IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN	)	
	)	
Petitioner	)	No. 3:96-0380
	)	Judge Campbell
v.	)	
	)	**Capital Habeas Corpus**
RICKY BELL, Warden	)	
	)	
Respondent	)	

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION
FOR RELIEF FROM JUDGMENT PURSUANT TO FED.R.CIV.P. 60(b)

Bradley A. MacLean (BPR # 9562)
STITES & HARBISON PLLC
SunTrust Center, Suite 1800
424 Church Street
Nashville, Tennessee 37219
(615) 244-5200

William P. Redick, Jr. (BPR #6376)
810 Broadway
Suite 201
Nashville, TN 37203
(615) 742-9865

Counsel for Petitioner

INDEX

I. Introduction

In 1998 this Court ruled that Petitioner's claims of prosecutorial misconduct had not been exhausted in state court and were therefore defaulted. This was error. Tennessee Supreme Court Rule 39 (hereinafter "Rule 39"), promulgated in June of this year, clarified that, since 1967, a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes. This Court's dismissal of the prosecutorial misconduct claims prevented a full consideration of the cumulative effects of all instances of prosecutorial misconduct within the context of the ineffective assistance of counsel at Petitioner's trial. While it is an extraordinary measure, the granting of a Rule 60(b) motion in this case is both proper and necessary. Justice requires a full and fair review of the cumulative effects of errors, fraud and deception committed by the attorneys at trial. Further, it requires a ruling on the likely result of the trial had the jury been presented with full, fair and accurate proof about the offense and the Petitioner himself.

A. All material and significant aspects of this case were prejudicially distorted by the deceit of the prosecution and the failures of defense counsel.

The law requires that prosecutorial misconduct and the failures of defense counsel be considered together in order to determine whether the result of the trial was fair and reliable. This memorandum describes how prosecutorial misconduct and ineffective assistance of counsel in Petitioner's case created a trial that was fundamentally unfair and led to an outcome that was highly unreliable. It details instances in which the prosecution intentionally withheld exculpatory information and engaged in fraud and deception. It also reviews the instances in which defense counsel failed to present Petitioner's defenses and to rebut the prosecutor's fraudulent case.

Collectively, the errors of prosecution and defense distorted every material aspect of this case including: (i) Petitioner's altruistic motives rather than criminal intent; (ii) the influence on Petitioner of the Southeastern Gospel Ministry (SGM) and the role of members of the SGM in the commission of the offense; (iii) Petitioner's non-involvement in the stabbing of the victims; (iv) potential but unpresented guilt stage and sentencing stage mental state defenses; (v) the inadmissible and rebuttable prosecution proof regarding Petitioner's prior criminal convictions; and (vi) compelling mitigating evidence that was available, but unpresented, to the jury.

Appendix A is a summary of the instances in which the nonfeasance and malfeasance of the prosecutor and the defense attorney, collectively and cumulatively, eliminated any opportunity that the trial of this case had to be fair and reliable.

B. State and federal courts collaterally reviewing this case have recognized that the trial was severely flawed, even without cumulating error.

Every court, state and federal, that has collaterally reviewed this case has found that trial counsel's performance was constitutionally inadequate in both the guilt and sentencing stages. See, e.g., Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1095. The disagreement among the reviewing courts with regard to the effectiveness of defense counsel has been the question of prejudice, not performance.

Upon the only presentation to date of a complete factual record of Petitioner's claims and defenses in this case, this Court found counsel's performance at sentencing to have been sufficiently prejudicial to require the sentence of death to be set aside. Id., at 1091-1102. This Court found the unpresented mitigating evidence that the jury did not hear to be "very impress[ive]," "vivid," "significant," "extremely credible," "compelling," and "overwhelming."

Id. The Court found the failures of trial counsel to provide this evidence to the sentencing jury to be "grave," "serious," "very significant," "substantial," "breathtaking[]," and "grievous." Id.

In reaching this decision, however, this Court improperly failed to consider the failures of counsel collectively and cumulatively with the instances of prosecutorial misconduct and other errors.

