IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNIE E. JOHNSON	)	
	)	
Petitioner-Appellant	)	No. 05-6925
	)	
v.	)	
	)	
RICKY BELL, Warden,	)	
	)	
Respondent-Appellee	)	

MOTION FOR STAY OF EXECUTION

Pursuant to 28 U.S.C. §1651, 2251, and all other applicable law, Petitioner-Appellant Donnie Johnson respectfully moves this Court for a stay of execution pending final disposition of this appeal. See e.g., In Re: Abdur'Rahman, Nos. 02-6547, 02-6548 (6th Cir. June 6, 2003)(en banc)(granting stay of execution to consider Rule 60(b) motion on appeal)(Exhibit 1); Cooey v. Bradshaw, 338 F.3d 615 (6th Cir. 2003)(en banc)(denying motion to vacate stay in Rule 60(b) proceedings); Zeigler v. Wainwright, 791 F.2d 828 (11th Cir. 1986)(granting stay of execution pending resolution of Rule 60(b) appeal).[1]

In support of this motion, Donnie Johnson states:

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[1] Donnie Johnson has filed in the United States District Court a motion for stay pending appeal, requesting that the District Court stay the orders which are the subject of this appeal. See Johnson v. Bell, W.D.Tenn.No. 97-3052, R. 138 (Motion For Stay Pending Appeal). The District Court has yet to rule on that motion.

1. In this appeal, Donnie Johnson seeks reversal of the District Court's denial of his motion for equitable relief, filed pursuant to U.S. Const. Article III, 28 U.S.C. §2243, and Fed.R.Civ.P. 60(b).

2. Donnie Johnson has filed his opening brief outlining the numerous reasons why the District Court's orders should be reversed. See *Johnson v. Bell*, 6th Cir. No. 05-6925, Proof Brief Of Appellant (Exhibit 2).

3. As noted in that brief, the District Court made numerous errors when considering Johnson's allegations that habeas proceedings should be reopened, given the state's use of perjured testimony to secure the habeas judgment against Johnson. Those errors include:

a. The District Court failed to recognize its inherent Article III powers over its own judgment, See Proof Brief Of Appellant, pp. 13-16;

b. The District Court failed to properly apply the Supreme Court's decision in Banks v. Dretke, 540 U.S. 668 (2004), as explicated in the intervening decision in Bell v. Bell, 460 F.3d 769 (6th Cir. 2006), See Proof Brief Of Appellant, pp. 16-22;

c. The District Court failed to address Donnie Johnson's entitlement to relief based on "misrepresentation" and "misconduct" under Fed.R.Civ.P. 60(b)(3) and via an independent action in equity, See Proof Brief Of Appellant,

pp. 23-29, 30-34;

d. The District Court's treatment of Johnson's allegations of "fraud upon the court" was erroneous:

1) The District Court erroneously concluded that perjury cannot establish such fraud (See Proof Brief Of Appellant, pp. 34-35);

2) The District Court denied relief employing a clearly erroneous factual determination that Donnie Johnson had not asserted that Respondent's attorneys were involved in presenting such perjury (Id. at 35); and

3) The District Court failed to faithfully apply Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993) and erred by denying Johnson a hearing at which he could establish the *mens rea* necessary to establish fraud under *Demjanjuk*. See Proof Brief Of Appellant, pp. 35-36.

4. Given these numerous, serious errors in the District Court's order, there is a high probability that Donnie Johnson will be granted relief on appeal. Further, there is no debate that this Court has before it "serious questions going to the merits" of the District Court's decision. Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir. 1982).

5. Under these circumstances, a stay of execution is warranted so that the

Court may "preserve the existing state of things until the rights of the parties can be fairly and fully investigated." Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur, 53 F. 98, 101 (6th Cir. 1892), quoted in In Re Delorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985).

6. In assessing the propriety of a stay, this Court must balance four factors: (a) the movant's likelihood of success on the merits; (b) irreparable harm to the movant absent a stay; (c) the prospect that others will be harmed; and (d) the public interest. See e.g., Nader v. Blackwell, 230 F.3d 833, 834 (6th Cir. 2000)(granting stay pending appeal); Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991). These four factors "are factors to be balanced, not prerequisites that must be met." Nader, 230 F.3d at 834; Michigan Coalition of Radioactive Material Users, Inc., 945 F.3d at 153; In Re Delorean Motor Co., 755 F.2d at 1229.

7. Significantly: "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other." Michigan Coalition of Radioactive Material Users, Inc., 945 F.2d at 153; In Re Delorean Motor Co., 755 F.2d at 1229.

8. Thus, it has long been the law of the Sixth Circuit that a stay is

appropriate where the movant "*at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.*" Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d at 105 (emphasis supplied).

9. Under these standards, Donnie Johnson is entitled to a stay of execution: His life is at stake; as noted *supra* in ¶3a, 3b, 3c, 3d1, 3d2, and 3d3, this Court has before it serious questions about the propriety of the District Court's ruling; and the state and the public have no interest in executing a tainted federal court judgment.

10. In the balance of interests, therefore, Donnie Johnson is entitled to a stay of execution pending the outcome of this appeal.

11. Indeed, as noted *supra*, p. 1, this Court entered an *en banc* stay under similar circumstances in *Abdur'Rahman* and refused to vacate a similar stay in *Cooey*. See p. 1, *supra*. The Eleventh Circuit likewise granted a stay of execution in 60 (b) proceedings in Zeigler v. Wainwright, 791 F.2d 828 (11th Cir. 1986). As in these cases, a stay of execution is appropriate here. See also American Civil Liberties Union v. National Security Agency, Nos. 06-2095, 06-2140 (6th Cir. Oct. 4, 2006)(granting stay pending appeal)(Exhibit 3); Lambert v. Davis, No. 05-2610 (7th Cir. June 17, 2005)(granting stay of execution to determine whether petitioner's motion involved a first or second habeas application)(Exhibit 4).

12. Because Donnie Johnson presents significant issues on appeal in this death penalty case, because there is a strong likelihood of reversal, and because the state and the public have no interest in allowing a tainted federal judgment to be executed, this Court should grant a stay of execution to allow proper consideration of this appeal. Afterwards, this Court should reverse the judgment of the District Court.

CONCLUSION

This Court should grant a stay of execution pending the disposition of this appeal.

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By: Paul R Bottei

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by hand delivery to Alice Lustre, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243 on this 17th day of October, 2006.

Paul R Bottei

Exhibit 1

In Re Abdur'Rahman
6th Cir. Nos. 02-6547/6548
(June 6, 2003)

En Banc Stay Order

Nos. 02-6547/6548

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JUN 06 2003

LEONARD GREEN, Clerk

IN RE: ABU-ALI ABDUR'RAHMAN,

Movant (02-6547).

IN RE: ABU-ALI ABDUR'RAHMAN,

Petitioner-Appellant (02-6548),

v.

