnson related that as McCoy motioned to a back room, he told Johnson that he had gotten into an argument with Ms. Johnson. Mr. Johnson testified that he went to the back room where he found Ms. Johnson's body. Johnson explained that he helped clean up the crime scene and dispose of the body because he was scared of what McCoy would do if Johnson did not cooperate.

In a jury out hearing, McCoy assured, under oath, that he received no benefit for his testimony, despite the fact that McCoy's statements clearly implicated McCoy as being, at least, an accessory to first-degree murder. See Doc. No. 7 at Addendum 1, R. 354. At closing, the prosecution seized on this testimony, telling the jury "There's been nothing here shown ... why Ronnie McCoy would lie." Doc. No. 7 at Addendum 2 R. 21. Based on McCoy's testimony, and McCoy's denial of receiving any benefits, the jury convicted Donnie Johnson of first-degree murder, and later sentenced him to death.

2. The Initial Habeas Proceeding Before This Court

In his habeas petition, Mr. Johnson asserted that the State withheld evidence that it had provided benefits to McCoy for his testimony while it presented false testimony that no such deal existed (McCoy Claim). Doc. No. 21: Petition For Writ Of Habeas Corpus at 27; see Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Mr. Johnson supported the McCoy Claim with, among other things, (1) a citation to the trial transcript where McCoy assured that no deal existed for his testimony; and (2) a 1988 State of Tennessee Presentence Report which states that McCoy said he was granted immunity for turning State's evidence against Mr. Johnson. Doc. No. 75: Response To Respondent's First Motion For Partial Summary Judgment at 64.

To claim that McCoy's 1988 Presentence Report did not establish Donnie Johnson's entitlement to relief on his due process claim concerning McCoy's testimony, the state presented to this Court a sworn, signed affidavit from Ronnie McCoy. In that affidavit, McCoy swore to this Court that he had no idea why his presentence report stated that he received immunity:

> I was given no grant of immunity or made any promises regarding favorable treatment in exchange for my testimony.

> I have seen the presentencing report from 1988 which says that I was given immunity. *I do not know why the report says that.*

Doc. No. 60: Motion To Attach Document at Exhibit thereto (emphasis supplied).

In granting the State summary judgment on the McCoy Claim, this Court held that Mr. Johnson had procedurally defaulted the McCoy Claim because it was not presented during State court proceedings and Mr. Johnson did not show that this evidence was previously unavailable. After so ruling, this Court went on to find that the McCoy Claim lacked merit. This Court reasoned that McCoy and the prosecuting attorney had sworn no deal existed, and it therefore discredited the Presentence Report. Doc. No. 84: Memorandum And Order On Respondent's Motion For Partial Summary Judgment at 112-117.

3. This Court Should Grant Equitable Relief

In denying habeas relief on Claim 2, this Court was not aware of the Supreme Court's intervening decision in Banks v. Dretke, 540 U.S. ___ (2004). In addition, the Court was not aware of misconduct and fraud which led to the denial of relief. On both of these bases, this Court should grant equitable relief from judgment.

a. The Intervening Supreme Court Decision In *Banks v. Dretke* Entitles Donnie Johnson To Relief From Judgment

1) *Banks*

In Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), the State at a death penalty sentencing hearing presented a witness in support of the State's contention that the defendant posed a continuing threat to society. The State, however, withheld information that the witness was a paid informant, and it failed to correct false testimony respecting the witness' dealings with the police. The jury found the defendant a continuing threat to society, and it sentenced him

to death.

During habeas corpus proceedings in the District Court, evidence came to light demonstrating that the witness was indeed a paid informant and that he had testified falsely at the petitioner's sentencing hearing. While the District Court granted the habeas petitioner relief from his death sentence, the Circuit Court reversed. The Circuit Court opined that the evidence presented in the federal habeas proceeding could have been discovered during state post-conviction proceedings and presented at those proceedings. It therefore concluded that the petitioner's lack of diligence during the state proceedings rendered the evidence uncovered in the federal habeas proceeding procedurally barred.

The Supreme Court reversed. It first recounted that a federal court must consider an otherwise defaulted claim if the petitioner can show "cause" for the default and prejudice arising therefrom. The Court noted that in the context of a withheld evidence claim, the cause and prejudice inquiry parallels two of the three elements constituting a withheld evidence claim: (1) whether the state suppressed the evidence during state proceedings; and (2) whether the evidence is "material." Banks v. Dretke, 540 U.S. at ____,124 S.Ct. at 1272.