Upon circuit review, in a split decision, in which three different opinions were filed, one member of the three judge panel agreed with this Court. See, Abdur-Rahman v Bell, 226 F.3d 696, 719-724 (6th Cir. 2000). In dissent, Judge Cole recognized that trial counsel's "preparation for and presentation at the sentencing hearing, was constitutionally inadequate . . . . [in that counsel] completely failed to investigate and present Abdur'Rahman's mental health history, his institutional history, or other mitigating evidence." Id. at 720. He further noted that had defense counsel investigated and prepared, the jury would have heard mitigation evidence that Petitioner "has a history of traumatic abuse as a child, that he had a long history of mental health problems, and treatments, and, finally, that Abdur'Rahman had previously been a productive member of society." Id. at 721. Thus, two of the four federal judges who have reviewed this case have found the deficient performance of counsel at the sentencing stage alone to be sufficient to require the sentence of death to be set aside.

The proof presented in this Court, that Petitioner's prejudice in the sentencing stage of the trial was a result of trial counsel's ineffectiveness, was so strong that the state did not even contest the merits of this Court's decision on appeal. Without advance notice to the parties or an opportunity to be heard, however, the majority of the circuit panel *sua sponte* reinstated the sentence of death on an issue that had been abandoned by the state, not included in the briefs,

and not addressed during oral argument. Despite the presentation of an expansive record before this Court, the panel majority did not discuss the proof presented in support of the claim of the ineffectiveness of counsel at the sentencing stage, except in the most cursory and conclusory way.

Petitioner's petition to rehear with the Sixth Circuit Court of Appeals that was circulated to the *en banc* court. Upon the information and belief of undersigned counsel, the vote among the then-active judges on the petition to rehear was as close as it possibly could have been without resulting in an order to rehear. Consequently, the petition to rehear was denied and the panel majority decision to reinstate the death sentence stood.

A petition for certiorari to the United States Supreme Court was denied on October 9, 2001. Petitioner filed a Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for further Proceedings with the Sixth Circuit Court of Appeals, on October 10, 2001. That motion is presently pending before the Court of Appeals.

C. The post-trial reaction of trial jurors to information not presented at trial demonstrates that the result of the trial would have been different if available evidence had been presented.

The results of post-trial interviews of the jurors who deliberated in this case make it obvious that the outcome of the sentencing hearing would have been different if the available mitigating evidence had been presented to them. The original affidavits from eight of the jurors who deliberated in this case are being filed contemporaneously herewith.[1] Excerpts from each of

[1] The eight juror affidavits were before the United States Supreme Court on the Petition for a Writ of Certiorari that was denied on October 9, 2001. The juror affidavits were attached to the brief of *amici curiae*, the National Mental Health Association, et. al. The Court accepted the juror affidavits into the record over the state's motion to strike. See, Abdur'Rahman v Bell, 2001 WL 575672., Sup. Ct. No. 00-1742, October 9, 2001.

the eight juror affidavits include the following:

Juror Bonnie M. Meyer: "In the sentencing stage of the trial, I did not want to give the defendant the death penalty. I did not think the evidence was strong enough for the death penalty. I was one of the last hold-outs on the jury to vote for the death penalty. . . . If I had known anything about the defendant's background, that he had been abused as a child, and that he may have suffered from a mental disorder or mental illness that could help explain why he did what he did, then I do not believe I would have voted for the death penalty."

Juror Alice Stoddard: "I would have wanted to know then about Mr. Jones's history of mental illness and the nature of the facts about his 1972 murder conviction relating to homosexual assault against him. I would have been interested in the fact that no blood was found on Mr. Jones' coat and in particular I think that the facts of his childhood abuse and corresponding mental illness should have been made known to us as jurors in some detail. We would have wanted to consider all this evidence. I believe I would have voted for a life sentence for Mr. Jones rather than death had I heard the factual evidence I have just mentioned. I do not believe this information should have been withheld from us."

Juror Jimmy Swarner: "I would have wanted to hear everything about Mr. Jones' life before deciding on his sentence. I would have wanted to know all about the way his father treated him and about his mental problems. . . . I don't want Mr. Jones to be put to death."