RICKY BELL, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: MARTIN, Chief Judge; BOGGS, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court is vacated, the mandate is stayed and these cases are restored to the docket as a pending appeal. It is further ORDERED that the execution of sentence is stayed pending further order of this Court.

The Clerk will direct the parties to file supplemental briefs and will schedule these cases for oral argument at a later date.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

Exhibit 2

Johnson v. Bell
6th Cir. No. 05-6925

Proof Brief Of Appellant

No. 05-6925

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNIE E. JOHNSON,

Petitioner-Appellant

v.

RICKY BELL, Warden,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

PROOF BRIEF OF APPELLANT DONNIE JOHNSON

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REQUEST FOR ORAL ARGUMENT

Appellant Donnie Johnson respectfully requests oral argument.

JURISDICTION

Pursuant to Article III, 28 U.S.C. §2243, and Fed.R.Civ.P. 60(b), Donnie Johnson filed a motion seeking equitable relief from judgment. (R. 104: Motion For Equitable Relief; Apx. ___). On November 30, 2005, the District Court denied the motion. (R. 122: Order; Apx. ___). Johnson filed a timely notice of appeal. (R. 123: Notice Of Appeal; Apx. ___). He also filed a motion to alter or amend (R. 124: Motion To Alter Or Amend; Apx. ___), which was subsequently denied. (R. 130: Order; Apx. ___). Johnson timely filed an amended notice of appeal. (R. 132: Notice

Of Appeal; Apx. ___).

STATEMENT OF THE ISSUES

Having claimed in his habeas petition that the prosecution presented the false testimony of its key witness, Ronnie McCoy, and unconstitutionally withheld exculpatory evidence showing that McCoy had been granted immunity to testify, is Donnie Johnson entitled to relief from judgment and/or a hearing on his request for equitable relief when:

1. In initial habeas proceedings, the District Court denied relief on the basis of procedural default and held, despite a clear factual dispute, and without holding a hearing, that Johnson had not proven the existence of a deal for immunity;

2. The intervening case of Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256 (2004), makes clear that the District Court's original finding of procedural default is legally unsustainable;

3. Johnson has alleged that fraud, misconduct, and/or misrepresentation corrupted the initial habeas proceedings when attorneys for the state filed with the District Court false affidavits from McCoy and a state prosecutor misrepresenting that McCoy was not given immunity;

4. There is clear proof (including a new sworn statement from McCoy's parole officer) that the District Court affidavits from McCoy and the state prosecutor which formed the basis of the District Court judgment are, in fact, perjurious; and

5. The District Court wholly failed to address Johnson's entitlement to relief through an independent action in equity and made critical errors in assessing whether there has been "fraud upon the court"?

STATEMENT OF THE CASE

I.
AFTER MCCOY GAVE A STATEMENT IMPLICATING JOHNSON AND HIMSELF IN THE VICTIM'S MURDER, THE STATE PAROLED MCCOY ON A PRIOR CONVICTION

On August 14, 1984, the State indicted Ronnie McCoy for burglary and false reporting. (R. 52: Motion For Leave To Conduct Discovery, at Ex. 5; Apx. ___). Less than one month before the victim's murder the State and McCoy struck a deal: In return for McCoy's guilty plea, the State agreed that McCoy could serve his time in the Shelby County Penal Farm on work release. (Id.; Apx. ___; see R. 7: Notice Of Filing Documents, at Addendum 1, Tr. 355; Apx. ___). Pursuant to this agreement, McCoy spend his days working at the business where the victim was killed and where Johnson also worked. (See R. 7: Notice Of Filing Documents, at Addendum 1, Tr. 396; Apx. ___).

On December 9, 1985, Connie Johnson's body was found in van parked at a Memphis mall. (R. 7: Notice Of Filing Documents, at Addendum 1, Tr. 125-26; Apx. ___). In the following weeks, Mr. Johnson's trial counsel interviewed McCoy. He claimed to have no knowledge about the murder. (R. 7: Notice Of Filing Documents, at Addendum 1, Tr. 384; Apx. ___).

On December 28, 1985, McCoy reversed course. He told authorities that

Mr. Johnson killed his wife at their workplace, and he helped Johnson clean up the crime scene and dispose of the body. (R. 104: Motion For Equitable Relief, at Ex. 4; Apx. ___).

McCoy's statement implicated him in numerous felony offenses that could subject him to lengthy prison sentences. See T.C.A. § 39-1-303 (Michie)(repealed) (aiding & abetting murder - life imprisonment or death); T.C.A. §§ 39-1-601(1), 39-1-604(a)(1) (Michie)(repealed) (conspiracy to commit murder - five to fifteen years); T.C.A. §§ 39-1-306, 39-1-307 (Michie)(repealed) (accessory after the fact - up to five years); T.C.A. § 39-6-702 (Michie)(repealed) (improper disposal of a corpse - one to five years). The State, however, did not even revoke his work release status. And little over two months after giving his statement, the State paroled McCoy into the free world. (R. 52: Motion For Leave To Conduct Discovery, at Ex. 3; Apx. ___).

II.
AT DONNIE JOHNSON'S TRIAL, MCCOY WAS THE PROSECUTION'S KEY WITNESS

Donnie Johnson's trial was a finger-pointing contest between Johnson and McCoy. McCoy testified that Johnson killed the victim as she visited the business where the two men worked. (R. 7: Notice Of Filing Documents, at Addendum 1, Tr. 360-61; Apx. ___). McCoy went on to testify that he helped Johnson clean up

the crime scene and dispose of the body, (id., Tr. 361-67; Apx. ___), and he thereafter denied any involvement in the murder. (Id., Tr. 384; Apx. ___). In a jury out hearing, McCoy assured that no deal had been made for his testimony against Johnson, (id., Tr. 354; Apx. ___), and the prosecution told the jury during closing argument that it knew of no reason why McCoy would lie. (Id., at Transcript Of Closing Arguments, 21; Apx. ___). Johnson, on the other hand, testified that McCoy killed the victim, and he helped McCoy dispose of the body. (Id., Tr. 508-13; Apx. ___). The jury convicted Johnson of first-degree murder and sentenced him to death.[1]

III.
THE DISTRICT COURT DENIED RELIEF ON JOHNSON'S CLAIMS THAT THE PROSECUTION PRESENTED MCCOY'S FALSE TESTIMONY THAT NO DEAL EXISTED FOR HIS TESTIMONY WHILE IT WITHHELD EVIDENCE THAT SUCH A DEAL EXISTED

As it turns out, in reality, McCoy had a very good reason to lie: To receive immunity from prosecution. As Donnie Johnson has emphasized McCoy did, in fact, have an agreement with the prosecution: McCoy was granted immunity from

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[1] Remarkably, Johnson's trial attorneys had no qualms representing him even though they had obtained the original deal that garnered McCoy his work release status. Because the District Court concluded that Johnson's conflict of interest claim was procedurally defaulted, ((R. 84: Memorandum And Order, at 56-66; Apx. ___), we do not know whether they represented McCoy during the State's investigation of the Connie Johnson murder.

prosecution while receiving the prosecution's favor of obtaining parole. The jury, however, never heard this critical evidence. Moreover, McCoy's sworn statement during trial – that he received no favors – was also a lie.