As to the second prong, the Court concluded that it was beyond genuine debate that the witness' informant status was material. Banks v. Dretke, 540 U.S. at ____, 124 S.Ct. at 1272. As to the first prong, the Court concluded that the state's continued suppression of the witness' paid informant status constituted cause for failure to present the claim during state post-conviction proceedings. The Court based its ruling on the facts that: (1) during trial, direct appeal, and state post-conviction proceedings, the state knew of, but kept back, the witness' paid informant status; (2) prior to trial the state had asserted that it would disclose all exculpatory evidence to the defense; (3)

during the state post-conviction proceedings the state denied an assertion that the witness was a police informant; and (4) at trial the prosecution sat mute when the witness testified falsely about his dealings with the police. The Court concluded that because the State persisted in hiding the witness' informant status and misleadingly represented that it had complied in full with its *Brady* disclosure obligations, the petitioner had cause for failing to present a withheld evidence claim during state post-conviction proceedings. Banks v. Dretke, 540 U.S. at ____,124 S.Ct. at 1273.

2) *Banks* Entitles Johnson To Equitable Relief Because It Demonstrates Clear Error In This Court's Prior Ruling On Claim 2; In Light Of *Banks*, Donnie Johnson's Claim Is Not Defaulted And Is Meritorious

The circumstances surrounding Mr. Johnson's McCoy Claim are virtually identical to the circumstances involved in *Banks*. Mr. Johnson asserts that, as in *Banks*, during trial, direct appeal, and State post-conviction proceedings the State knew of, but kept back, the fact that it had a deal for McCoy's testimony. As in *Banks*, the State affirmatively represented, through trial testimony it procured from Mr. McCoy, that there was no exculpatory evidence about a deal for McCoy's testimony. Doc. No. 7, Addendum 1 at 354. Mr. Johnson asserts that, as in *Banks*, the State remained mute as McCoy assured the trial attorneys that no deal existed for his testimony. See id. Thus *Banks* demonstrates that Mr. Johnson can show cause for any default of the McCoy Claim by showing that the State persisted in hiding a deal it made with McCoy while it misleadingly represented that it had complied in full with its *Brady* disclosure obligations.

Finally, as in *Banks*, it is beyond genuine debate that a deal for McCoy's testimony would be material. McCoy was the State's key witness against Mr. Johnson. McCoy was a prime alternative suspect who could have been prosecuted for the victim's murder or, at the very least, for

accessory after the fact to first-degree murder. McCoy thus had every reason to garner favor with the prosecution by trading his story that Mr. Johnson killed his wife for lenient treatment. Evidence that McCoy had a deal for his testimony would therefore be material. See Giglio v. United States, 405 U.S. 150 (1972).

Banks thus constitutes intervening law which demonstrates, contrary to this Court's prior judgment, that Donnie Johnson is entitled to federal review of his claim and that his claim is meritorious.

b. The Withholding Of Exculpatory Evidence, Misrepresentations, And Fraud Also Provide A Basis For Equitable Relief From Judgment On Claim 2

While *Banks* provides a basis for equitable relief, so does proof of misconduct and fraud. As discussed above, in support of his McCoy Claim, Mr. Johnson submitted the 1988 State of Tennessee Presentence Report which reports that McCoy said he was granted immunity for turning State's evidence against Johnson. As also discussed above, the State responded to the Presentence Report with the Affidavits of McCoy and Ken Roach attesting that there was no deal for McCoy's testimony. McCoy further claims that he does not know why the Presentence Report states he said he was given immunity. Doc. No. 60: Motion To Attach Document at Exhibit thereto. Based on the Roach and McCoy affidavits, this Court discredited the Presentence Report. See Doc. No. 84: Memorandum And Order On Respondent's Motion For Partial Summary Judgment at 115-17. New evidence demonstrates that, contrary to McCoy's affidavit, he knows why the Presentence Report says he was granted immunity - its says so because McCoy said so.

Mr. Johnson recently located Wayne Morrow, the Parole Officer who drafted the 1988 Presentence Report which states that McCoy said he was granted immunity for turning State's

evidence against Mr. Johnson. Mr. Morrow affirms that McCoy did, indeed, say that he was granted immunity for turning State's evidence. See Exhibit 3, Declaration Of Wayne Morrow, at ¶ 3. Mr. Morrow, of course has no reason to lie. McCoy and the State do - McCoy to keep the State's favor and the State to preserve Mr. Johnson's conviction and death sentence. Mr. Morrow's declaration thus indicates that a fraud was indeed perpetrated on this Court when the State filed the McCoy and Roach Affidavits during the habeas proceedings.

While Morrow's affidavit establishes that McCoy's affidavit to this Court was false, additional words straight from McCoy's mouth confirm that he lied to the jury and that the state presented to this Court a false affidavit from McCoy during initial habeas proceedings.