Juror Scarlett McAllister Smith: "I certainly would have wanted to see the TBI lab report which showed Mr. Jones had no blood on his clothes. I would have wanted to know all about Mr. Jones' extensive mental health history including treatment, diagnoses, and attempted suicides. We should have been informed about the abuse experienced at the hands of his father

which occurred when he was young. I really would have wanted to have heard from his wife about his behavior--talking to nonexistent people and animals--and also heard about his family's mental health problems."

Juror Yolanda Howard: "It is my belief I would have voted for life for Mr. Jones rather than death if I had heard the details of this man's life and the extent of his mental illness. We didn't have a chance to understand Mr. Jones at all because we weren't informed. Another thing that really bothers me is we did not see the TBI lab report about the blood tests. It seems important that we should have known that no blood was found on Mr. Jones clothes, especially since they showed us pictures with all the blood in them. Seeing those pictures was really upsetting to me. It might really have made a difference to me if I had heard testimony about the lack of blood on Mr. Jones's clothes. Basically, I am upset that all this information was withheld from us in deciding this man's life. That is a hard decision to make and I think we should have had complete information."

Juror Loretta L. Galloway Simpson: "I am truly bothered by all the information withheld from us: no blood stains on Mr. Jones's clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I wouldn't want to have my case handled this way, if it had been me, not Mr. Jones. I would have wanted them to present everything about me - whether it was for me or against me. Mr. Jones sounds like he needs help. If he has mental problems, death is not the answer. I do not want Mr. Jones executed under these conditions. I absolutely, as a juror, would have wanted to have heard all the information about Mr. Jones before deciding his sentence - life or death. Given all the history of mental illness Mr.

Jones has, I would have voted for a life sentence. I most definitely would have voted for life even then."

Jury Foreman Everett C. Stone III: "[I]t is my belief and opinion that this evidence would have made a significant difference in the sentencing phase of the trial. Further, given the nature of the evidence, I would further offer for consideration that the death penalty be over-turned in this case."

Juror James D. Wimberly: "We were not given information detailing Mr. Jones's mental illness and hospitalizations. I am truly bothered by all the information withheld from us: no blood stains on Mr. Jones' clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I especially think we should have known the details of his previous murder conviction being related to homosexual threats in prison. That previous conviction swayed me to vote for death. The results would have been different at sentencing if I had heard the true facts."

The substance of these juror's affidavits further demonstrate both the unfairness and the unreliability of Petitioner's trial. There is more than a reasonable likelihood that the outcome of the trial would have been different had the jury not been deceived by the prosecutor and failed by the defense attorney. In Tennessee, if one juror holds out for a life sentence, the defendant avoids the death penalty. See T.C.A. 39-2-203(h). In light of this fact, it is virtually certain that, had the proper case been presented, the outcome of Petitioner's trial would have been different.

II. The relationship between claims deemed defaulted by this Court, O'Sullivan v. Boerckel, Tenn. Sup. Ct. R. 39, Tenn. R. App. P. 11, and F. R. C. P. 60(b).

A. This Court dismissed numerous claims as defaulted because they were not presented in a discretionary appeal to the Tennessee Supreme Court.

In his petition for writ of habeas corpus, Petitioner raised numerous claims of prosecutorial misconduct. See, generally, Amended Petition For Writ Of Habeas Corpus, pp. 53-75, ¶¶ D1-D8. In response to these claims, this Court found that many of them were procedurally defaulted because, although they were presented on appeal to the Tennessee Court of Criminal Appeals, such claims had not been presented to the Tennessee Supreme Court in an application for permission to appeal. See, Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1080-1082 (M.D.Tenn. 1998). Particularly, see, 999 F.Supp. at 1082 n. 8, in which this Court dismissed claims ¶¶ D1(2) through (6), D1(8) through (12), D2(1) through (3), D3, D5(1) through (4), D8(1) through (3), D8(5) through (8).