In his petition for writ of habeas corpus, Donnie Johnson alleged that the prosecution presented false testimony and unconstitutionally withheld exculpatory evidence showing that McCoy was given immunity and consideration for his testimony. (R. 1: Petition For Writ Of Habeas Corpus, Claim 2, p.27; Apx. ___). Johnson supported his claim with a copy of McCoy's presentence report in a separate 1988 case, in which McCoy was quoted as saying that, in exchange for testifying against Johnson, McCoy had been given immunity by the prosecution. (See R. 75: Response To Motion For Partial Summary Judgment, p. 64; Apx. ___ (citing R. 52: Motion For Leave To Conduct Discovery, at Ex. 9; Apx. ___).

To get the District Court to deny the petition for writ of habeas corpus, however, the state presented affidavits from McCoy and State prosecutor Kenneth Roach swearing that McCoy had not received immunity. (R. 57: Response To Motion For Leave To Conduct Discovery, Roach Affidavit; Apx. ___; R. 60: Motion To Attach Document, McCoy Affidavit; Apx. ___). McCoy also swore that he had no idea why his presentence report stated he had received immunity. (R. 60: Motion To Attach Document, McCoy Affidavit; Apx. ___).

Relying on these affidavits, the District Court denied relief. The District Court initially concluded that Johnson's McCoy claim was procedurally defaulted. (R. 84: Memorandum And Order, at 115; Apx. ___). Then, notwithstanding conflicting evidence whether McCoy was given immunity, *and without holding an evidentiary hearing*, the District Court simply credited the statements of the state's witnesses and stated that Johnson "failed to establish" that McCoy received consideration for his testimony. (Id., at 117; Apx. ___). Of course, Johnson needed a hearing to be able to make such a showing.

IV.
THE DISTRICT COURT JUDGMENT WAS BASED ON FALSE AFFIDAVITS FILED BY THE STATE

Since the District Court entered its judgment, several things have occurred which indicate clear error in that judgment:

First, the Supreme Court decided Banks v. Dretke, 540 U.S. 668 (2004), which holds that a petitioner establishes "cause and prejudice" for an alleged failure to present a *Brady* claim in the state courts, when, as here, the prosecution withheld exculpatory evidence during the course of state court proceedings.

Second, Johnson has established the falsity of the affidavits from

McCoy and Roach, both of which denied that McCoy received immunity. The falsity of the evidence presented by the state during initial habeas proceedings is now apparent given the following evidence:

(1) Wayne Morrow, the parole officer who recorded McCoy's 1988 presentence report statement that he got immunity in exchange for testimony against Johnson, now swears that his report is accurate. (R. 104: Motion For Equitable Relief, Ex. 3, ¶3; Apx. ___). Morrow's sworn statement flatly contradicts McCoy's false habeas affidavit that there's no explanation why the presentence report says that he and the State struck a deal.

(2) McCoy's admission that he inculpated himself "Because I don't need anymore time . . . ." (R. 104: Motion For Equitable Relief, Ex. 4, p. 5; Apx. ___). This statement also conclusively establishes the falsity of Roach's and McCoy's District Court affidavits. McCoy's statement that he implicated himself in the murder "because [he] didn't need anymore time" makes absolutely no sense *unless McCoy was receiving immunity*. As discussed above, McCoy's statement subjected him to the possibility of lengthy prison sentences. McCoy's only sure way to avoid time was to give a statement in exchange for the State's agreement not to prosecute.

Given *Banks* and clear proof that the State succeeded in getting the District Court to rule against him by filing false affidavits, Donnie Johnson filed a motion for equitable relief from judgment, invoking the District Court's inherent powers under Article III, 28 U.S.C. §2243, and Fed.R.Civ.P. 60(b). (R. 104: Motion For Equitable Relief; Apx. ___). In his motion, Johnson asserted that the District Court had both inherent Article III power and authority under 28 U.S.C. §2243 and Fed.R.Civ.P. 60(b) to reopen proceedings on his *Brady*/false testimony claims. He asked the District Court to exercise those powers because: (1) Banks v. Dretke, 540 U.S. 668 (2004) establishes that his claim is not procedurally defaulted (id. at 1, 20, 22-25; Apx. ___); and (2) in initial habeas proceedings, the state had engaged in fraud, misrepresentation, and/or misconduct by presenting the false affidavits of McCoy and Roach in which they falsely denied the existence of immunity, while McCoy falsely claimed no knowledge why his presentence report shows he received immunity. (Id. at 11-12; Apx. ___).

The District Court denied relief. First, notwithstanding case law to the contrary, it asserted that it lacked inherent Article III powers over its judgment. (R. 122: Order, pp. 4-7; Apx. ___). Second, the District Court also asserted that *Banks* does not apply to situations in which a *Brady* claim had not been presented to the state courts, while also concluding that Johnson had not established fraud

upon the court. (Id., at 16-28; Apx. ___). The District Court did not address Johnson's additional assertions that the State's misconduct and/or misrepresentation through its filing of false affidavits corrupted the habeas proceedings. (See R. 104: Motion For Equitable Relief, at 11-12; Apx. ___ "([E]quitable 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."); 25 (alleging misconduct and fraud); 27 (misrepresentations and fraud). The District Court subsequently denied Johnson's motion to alter or amend. (R. 130: Order; Apx. ___).

SUMMARY OF ARGUMENT

Donnie Johnson presents clear proof that perjured testimony tainted the District Court judgment denying habeas relief. The District Court clearly erred in denying his motion for equitable relief from judgment without conducting a hearing. This Court should reverse and remand for further proceedings.

First, the District Court erred in failing to consider its inherent Article III powers to reform the tainted judgment. The District Court's failure to recognize this was in error.

Second, the District Court denied relief based on a clear misinterpretation of

Banks v. Dretke, 540 U.S. 668 (2004). *Banks* establishes clear error in the District Court's initial denial of habeas relief on the ground of procedural default. It was therefore error for the District Court to conclude otherwise.

Third, the District Court clearly erred in denying relief from judgment based upon the state's use of false affidavits during initial habeas proceedings. Three different vehicles are available for relief in this matter: (1) Fed.R.Civ.P. 60(b)(3); (2) an independent action in equity under Rule 60(b)'s Savings Clause; and (3) an action for "fraud upon the court."

The District Court's ruling on each of these grounds was in clear error, because:

(1) The District Court failed to consider the issue of equitable tolling under Fed.R.Civ.P. 60(b)(3);

(2) The District Court wholly failed to consider Donnie Johnson's entitlement to relief through an independent action in equity, where Donnie Johnson's allegations of perjury and fraud are fully cognizable and provide grounds for vitiating the judgment; and

(3) The District Court denied relief for "fraud upon the court" by misapprehending and misapplying governing law concerning such fraud. The District Court clearly erred in believing that perjury and/or use of false evidence

could not establish such fraud, and failed to faithfully apply this Court's decision in Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), which holds that withholding of exculpatory evidence in a capital case, if proven, establishes fraud upon the court.