The victim was killed December 8, 1984. Prior to December 28 of that year, McCoy maintained that neither he nor Mr. Johnson were involved in her murder. See Exhibit 4, Dec. 28, 1984 Statement of Ronnie McCoy, at 6. On December 28, however, that dramatically changed. McCoy gave the police a statement implicating himself and Johnson in the murder. McCoy claimed that he left Mr. and Mrs. Johnson alone in an office, McCoy went to perform a chore, when he returned Mr. Johnson showed him the victim's body, and McCoy helped Johnson dispose of it.

Tellingly, in that statement, McCoy said he previously had lied about his involvement in the murder because he "was scared of getting prosecuted and put in jail ...." Exhibit 4, December 28, 1984 Statement of Ronnie McCoy, at 5. When asked why he decided now to tell the truth, McCoy stated, "Because I don't need anymore time ...." Id. *But McCoy's statement makes him criminally liable for crimes, and could have formed the basis for a charge as serious as murder*. ***Why, then, was McCoy all of a sudden on December 28 not "scared of getting put in jail" and why did he think that he wouldn't get any more time?*** The answer is obvious: McCoy was granted immunity

for turning State's evidence against Donnie Johnson – which is *exactly* what McCoy told Wayne Morrow.

McCoy's own words thus betray his lies. Those words prove that McCoy lied when he claimed that he received no benefit for his testimony. They also show that McCoy's professed ignorance of the source of the contents of his 1988 Presentence Report is also not true. McCoy and the state deceived the trial court, and McCoy's deception continued throughout the habeas proceedings in this Court.

New evidence thus clearly indicates that during this Court's previous consideration of the McCoy Claim, a fraud was perpetrated on this Court. The state filed an affidavit containing the false statements of Ronnie McCoy. Coupled with the prosecution's (and McCoy's) denial that McCoy received any consideration from the police or the prosecution, there are clear grounds for this Court to revise its judgment, where such circumstances indicate that this Court denied relief based on false affidavits and the prosecution's misrepresentations at trial – which were included in the record reviewed by this Court.

This Court should therefore grant equitable relief and revise its judgment. It should reopen the proceedings on Claim 2, conduct further proceedings, and afterwards, grant habeas corpus relief.

C. Donnie Johnson Is Entitled To Equitable Relief In Light Of Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003), *cert. denied* 542 U.S. ___ (2004)

Donnie Johnson is also entitled to relief from judgment in light of the Sixth Circuit's intervening decision in Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003), *cert. denied* 542 U.S. ___ (2004), given jury instructions which misled the jury about the proper consideration of mitigating evidence. Indeed, the situation here is virtually identical to Henderson v. Collins, No. C1-94-106

(S.D.Ohio Jul. 10, 2003), *appeal pending* 6th Cir. Nos. 03-3988, 03-4054, 03-4080, attached as Exhibit 1, in which the United States District Court for the Southern District of Ohio granted Rule 60(b) relief to a death-sentenced inmate in light of *Davis*.

In *Henderson*, the petitioner alleged in his habeas petition that the jury was misled into thinking that they were required to unanimously reject a death sentence before a life sentence could be imposed, when in fact, a life sentence would have been imposed had the jury not unanimously voted for death. Though Henderson challenged the instructions from his trial in a claim of ineffective assistance of counsel, the District Court denied habeas relief on that claim in 1999. See Henderson, slip op. at 1-2.

In 2003, however, the Sixth Circuit decided *Davis v. Mitchell*, in which the Court of Appeals held that instructions identical to those given to Henderson's jury were unconstitutional. Davis, *supra*. As the Sixth Circuit held in *Davis*, "Instructions that leave a jury with the impression that juror unanimity was required to mitigate the punishment from death to life imprisonment clearly violate the Eighth Amendment." Davis, 318 F.3d at 685, quoted in Henderson, slip op. at 7. In light of the intervening Sixth Circuit decision in *Davis*, the United States District Court held that the intervening decision *Davis* "cast substantial doubt" on the District Court's prior judgment, since the instructions in *Davis* and *Henderson* were identical. Henderson, slip. op. at 5-7. Therefore, in light of the intervening decision in *Davis*, and "because Petitioner faces the ultimate and irreversible punishment imposed by the state," the District Court granted relief from judgment under Rule 60(b) and vacated the petitioner's death sentence. Henderson, slip op. at 7-8.