Before this Court's 1998 dismissal of the prosecutorial misconduct claims, Petitioner had maintained to this Court that he was only required by Tennessee law to seek review in the Tennessee Court of Criminal Appeals in order to satisfy federal exhaustion requirements. Petitioner maintained that he was not required to seek discretionary review in the Tennessee Supreme Court under Tenn. R. App. P. 11 (hereinafter "Rule 11"), on the basis that Rule 11 did not contemplate such an application as a prerequisite for federal exhaustion. See, Petitioner's Response To Respondent's First Motion For Partial Summary Judgment at 45-52, R. 91. Nevertheless, this Court rejected Petitioner's arguments and concluded that the substantial body of Petitioner's prosecutorial misconduct claims were defaulted on the ground that exhaustion

required presentation of claims in an application for discretionary review. In the course of reaching this conclusion, this Court relied on the authority of Silverburg v. Evitts, 993 F.2d 124, 126 (6th Cir. 1993). See, Abdur'Rahman, supra, 999 F.Supp. at 1080. In fact, in O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728 (1999), the United States Supreme Court resolved the split among the circuits and ruled consistently with the Sixth Circuit decision in Silverburg.[2] See, discussion, infra.

B. Newly promulgated Rule 39 demonstrates that a discretionary appeal to the state Supreme Court is not available—and has never been available—for the purpose of federal exhaustion.

> *Determination of the meaning of a statute begins with the plain language of the statute itself.* United States v. Ron Pair Enterprises, Inc., S.Ct. 1026, 1030 (1989); Bradley v. Austin, 841 F.2d 1288, 1293 (6th Cir. 1988).

On June 28, 2001, the Tennessee Supreme Court issued an Order and released Tenn. S. Ct. R. 39 which emphasizes that, since 1967, permission to appeal to the Tennessee Supreme Court following any denial of relief by the Tennessee Court of Criminal Appeals is not, and has not been, available for the purpose of federal exhaustion. See, Order, filed June 28, 2001 promulgating Rule 39, attached hereto as Appendix B. Rule 39 supports Petitioner's assertions in this Court, that his post-conviction claims were exhausted so long as they were presented to

[2] Because the Sixth Circuit's exhaustion rule was inconsistent with Petitioner's position, Petitioner concluded it to be futile to consume briefing space on appeal challenging the procedural ruling by this Court. The wisdom of Petitioner's decision in this regard was borne out by the Supreme Court's ruling in O'Sullivan, which was issued while the parties were preparing their Sixth Circuit briefs in this case. As will subsequently be explained in greater detail, while the O'Sullivan rule generally requires that claims be raised in a discretionary appeal to the state's highest court in order to exhaust for federal purposes, it left the door open for the states to have a contrary rule. Subsequent to O'Sullivan, the Tennessee Supreme Court stepped through this door and made it clear that its Rule 11 discretionary appeal had never been available for federal exhaustion. See, discussion, infra. The promulgation of Rule 39 with the sanction of the United States Supreme Court in O'Sullivan has rendered this Court's prior ruling on this issue incorrect and has made this Rule 60(b) motion possible.

the Tennessee Court of Criminal Appeals. Rule 39 states:

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

The Preamble to Rule 39 provides, as follows:

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

Rule 39 applies "in all appeals from post-conviction relief matters from and after July 1, 1967," and therefore applies to all of the claims in this case.

In contrast, a Rule 11 discretionary appeal is granted for purposes that concern the Tennessee Supreme Court's functions as the highest court in the state: i.e., uniformity of law, public policy, and supervisory authority. Tenn. R. App. P. 11 provides:

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

In fact, the Advisory Commission Comments to this rule provide that a Rule 11

application "is not designed to serve the office of arguing the merits of the decision of the intermediate appellate court." Consistently, the state's Answer in Opposition to Application for Permission to Appeal in response to Petitioner's Rule 11 application in this case argued:

> The petitioner is merely asking this Court for another review of the trial court's dismissal of the post-conviction petition. Petitioner has not demonstrated the existence of reasons such as would permit discretionary review by this Court.

State's Opposition at 2. This argument defies the purpose of the federal execution doctrine, which is precisely to insure that the state courts have an opportunity to rule on the merits of claims challenging state court convictions prior to any federal action.