This Court should reverse and remand for further proceedings, including an evidentiary hearing on the question whether Donnie Johnson is entitled to equitable relief.

ARGUMENT

THE DISTRICT COURT CLEARLY ERRED IN DENYING RELIEF FROM JUDGMENT, AND THE MATTER SHOULD BE REMANDED FOR FURTHER PROCEEDINGS

The District Court erred in denying Donnie Johnson's motion for equitable relief. Under Article III, 28 U.S.C. §2243, and Fed.R.Civ. P. 60(b), the federal courts have the plenary power to rectify the grave injustice which has occurred here, *viz.*, the denial of Donnie Johnson's habeas petition based upon the ongoing perjury of Ronnie McCoy and others. Because the District Court failed to apply both its inherent Article III powers and 28 U.S.C. §2243, this Court should reverse and remand for further proceedings.

In addition, under Rule 60(b), the District Court clearly erred in its analysis of the equities here. First, the District Court clearly erred in its analysis of the

Supreme Court's intervening decision in Banks v. Dretke, 540 U.S. 668 (2004). Second, especially where it never held an evidentiary hearing on the issue, the District Court clearly erred by concluding that Donnie Johnson is not entitled to relief given the state's presentation of false affidavits of McCoy and Roach during the initial habeas proceedings. Donnie Johnson has made more than a *prima facie* showing that the state presented false evidence to the District Court which led to the habeas judgment. Donnie Johnson has made a showing of not only fraud, but misconduct and misrepresentation as well, all of which provide independent grounds for equitable relief under Article III, 28 U.S.C. §2243, and Fed.R.Civ.P. 60(b).

This Court should reverse the judgment of the District Court and remand for further proceedings, including an evidentiary hearing on the questions of fraud, misrepresentation, and misconduct.

I. As A Matter Of Separation Of Powers, The District Court Clearly Erred In Concluding That Congress Can Constrain The Exercise Of Inherent Article III Powers To Revise A Judgment In The Interest Of Justice: This Court Should Remand For Further Proceedings

As an initial matter, the District Court erred by claiming that, given Congressional enactments, it could not exercise its inherent Article III powers to revise the tainted judgment here. (See R. 122: Order, pp. 4-7; Apx. ___). In

particular, the District Court asserted that any inherent power of the District Court does not survive Congress' enactment of the AEDPA. (Id. at 7; Apx. ___). As a matter of Separation Of Powers, such a conclusion simply cannot be correct.

Over a century ago, the Supreme Court made clear that an Article III court retains "inherent power . . . over its own judgments." Bronson v. Schulten, 104 U.S. (14 Otto) 410, 417 (1881). That inherent power dates to the adoption of Article III itself, which extends federal jurisdiction to all matters of equity. See U.S.Const. Art. III §2. See also United States v. Ohio Power Co., 353 U.S. 98, 99 (1957)(per curiam)(acknowledging Supreme Court's "power over [its] own judgments.").

In Plaut v. Spendthrift Farm, 514 U.S. 211, 256 (1995), therefore, the Supreme Court held that Congress violates the Separation Of Powers by passing legislation *requiring* an Article III court to reopen an otherwise final judgment. The reason for this is clear: Under the Constitution, the power over an Article III judgment lies exclusively with the Article III courts, not with Congress. Indeed, it goes without saying that Congress cannot, by ordinary legislation, negate a provision of the Constitution. See e.g., City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (Constitution is paramount superior law, unchangeable by ordinary legislative means).

Applied here, that principle applies with equal force: Just as Congress cannot constitutionally demand that Article III courts reopen judgments, neither can Congress constrain Article III courts from exercising their own powers to reopen an inequitable judgment. Congress simply has no say in the matter either way: The Separation Of Powers forbids it.

Contrary to the District Court's conclusion, therefore, neither the AEDPA nor Rule 60(b) can ultimately constrain the District Court's inherent powers over its own tainted judgment in this case. Because the District Court concluded otherwise – in violation of the Separation Of Powers – this Court should reverse and remand, so that the District Court may consider the application of Article III inherent powers in the first instance.[2]

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[2] The District Court also failed to consider or apply Donnie Johnson's invocation of 28 U.S.C. §2243 as a separate basis for equitable relief. Section 2243 instructs District Courts to decide habeas cases "as law and justice require." Explicit since 1874, this command confirms that habeas courts are endowed with the full panoply of equitable powers necessary to ensure fundamental justice in a particular case. 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 (1901)(emphasis supplied).

Without question, 28 U.S.C. §2243 also provides a separate basis for equitable relief here. It pre-dates the AEDPA and Rule 60(b), and has never been explicitly repealed. Thus, the District Court was constrained to apply it by its terms. The District Court failed to do so, however. Just as this Court should remand for the District Court to apply Article III in the first instance, this Court should likewise (continued...)

II. The District Court Clearly Erred In Denying Equitable Relief From Judgment In Light Of *Banks*

In addition, the District Court clearly erred in denying relief from judgment on the grounds that it did. Contrary to the District Court's conclusion, under Gonzalez v. Crosby, 545 U.S. 524 (2005), Donnie Johnson presents a valid 60(b) motion in light of Banks v. Dretke, 540 U.S. 668 (2004), which undoes the District Court's prior erroneous procedural default ruling. In addition, contrary to the District Court's conclusion, where there is clear proof that the District Court denied habeas relief by relying on false affidavits from Ronnie McCoy and a state prosecutor, Donnie Johnson has presented valid grounds for equitable relief based not only on fraud, but on misconduct and misrepresentation as well. Each of these grounds for relief – fraud, misrepresentation, and misconduct – provides an independent basis for equitable relief in this case under Rule 60(b) and its Savings Clause. Because the District Court concluded otherwise, this Court should reverse the judgment and remand for further proceedings.

A. The District Court Clearly Erred In Its Interpretation Of *Banks* And Thus Abused Its Discretion By Denying Equitable Relief By Relying On A Misunderstanding Of The Law

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[2](...continued)
remand for the District Court to apply §2243 in the first instance.

1. Donnie Johnson Has Properly Sought Equitable Relief Under Fed.R.Civ.P. 60(b) By Invoking *Banks v. Dretke*, 540 U.S. 668 (2004), Which Undoes The District Court's Initial Finding Of Procedural Default

In Gonzalez v. Crosby, 545 U.S. 524 (2005), the Supreme Court addressed the applicability of Fed.R.Civ.P. 60(b) to habeas corpus proceedings. In *Gonzalez*, the Court made clear that a habeas petitioner may seek relief from judgment under Rule 60(b) so long as the petitioner does not seek to relitigate a claim "on the merits."