The situation here is no different. Jurors were told that they had to unanimously agree as to any life sentence. Doc. No. 7, Addendum 1, Tr. Vol. VI, p. 569. Jurors were not instructed that they

didn't need to render a unanimous verdict, nor were they informed that a failure to agree as to sentence would result in a life sentence. See Doc. No. 7, Addendum 1, Tr. Vol. VI, pp. 568-569. This Court initially denied relief, believing that jurors were not entitled to instructions that a unanimous verdict for life was not required. See Doc. No. 84: Memorandum And Order On Respondent's Motion For Partial Summary Judgment, at. 222-223. In reaching this conclusion, this Court relied on Coe v. Bell, 161 F.3d 320 (6th Cir. 1998), but as *Davis v. Mitchell* makes plain, *Coe*'s vitality is clearly uncertain. See Davis, 318 F.3d at 692 (Boggs, J., dissenting).

As the Sixth Circuit has now held in *Davis v. Mitchell*: **"Instructions that leave a jury with the impression that juror unanimity was required to mitigate the punishment from death to life imprisonment clearly violate the Eighth Amendment**." Davis, 318 F.3d at 685 (emphasis supplied), quoted in Henderson, slip op. at 7. That is exactly what occurred here.

Jurors were told that they had to be unanimous in voting for life: "The verdict [of life imprisonment] must be unanimous and signed by each Juror." Doc. No. 7, Addendum 1, Trial Tech. R. 569. Jurors were unconstitutionally left with the impression "that juror unanimity was required to mitigate the punishment from death to life." Id. Also, as in *Davis*, the jury here was first instructed about how to impose a death sentence, after which it received instructions as to how to impose a life sentence. Doc. No. 7, Addendum 1, Trial Tech. R. 565-569. This is similar to the situation in *Davis* as well. See Davis, 318 F.3d at 684-685, 690 (jury instructed to consider death first, and afterwards life; in light of lack of clarity of instructions regarding unanimity and sequence of instructions, granting habeas corpus relief). As in *Davis*, therefore, the jury verdict of death was unconstitutional.

Davis thus casts the correctness of this Court's judgment into grave doubt. Like the District

Court judgment in *Henderson*, the District Court judgment here cannot be squared with the pronouncements of the Sixth Circuit in *Davis v. Mitchell*. Like the prior erroneous District Court judgment in *Henderson*, the prior judgment of this Court will result in the execution of a death sentence in clear conflict with the Sixth Circuit's decision in *Davis*. Consequently, exactly as in *Henderson*, given the clear legal error in this Court's prior judgment, and given that failure to grant relief will result in Donnie Johnson's execution – despite the meritorious nature of his claim – this Court should grant the motion for relief from judgment in light of the intervening decision in *Davis*. Henderson v. Collins, No. C1-94-106 (S.D.Ohio Jul. 10, 2003), *appeal pending* 6th Cir. Nos. 03-3988, 03-4054, 03-4080.

In addition, for the same reasons stated in Donnie Johnson's request for equitable relief based on *Cone v. Bell*, See pp. 14-16, *supra*, a challenge to the unanimity jury instruction is not procedurally defaulted, as this Court previously believed on initial submission. Rather, the Tennessee Supreme Court made clear that it was affirming the death sentence only after "reviewing the briefs and arguments of counsel *and the entire record*" in this case. State v. Johnson, 743 S.W.2d at 155. As in *Cone*, this statement of the Tennessee Supreme Court establishes that the Tennessee Supreme Court did decide this issue on direct appeal by undertaking its "statutory duty . . . to review a death sentence and to determine whether it was imposed in any arbitrary fashion." See State v. King, 694 S.W.2d 941, 947 (Tenn. 1985).

Thus, in light of *Davis* and *Cone*, this Court should grant relief from judgment on Donnie Johnson's claims that he was unfairly denied relief on his challenges to instructions which misled the jury about the need to be unanimous about mitigating circumstances. In light of *Davis* and *Cone*, this Court should grant equitable relief, reopen the judgment, and conduct further proceedings.

CONCLUSION

Pursuant to Article III, 28 U.S.C. §2243, and Fed.R.Civ.P. 60(b), this Court should grant the motion for equitable relief and/or relief from judgment. This Court should grant relief, reopen the prior erroneous judgment, and afterwards grant habeas corpus relief and/or a certificate of appealability.

Respectfully Submitted,

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Certificate of Service

I certify that on October 13, 2004, a copy of the foregoing was hand delivered to Paul Summers, Attorney General, Criminal Justice Division, 500 Charlotte Avenue, Nashville, Tennessee 37243-0493.

C. Mark Pickrell

EXHIBIT 1

Henderson v. Collins, No. C1-94-106 (S.D.Ohio Jul. 10, 2003)

EXHIBIT 2

Jury Instructions & Sentencing Verdict
Tr.Vol. VI, pp. 565, 570