Taken together, Rule 39, the Preamble to Rule 39, and Rule 11 make it clear that since the creation of the Tennessee Court of Criminal Appeals in 1967[3], any application to the Tennessee Supreme Court from a decision of the Tennessee Court of Criminal Appeals has not been an appeal of right, but rather has been an appeal governed by Rule 11 as applied within the discretion of the Supreme Court. The Rule 11 discretionary appeal has always been limited to claims "where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11." Preamble to Rule 39. Accordingly, as Rule 39 makes clear, the limitations imposed on discretionary appeals by Rule 11 do not include federal exhaustion. Thus, in this case, a Rule 11 discretionary appeal was not available for the exhaustion of Petitioner's claims.

Further, this case presents no question concerning the retroactive or retrospective

[3] Also on July 1, 1967, the Tennessee Post-Conviction Procedures Act took effect. Tenn. Pub. Acts, Ch. 310, formerly codified at T.C.A. § 40-3801, et seq., and currently codified at T.C.A. § 40-30-101, et seq. The state post-conviction procedures are defined solely by the statute that codifies them. Both the Court of Criminal Appeals and the state post-conviction procedures therefore were created the same day in 1967. Although it is not stated in Rule 39 and does not need to be stated, the co-extensive life since July 1, 1967 of the intermediate appellate court in criminal cases and the state post-conviction procedures is another logical reason that the Tennessee Supreme Court directed that Rule 39 shall apply, beginning on July 1, 1967.

application of Rule 39, since the Rule only memorializes what the law has been since 1967 and was in 1995, after the Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief, when the only discretionary appeal was sought in Petitioner's case.

C. Federal courts recognize the authority of a state's highest court to determine that claims need not be raised in a state discretionary appeal to the highest court in order to satisfy federal exhaustion requirements.

> *It would be a strange rule of federalism that ignores the view of the highest Court of a State as to the meaning of its own law.* Stringer v. Black, 503 U.S. 222, 235, 112 S.Ct. 1130, 1139 (1992).

In O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728 (1999), the Court's majority opinion found that the federal exhaustion requirement did require presentation in state court of claims in a discretionary appeal. The rule of the majority, however, was based on notions of comity, i.e., deference by the federal courts to the review by state courts of state court convictions. The majority, therefore, observed:

> We acknowledge that the rule we announce today – requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State – has the potential to increase the number of filings in state supreme courts. We also recognize that this increased burden may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court. (Citations to South Carolina and Arizona supreme court rulings that decided not to require the presentation of claims in order to satisfy federal exhaustion omitted). Under these circumstances, O'Sullivan may be correct that the increased, unwelcome burden on state supreme courts disserves the comity interests underlying the exhaustion doctrine.

119 S.Ct. at 1733-34. Justice Stevens' dissenting opinion, joined by Justices Ginsburg and Breyer, noted that the imposition of the exhaustion requirement on discretionary state court appeals "will impose unnecessary burdens on habeas petitioners; it will delay the completion of litigation that is already more protracted than it should be; and most ironically, it will undermine

federalism by thwarting the interests of those state supreme courts that administer discretionary dockets." Id. at 1739.

Justices Stevens, Ginsburg, and Breyer pointed out that the majority "leaves open the possibility that the state supreme courts may avoid a deluge of undesirable claims by making a plain statement – as Arizona and South Carolina have done – that they do not wish the opportunity to review such claims before they pass into the federal system." Id. at 1740. These justices "agree[d] with Justice Souter [in his concurring opinion]. . . that a proper conception of comity obviously requires deference to such a policy," id.. These Justices concluded: "The key point is that federal courts should not find procedural default when a prisoner has relied on a state supreme court's explicit statement that criminal defendants need not present to it every claim that they might wish to assert as a ground for relief in federal habeas proceedings." Id. at 1741. There would be no default so long as the state court has taken the "step of expressly disavowing any desire to be presented with every such claim." Id.

Thus, in O'Sullivan, the Court created "a kind of presumption that a habeas petitioner must raise a given claim in a petition for discretionary review in state court prior to raising that claim on federal habeas but the State could rebut the presumption through state law by clearly expressing a desire to the contrary." Id., at 1741-42. Indeed, the Supreme Court mentioned South Carolina and Arizona as examples of states which, based upon statements from their respective supreme courts, might express "contrary preferences." Id., at 1741-42. See, also, the majority opinion, 119 S.Ct. at 1734, which cites and relies upon the statements by the Supreme Courts of South Carolina and Arizona, which did not require litigants to raise claims in discretionary appeals in order to satisfy federal exhaustion.