When a petitioner asserts that, as a result of a finding of procedural default, he was erroneously denied a merits ruling on a claim during initial habeas proceedings, he may properly proceed under Rule 60(b). Gonzalez, 545 U.S. at ___ n.4, 125 S.Ct. at 2648 n.4 (Petitioner may proceed under Rule 60(b) when, in seeking equitable relief, petitioner "merely asserts that a previous ruling which precluded a merits determination was in error – for example a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.").

That is the precise situation here. In the District Court, Donnie Johnson asserted that the prosecution withheld material exculpatory evidence showing that Ronnie McCoy received immunity, and that the prosecution presented false testimony in that regard. (R. 1: Petition For Writ Of Habeas Corpus, Claim 2, p.

27; Apx. ___). On initial submission, the District Court denied relief on the grounds that Donnie Johnson's claim was procedurally defaulted. (R. 84: Memorandum And Order, at 115; Apx. ___).

Banks, however, makes clear that the District Court's original finding of default is untenable. In *Banks*, the Supreme Court held not only that the state is constitutionally obligated to disclose material exculpatory evidence, but that the prosecution may not mislead a defendant into thinking exculpatory evidence does not exist. As the Supreme Court explained:

> 'Ordinarily we presume that public officials have properly discharged their official duties. . . . Courts, litigants, and juries properly anticipate that 'obligations to refrain from improper methods to secure a conviction . . . plainly resting upon the prosecuting attorney, will be faithfully observed. *Berger [v. United States]*, 295 U.S. [78], 88 [1935] Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.

Banks, 540 U.S. at 696. Where a prosecutor has made representations about the existence of exculpatory evidence, "It [is] not incumbent on [a petitioner] to prove [a prosecution's] representations false, rather, [a petitioner] [is] entitled to treat the prosecution's submissions as truthful." Id., 540 U.S. at 698. When the prosecution has misled a defendant/petitioner about the existence of exculpatory evidence and the withheld evidence is "material," the petitioner has "cause and prejudice" for any alleged procedural default in failing to raise and exhaust a *Brady* claim in the

state courts. See Banks, 540 U.S. at 690-703.

Banks applies with full force here. In this case, the prosecution elicited McCoy's testimony that he received no consideration for his testimony. (R. 7: Notice Of Filing Documents, at Addendum 1, Tr. 354; Apx. ___). That representation was, and is, false. Not only that: McCoy's and the prosecution's later federal affidavits denying immunity are false as well, as proven by: (1) Wayne Morrow's declaration about the information contained in McCoy's presentence report; (2) The presentence report itself in which McCoy stated he received immunity for testifying; and (3) McCoy's earlier statement that he implicated himself in the murder to avoid prison time. All told, therefore, Ronnie McCoy and the prosecution lied about McCoy's immunity at trial. They continued to perpetuate that lie in the United States District Court. And even to this day, they continue to deny the truth that McCoy was freed in exchange for his testimony against Donnie Johnson. Under these circumstances, *Banks* applies and makes clear that there is no legitimate basis for sustaining the District Court's initial conclusion that Donnie Johnson's *Brady*/false testimony claim is procedurally defaulted.

2. The District Court Has Misunderstood *Banks* And Abused Its Discretion In Denying Johnsons's Request For Relief From Judgment In Light Of *Banks*

The District Court, however, has misapprehended the holding of *Banks*. The District Court seemed to think that *Banks* only supplies "cause and prejudice" if the petitioner exhausted a *Brady* claim in the state courts. The District Court expressed its belief that Johnson did not exhaust a *Brady* claim, and, as a result, he was not entitled to rely on *Banks*.

The District Court, however, has fundamentally misunderstood *Banks* and the "cause and prejudice" standard. Indeed, in Bell v. Bell, ___ F.3d ___ , 2006 U.S.App.Lexis 21708 (6th Cir. 2006), Judge Clay has just recently held for this Court that *Banks* fully applies to supply "cause and prejudice" when a petitioner has not presented a *Brady* claim to the state courts. Id., p. *17-22 (*Brady* claim not presented to state court, but default overcome under *Banks*). This only makes sense.

In *Bell*, as in *Banks* (and as occurred here), the whole reason the habeas petitioner did not properly present his claim to the state courts *was* the withholding of evidence and deception by the prosecution. *Banks* and *Bell* are predicated on the notion that a petitioner cannot be faulted for failing to present a claim to the state courts when the prosecution's deception prevented the petitioner from doing so. That is the exact situation here. The District Court, however, has fundamentally misunderstood the holding of *Banks*, as explained in *Bell*.

A District Court abuses its discretion when it rules based upon application of the incorrect legal standard. See e.g., In Re Grand Jury Subpoenas, 454 F.3d 511, 515 (6th Cir. 2006); Deja Vu of Cincinnati v. Union Twp. Bd. Of Trustees, 411 F.3d 777, 782 (6th Cir. 2005)(en banc); United States v. Martinez, 430 U.S. 317, 326 (6th Cir. 2005). Such an abuse of discretion has occurred here: The District Court has denied relief based on a clear misunderstanding of *Banks*. Thus, its judgment should be reversed and the matter remanded for further proceedings, including an evidentiary hearing.

This is especially true where the District Court has further faulted Donnie Johnson for not proving the existence of McCoy's deal for immunity. (R. 122: Order, p. 23; Apx. ___). Absent a hearing, however, Donnie Johnson cannot prove his entitlement to relief, which is why he is entitled to a hearing under *Banks*.

The District Court also faults Johnson for not being more diligent in proving McCoy's perjury. (Id.; Apx. ___). But this, too, turns the equities on their head. It is the state which lied at trial. It is the state that presented false affidavits in federal proceedings, while Johnson has, for years, been trying to obtain relief. As this Court recently made clear in Bell v. Bell, *supra*, to fault Johnson under these circumstances is patently unfair: This would allow the state to withhold

exculpatory evidence at trial, *then* present false evidence in federal court, and *then* claim that federal review should be avoided because Johnson should have more quickly proven (without a hearing) that the state withheld evidence *and* presented false evidence to the District Court.

Contrary to the District Court's reasoning, there are extraordinary circumstances present here: *the state withheld evidence and lied to get a man executed and, unabated, has perpetuated that lie to this day.* Contrary to the District Court's logic, this manifestly provides a reason for *granting* equitable relief, not denying it.

It was the state's obligation not to withhold evidence and present false testimony in the District Court. The federal courts are not powerless to act. Because the District Court clearly erred in applying *Banks*, and because the District Court compounded that error by denying a hearing and then faulting Johnson for not proving that McCoy received immunity, this Court should reverse the judgment of the District Court. Because, as shown by *Bell*, the District Court abused its discretion in applying *Banks*, this Court should reverse and remand for further proceedings, including an evidentiary hearing.

III. The District Court Clearly Erred In Denying Relief From Judgment On The Basis Of The Perjury During Initial Habeas Proceedings, Which *Prima Facie* Establishes Fraud, Misconduct, And/Or Misrepresentation Warranting Relief From Judgment: The Matter Should Be Remanded For Further Proceedings

Donnie Johnson has also alleged that fraud, misrepresentation, or misconduct vitiates the District Court's judgment denying habeas relief. Without conducting an evidentiary hearing, the District Court has denied relief from judgment solely on the allegations of fraud. This Court should reverse and remand because: (1) The District Court wholly failed to address Donnie Johnson's entitlement to relief on the basis of misrepresentation or misconduct under Rule 60(b) and/or its Savings Clause; and (2) The District Court clearly erred in denying relief on the basis of Johnson's fraud allegations.

A. Equitable Relief Can Be Granted Under Rule 60(b) And Its Savings Clause On Any Ground Establishing Unfairness In A Judgment, Including Misrepresentation, Misconduct And/or Fraud, Each Of Which Is A Distinct Grounds For Equitable Relief

Donnie Johnson has asserted that the initial habeas judgment was tainted by the state's use of false affidavits from Ronnie McCoy and the state prosecutor. As a result, he has alleged that the habeas judgment can be reopened because at least one (if not all three) of the following have occurred: (1) misconduct; (2) misrepresentation; and/or (3) fraud. These are each separate and distinct grounds

for equitable relief, each of which may provide a basis for relief under either the enumerated clauses of Fed.R.Civ.P. 60(b) or Rule 60(b)'s Savings Clause.

1. When There Are Allegations Of Misconduct, Misrepresentation And/Or Fraud, Fed.R.Civ.P. 60(b)(3) Provides A Basis For Relief From Judgment

Fed.R.Civ.P. 60(b)(3) itself specifically provides that: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Id. Each of these standards is distinct. While fraud may require nefarious intent, misrepresentation and misconduct do not. So long as there has been unfairness in the procurement of a judgment, relief may be granted even absent proof of intentional fraud. See e.g., Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988).

2. Under Rule 60(b)'s Savings Clause, Misconduct, Misrepresentation, And/Or Fraud May Be Remedied Through Either: (1) An Independent Action In Equity; Or (2) An Action For Fraud Upon The Court

Rule 60(b) also contains a Savings Clause, which provides two additional remedies: (1) An independent action in equity; and (2) an action for "fraud upon the court." The Savings Clause provides:

> This rule does not limit the power of a court [(1)] to entertain an independent action to relieve a party from a judgment, order, or proceeding, or [(2)] to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §1655, or [(3)] to set aside a judgment for fraud upon the court.

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

Apparent from the text of the Savings Clause is that an "independent action" in equity and a proceeding for "fraud upon the court" are two distinct remedies. As one District Court has explained: "Rule 60(b) reserves the rights of aggrieved parties to bring *two different types of actions*: independent actions to relieve a party from a judgment, order, or proceeding; and (2) an independent action to relieve a party for fraud on the court." Tibbetts v. President and Fellows of Yale College, 2005 U.S.Dist.Lexis 919, *14 (D.Conn. 2005).

Thus, as a practical matter, where there are allegations of fraud or misconduct (as there are here) a District Court may grant relief using any of three different remedies: (1) Rule 60(b)(3); (2) The Independent Action in equity; and (3) An action for "fraud on the court." See e.g., United States v. Buck, 281 F.3d 1336 (10th Cir. 2002)(acknowledging three separate vehicles for seeking relief from judgment where fraud is involved).[3]

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[3] In *Buck*, where there were allegations of fraud, the Tenth Circuit initially examined the applicability of 60(b)'s six enumerated subsections. Buck, 281 F.3d at (continued...)

a. Standards Governing The Independent Action In Equity

The "independent action" cited in Rule 60(b) refers to "a procedure which has been historically known simply as an independent action in equity to obtain relief from a judgment." Bankers Mortgage Co. v. United States, 423 F.2d 73, 78 (5th Cir. 1970); Holt v. United States, 221 F.R.D. 485, 487 (E.D.Wis. 2004).

The "independent action" in equity is thus governed by "principles which have historically applied to the independent action in equity to reform a judgment." West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 706 (5th Cir. 1954). See also Carlson v. United States Department of Education, 2003 U.S.Dist.Lexis 22686, *11 (D.Minn. 2003)("Rule 60(b) does not disturb the power federal courts had prior to the adoption of Rule 60 to relieve a party from a judgment by means of an independent action according to traditional principles of equity.")

The independent action in equity may be based on any type of allegation of unfairness: It is not limited allegations of fraud. As Justice Shiras explained for a

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[3](...continued)
1340-1341. The Court then noted that "[n]evertheless, Rule 60(b) authorizes two other avenues for relief from fraud upon the court." Id. at 1341. "The first additional avenue," the Court explained "is the independent action," while the "second procedure for obtaining relief is to invoke the inherent power of a court to set aside a judgment if procured by fraud upon the court." Id. As in *Buck*, Donnie Johnson has invoked all three available procedures.

unanimous Supreme Court in Wasatch Mining Co. v. Crescent Mining Co., 148 U.S. 293 (1893), grounds supporting an independent action are not limited to intentional fraud because equity focuses on the nature of the harm itself, rather than the manner in which the harm was inflicted. Regardless of intent, the actual injury to the aggrieved party remains the same. It is upon the harm that equity operates:

> In equitable remedies given for fraud, accident or mistake, it is the facts as found that give the right to relief, and it is often difficult to say, upon admitted facts, whether the error which is complained of was occasioned by intentional fraud or by mere inadvertence or mistake. Indeed, upon the very same facts, an intelligent man, acting deliberately, might well be regarded as guilty of fraud, and an ignorant and inexperienced persons might be entitled to a more charitable view. *Yet the injury to the complainant would be the same in either case.*

Wasatch Mining Co. v. Crescent Mining Co., 148 U.S. 293, 298, 13 S.Ct. 600, 601 (1893)(emphasis supplied). See also National Surety Co. of New York v. State Bank of Humboldt, 120 F. 593, 597-598 (8th Cir. 1903); Carlson v. United States Department of Education, 2003 U.S.Dist.Lexis 22686, *12 (D.Minn. 2003) ("[I]ndependent actions may be based on newly discovered evidence, fraud, or misrepresentation.").

The elements of an independent action in equity are well-settled. As this Court has explained:

> The 'indispensable elements' of the independent action are: (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Barrett v. Secretary of Health & Human Services, 840 F.2d 1259, 1263 (6th Cir. 1987). See Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir. 1970).[4]

The moving party must also make a substantial showing that the judgment is manifestly unfair such that equity should intervene. As the Supreme Court explained in United States v. Beggerly, 524 U.S. 38, 45 (1998): "Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of injustices which, in certain instances, are deemed sufficiently gross

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[4] As Chief Justice John Marshall explained nearly two centuries ago: "Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."Marine Ins. Co. v, Hodgson, 7 Cranch, 332, 336 (1813). See Marshall v. Holmes, 141 U.S. 589, 596 (1891); See also West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702 (5th Cir. 1954)("[T]he desire of courts to repair an injustice wrought by a judgment will overcome the necessity for finality where it is against conscience to execute that judgment and where that judgment was rendered without fault or neglect on the part of the party seeking to reform it.")

to demand a departure from rigid adherence to the doctrine of *res judicata*." As with any proceeding under the six enumerated subsections of Rule 60(b), a reviewing court must certainly take into account the equities, which in this case include the fact that the prior habeas judgment was rendered in a capital proceeding.

b. Standards Governing "Fraud Upon The Court"

This Court has addressed the scope of fraud upon the Court in the Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993). As this Court has explained:

> [T]he elements of fraud upon the court . . . consist[] of conduct: 1. On the part of an officer of the court; 2. That is directed to the 'judicial machinery' itself; 3. That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court.