The Arizona rule is very similar to Tennessee Supreme Court Rule 39 in pertinent part. The Ninth Circuit Court of Appeals was confronted with the Arizona rule in Swoopes v. Sublett, 196 F.3d 1008 (9th Cir. 1999), and recognized that the majority in O'Sullivan "acknowledged an exception relating to 'any specific state remedy when a State has provided that that remedy is unavailable.'" 196 F.3d at 1009. The remedy need not be exhausted "so long as the state has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." Id. at 1009-10, citing O'Sullivan, 119 S.Ct. at 1735 (Souter, J., concurring). The Ninth Circuit concluded:

> In sum, the Arizona Supreme Court has announced that . . . review need not be sought before the Arizona Supreme Court in order to exhaust state remedies. Thus post-conviction review before the Arizona Supreme Court is a remedy that is 'unavailable' within the meaning of *O'Sullivan*. . . . Recognizing that 'each state is entitled to formulate its own system of post-conviction relief, and ought to be able to administer that system free of federal interference, *see Nino v. Galaza*, 183 F.3d 1003, 1007 (9th Cir. 1999), we must credit Arizona's choice.

196 F.3d at 1010.

In addition, the Pennsylvania Supreme Court issued a *per curiam* order establishing a rule similar to Rule 39. See, In Re: Exhaustion Of State Remedies In Criminal And Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No. 1 (hereinafter: Order No. 218). Order No. 218 is quoted and construed in Balsi v. Attorney General of the Commonwealth of Pennsylvania, 120 F.Supp.2d 451 (M.D.Penn. 2000). The Balsi court held:

> [W]e believe that we are bound to hold, and we do hold, that the order of the Supreme Court of Pennsylvania waives the exhaustion doctrine insofar as the doctrine requires a petitioner under § 2254 to present claims to the Supreme Court of Pennsylvania in a petition for allocatur prior to presenting them in federal court.[4]

[4] The Balsi court so ruled ignoring the fact that "it would seem odd that a state court might dictate to a federal court the interpretation of a federal statute," i.e., the federal habeas exhaustion requirement. See, 120

In a later case, Mattis v. Vaughn, 128 F.Supp.2d 249. 255 n. 6 (E.D.Pa. 2001), another federal court from a different Pennsylvania district agreed. In Mattis, the court held:

> We hold therefore that Order No. 218 of the Pennsylvania Supreme Court has made such review 'unavailable' in Pennsylvania. . . . We agree also with the concurring and dissenting Justices in *O'Sullivan* that the interests of comity would be greatly disserved by ignoring the pronouncements of state supreme courts that they see no need for prisoners to petition them for discretionary review before the prisoners can seek federal habeas corpus relief.

128 F.Supp.2d at 259.

D. Rule 60(b) provides the authority to address the issues presented in this Motion.

As has been demonstrated, the United States Supreme Court has recognized the authority of states to set their own exhaustion rules. The Tennessee Supreme Court promulgated Rule 39 consistent with the state court rules contemplated in O' Sullivan, thereby highlighting this Court's misinterpretation of Tennessee's requirements for federal exhaustion. See, Rule 39. Because this Court denied relief based on an alleged procedural default that did not exist in Tennessee, this Court may grant relief from judgment under Rule 60(b), order further proceedings, and ultimately review the merits of relevant claims. Rule 60(b) is the appropriate vehicle for correcting this Court's earlier error.

F. R. C. P. 60 provides relief from:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: .... (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) relief is properly obtained by motion in the court that rendered judgment.

F.Supp.2d at 465.

This Rule 60(b) motion is timely filed. It is based on the recent clarification of pre-existing law, i.e., Tenn. Sup. Ct. R. 39, promulgated on June 28, 2001. When Rule 39 was promulgated on June 28, 2001, this case was pending before the United States Supreme Court on a Petition for a Writ of Certiorari. That Petition was denied on October 9, 2001, a ruling that was issued without prior notice. Petitioner placed this Court on notice on October 10, 2001 of his intent to submit this motion. This motion is made based on the extraordinary circumstances herein described, and is a proper vehicle for the relief sought as set out in this motion and memorandum. Generally, see, 11 Wright & Miller, Federal Practice and Procedure (2d Ed., 1995) §§ 2851-2880.