Demjanjuk, 10 F.3d at 348. "[T]he intent requirement 'is satisfied by proof of actual intent to defraud, of wilful blindness to the truth, or of a reckless disregard for the truth." Id.; see Alley v. Bell, 405 F.3d 371, 372 (6th Cir. 2005)(Cole, J., concurring) (where attorneys for party have acted "willfully" or "recklessly" in concealing truth, fraud has occurred). Under *Demjanjuk*, therefore, for there to be "fraud upon the court," proof of actual intent to defraud is not required.

B. The District Court Has Clearly Erred In Its Disposition Of Donnie Johnson's Allegations Of Misconduct, Misrepresentation, And/Or Fraud

Having alleged that he was denied fair federal habeas proceedings through the state's presentation and use of false affidavits, Donnie Johnson has stated cognizable grounds for equitable relief under the above standards governing Rule 60(b)(3), the independent action in equity, and as an action for "fraud upon the court." The District Court, however, clearly erred in its disposition of each of these separate bases for relief. This Court should therefore reverse the District Court and remand.

1. The District Court's Disposition Of Donnie Johnson's Allegations Under Rule 60(b)(3) Was In Error

The District Court concluded that Donnie Johnson's allegations of misconduct, misrepresentation, and fraud arising from the state's use of false affidavits were not filed within the general one-year limitations period for filing a motion under Rule 60(b)(3). (See R. 122: Order, at 24 n.8; Apx. ___). The District Court, however, failed to consider Donnie Johnson's entitlement to equitable tolling of that period.

As adverted to earlier, Banks v. Dretke, 540 U.S. 668 (2004), makes clear that the state cannot present false evidence and then contend that the state should

win because it wasn't caught soon enough – especially when the state (as here) represented that it was telling the truth all along. (See R. 104: Motion For Equitable Relief, at 22-24; Apx. ___). Moreover, when previously before the District Court, Donnie Johnson specifically sought discovery and investigative assistance seeking to prove that McCoy was lying. Johnson specifically sought funds for an investigator to show that McCoy was lying and had been given a deal, and he also sought discovery concerning McCoy. (See R. 108: Reply To Response To Motion For Equitable Relief; Apx. ___; citing R. 22 & 23: Motion For Support Services & Memorandum In Support; R. 52 & 53: Motion For Discovery & Memorandum In Support; Apx.). The District Court, however, denied those motions, thus interfering with Johnson's ability to present such issues sooner. (See R. 50: Order Denying Investigative Assistance; Apx. ___; R. 72: Order Denying Discovery; Apx. ___).

Donnie Johnson cannot be faulted that he did not find McCoy's parole officer and present his declaration sooner – he was unable to do so before the District Court entered judgment because he had been denied the necessary resources to do so. Rather, he filed the officer's declaration within weeks of obtaining it. These circumstances allow for the tolling of the normal one-year limitations period. The District Court erred in failing to consider this, and

therefore, the matter should be remanded.

2. The District Court Failed To Consider The Allegations Of False Testimony As Providing A Basis For Relief Through An Independent Action In Equity, And The Matter Should Therefore Be Remanded

As noted *supra*, an independent action in equity provides a separate basis for equitable relief under 60(b)'s Savings Clause. The District Court, however, overlooked this part of the Savings Clause, asserting that absent relief under Rule 60(b)(3), "fraud upon the court" was the only other basis for relief. (R. 122: Order, at 24 n. 8; Apx. ___). As demonstrated above, however, the District Court's view is simply incorrect.

Moreover, there is no limitation period governing the granting of equitable relief through the Savings Clause's independent action. See In Re West Texas Marketing Corp., 12 F.3d 497 (5th Cir. 1994); Narramore v. United States, 852 F.2d 485, 492-493 (9th Cir. 1988); Notes of Advisory Committee on Amendment to Rules, 1946. Thus, Donnie Johnson simply faces no limitations issue.

In addition, the District Court expressed its belief that allegations that a party created and/or used perjured or false evidence to obtain a judgment cannot form the basis for equitable relief. See (R. 122: Order, at 24; Apx. ___). This, too, is simply wrong on the law.

Allegations of perjury or use of falsified evidence are fully cognizable in such an independent action. In fact, the Supreme Court clearly recognized this over a century ago in Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62 (1891), in which a party used a forged document and sought equitable relief. The Sixth Circuit has reached the identical conclusion. Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425 (6th Cir. 1996)(false testimony and withholding of exculpatory evidence). Other circuits have likewise concluded that a party's use of perjured testimony (or the withholding of exculpatory evidence) provides grounds for the very type of equitable relief which Donnie Johnson seeks. See Venture Industries Corp. v. Autoliv ASP Inc., 2006 U.S.App.Lexis 20114 (Fed. Cir. 2006)(expert's presentation of false evidence); Bonar v. Dean Witter Reynolds, 835 F.2d 1378 (2d Cir. 1988)(expert falsified credentials); Harre v. A.H. Robins, Inc., 750 F.2d 1501 (11th Cir. 1985)(false testimony); Schreiber Foods Inc. v. Beatrice Cheese Inc., 402 F.3d 1198 (Fed.Cir. 2005); Fraige v. American-National Water Mattress Corp., 996 F.2d 295 (Fed.Cir. 1993).

In alleging that the state used false affidavits, Donnie Johnson has stated grounds which may entitle him to relief under Rule 60(b)'s independent action. The District Court, however, never addressed the applicability of the independent action, while likewise holding, contrary to the governing Sixth Circuit precedent

of *Abrahamsen* that perjury cannot provide a basis for equitable relief from judgment. Because the District Court not only failed to address the independent action but compounded that error by wrongly concluding that perjury cannot provide a basis for relief, this Court should reverse and remand for further proceedings on the question whether Donnie Johnson should be granted equitable relief through an independent action under the Savings Clause. See e.g., Alley v. Bell, 405 F.3d 371 (6th Cir. 2005)(en banc)(remanding for consideration of motion for equitable relief in the first instance); Jordan v. Paccar, Inc., 1996 U.S.App.Lexis 25358 (6th Cir. 1996) (remanding for hearing on motion for relief from judgment).

3. The District Court Clearly Erred In Its Consideration Of "Fraud Upon The Court"

Finally, the District Court likewise clearly erred in its disposition of the motion, insofar as it seeks relief for "fraud upon the court." In denying relief, the District Court made numerous critical errors in the application of law, each of which requires reversal:

First, the District Court reached the erroneous legal conclusion that use of perjured testimony cannot establish "fraud upon the court." (R. 122: Order, at 26; Apx. ___). As previously noted, however, that is simply not

the law of the United States Supreme Court or the Sixth Circuit, which provide that the use of false evidence provides grounds for equitable relief. See Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62 (1891); Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425 (6th Cir. 1996).

Second, the District Court asserted that Donnie Johnson had not asserted that Respondent's attorneys were involved in the presentation of the false evidence. That is not true. Donnie Johnson made clear that the state's attorneys were involved in the presentation of this evidence: Indeed, the record is eminently clear that the false evidence was filed by them with the Court. (See R. 104: Motion For Equitable Relief, at 27; Apx. ___ (state filed false affidavit); R. 60: Motion To Attach Document; Apx. ___(filing of McCoy affidavit)).

Third, the District Court faulted Donnie Johnson for failing to show that Respondent's counsel "knowingly submitted any such false affidavits." (R. 122: Order, at 27; Apx. ___). Of course, the question whether Respondent's counsel acted with the *mens rea* necessary to establish fraud under *Demjanjuk* (intentionally false, wilfully blind to truth, or in reckless disregard of truth, See p. 25, *supra*) is a factual question. Alley v. Bell, 405 F.3d 371, 372-373 (6th Cir. 2005)(en banc) (Cole, J., concurring). *The*

District Court, however, never provided Donnie Johnson a hearing at which he could prove his allegations. The District Court cannot fault Donnie Johnson for failing to prove his allegations when he was never given any opportunity to do so. The remedy for this is a hearing, not dismissal.

Fourth, the District Court asserted that there had been no fraud directed at the judicial machinery. (R. 122: Order, at 28; Apx. ___). Once again, this misses the mark, and overlooks controlling authority. In Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), the Supreme Court found "fraud upon the court" where individuals were involved in fabricating evidence to deceive the courts on an issue of public concern, an issue "of great moment to the public." The very same can be said here: The fairness of Donnie Johnson's conviction and sentence are of great moment not only to him, but necessary to insure that the entire system of capital punishment is fair. Without doubt, what happens to Donnie Johnson "is of great moment" not only to him, but to the public as well.

Indeed, it is for this reason that this Court granted relief for "fraud upon the court" in Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993). In *Demjanjuk*, attorneys for the government were less than forthcoming about providing evidence which was exculpatory to Demjanjuk, who faced capital

punishment for his alleged actions. This Court had little problem concluding that the withholding of evidence in a capital case subverted the workings of the judicial process, such that "fraud upon the court" was established. The District court, however, completely failed to consider either *Demjanjuk* or Workman v. Bell, 245 F.3d 849 (6th Cir. 2001)(en banc), which likewise indicates that fraud perpetrated during a capital habeas corpus proceeding (if shown to be fraudulent) is sufficient to require relief from judgment as a "fraud upon the court."

All told, the District Court's "fraud upon the court" analysis is fatally flawed for at least four reasons. The District Court failed to apply *Abrahamsen.* It made the clearly erroneous factual assertion that Donnie Johnson had not alleged complicity of Respondent's attorneys. It failed to accord a hearing but then faulted Johnson for not proving his claim. The District Court likewise failed to apply controlling principles from *Hazel-Atlas Glass*, *Damjanjuk*, and *Workman.* For each of these reasons, this Court must reverse and remand for further proceedings, including an evidentiary hearing.

CONCLUSION

The District Court's habeas judgment was tainted by the false testimony of two key witnesses. Donnie Johnson has stated grounds for relief under

Fed.R.Civ.P. 60(b)(3), as an independent action in equity, and for "fraud upon the court." The District Court's disposition of each of these grounds contains patent error. The District Court's order should be reversed, and the matter remanded for further proceedings, including an evidentiary hearing.

Respectfully Submitted,

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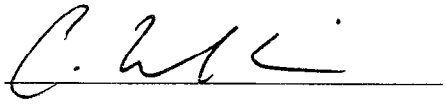

CERTIFICATE OF COMPLIANCE

I certify that this principal brief complies with Fed.R.App.P. 32(a)(7), in that it does not exceed 14,000 words: The brief contains approximately 9,500 words.

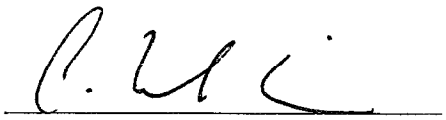

Exhibit 3

American Civil Liberties Union v. National Security Agency\
Nos. 06-2095, 06-2140
(6th Cir. Oct. 4, 2006)

Order Granting Stay Pending Appeal

Nos. 06-2095/2140

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN- ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS OF MICHIGAN; GREENPEACE, INCORPORATED; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA McKELVEY; BARNETT R. RUBIN,	)	
Plaintiffs - Appellees (No. 06-2095) Cross - Appellants (No. 06-2140)	)	
v.	)	O R D E R
NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE; KEITH B. ALEXANDER, General, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service,	)	
Defendants - Appellants (No. 06-2095) Cross - Appellees (No. 06-2140)	)	

BEFORE: BATCHELDER, GILMAN, and GIBBONS, Circuit Judges

The government moves for a stay pending appeal of the district court's order holding the Terrorist Surveillance Program unconstitutional and permanently enjoining the Government from utilizing the Program "in any way, including, but not limited to, conducting warrantless wiretaps of telephone and internet communications, in contravention of [FISA and Title III]."

In considering whether a stay pending appeal should issue, we balance the traditional factors governing injunctive relief: (1) whether the applicant has demonstrated a substantial likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other interested parties; and (4) where the public interest lies. *Baker v. Adams County/Ohio Valley Sch. Bd.,* 310 F.3d 927, 928 (6th Cir. 2002);

Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991). This court, in *Grutter v. Bollinger*, 247 F.3d 631, 633 (6th Cir. 2001), noted that

> *Michigan Coalition* said that the success on the merits which must be demonstrated is inversely proportional to the harm. More than a possibility of success must be shown, and "even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the nonmoving party if a stay is granted, he is still required to show, at a minimum, 'serious questions going to the merits.'" (edits and citations omitted).

After careful review, we conclude that this standard has been met in this case. Accordingly, the motion for a stay pending appeal is **GRANTED**.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

Exhibit 4

Lambert v. Davis
No. 05-2610
(7th Cir. June 17, 2005)

Order Granting Stay Of Execution

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 17, 2005

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

MICHAEL A. LAMBERT, Petitioner-Appellant, No. 05-2610 v. CECIL DAVIS., Superintendent, Respondent-Appellee.	] Appeal from the United States] District Court for the] Southern District of Indiana,] Indianapolis Division.]] No. 05 C 708]] Larry J. McKinney,] Chief Judge.

IT IS ORDERED that Michael Lambert's execution, scheduled for June 22, 2005, is **STAYED**. In due course, the court will issue an order addressing whether a certificate of appealability should be issued.