"[Rule 60(b)(6)] vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 615, 69 S.Ct. 384, 390 (1949). "Amended 609b) provides for setting aside a judgment for any one of five specified reasons or for `any other reason justifying relief from the operation of the judgment. "' Id., 69 S.Ct. at 389.[5] Although a one year limitation on filing Rule 60(b) motions generally applies, it does not apply "under the `other reason' clause of 60(b)." Id. at 390.

Rule 60(b) "gives the courts a 'grand reservoir of equitable power to do justice in a

[5] In Schmitt v. American Family Mutual Insurance Company, 187 F.R.D. 568 (S.D. Ind. 1999), the District Court held:

> Rule 60(b) of the Federal Rules of Civil Procedure authorizes relief from a court's judgment or order based on a variety of grounds, including mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or misconduct by the opposing party, lack of jurisdiction of the issuing; court, or prior satisfaction or release of the judgment. Rule 60(b)(6) adds a residual category authorizing relief for "any other reason justifying relief from the operation of the judgment." Rule 60 (b)(6) may be used to order relief from judgment only where "extraordinary circumstances" exist or where the judgment may cause "extreme and undue hardship."

Schmitt, 187 F.R.D. at 571.

particular case.'" Pierce v. Cook Co., 518 F.2d 720, 722 (10th Cir. 1975), cert. denied, 423 U.S. 1079 (1976). The Sixth Circuit has held that "Rule 60(b) is appropriate to accomplish justice in an extraordinary situation and is addressed to the sound discretion of the court." Overbee v. Van Waters & Rogers, 765 F.2d 578, 580 (6th Cir. 1985). The fact that Petitioner's life is at stake, in and of itself, is an extraordinary circumstance, sufficient to require this Court to exercise its discretionary authority pursuant to Rule 60(b).

A Rule 60(b) motion is particularly appropriate in this case because of the unique characteristics of 28 U.S.C. § 2254 federal habeas cases. In Matarese v. Lefevre, 801 F.2d 98, 106 (2d. Cir. 1986), cert. denied, 480 U.S. 908 (1987), the Second Circuit held that finality as a limitation to the application of a Rule 60(b) motion in some cases has little relevance in the habeas context. The Second Circuit held that it is "particularly appropriate; for the District Court to entertain a Rule 60(b)(6) motion on the grounds of a retroactive change in the law in the context of a habeas corpus proceeding in which `conventional notions of finality have no place.'" Matarese, 801 F.2d at 106. "[T]he importance of the underlying action, petitioner's first and only application for a writ of habeas corpus, militates toward a grant of reconsideration." Liberatore v. Mcguiness,1998 U.S. Lexis 22842 (S.D.N.Y. 1998) (granting 60(b)(6) motion in habeas case to allow consideration of claims on the merits); Hall v. Alabama, 700 F.2d 1333 (11th Cir. 1983) (court entertained Rule 60(b) motion in habeas corpus proceeding).

The District Court in Schmitt, 187 F.R.D. at 573, held that when the interest in finality is "minimal to nonexistent" a change in state decisional law may constitute an extraordinary circumstance warranting Rule 60 (b) relief. If relief is granted pursuant to this Rule 60(b) motion, less of a hardship would obviously accrue to Respondent than would accrue to

Petitioner, should it not be granted. A grant of relief would cause Respondent to *suffer* "minimal hardship," *id.*, at 575. See, also, Matarese v. LeFevre, supra, 801 F.2d at 106 (relief should be granted "where the judgment may work an extreme and undue hardship"). In fact, a, grant of relief would cause Respondent no hardship at all. It would merely prevent the state from executing an unconstitutional judgment - something in which it has absolutely no interest. On the other hand, "[t]he hardship that [Petitioner] would suffer without relief from judgment is clear," Schmitt, supra, 187 F.R.D. at 576. Upon a denial of relief, Petitioner's hardship is that he would lose his life. "In order to prevent the working of extreme and undue hardship upon plaintiff, to accomplish substantial justice and to act with appropriate regard for the principles of federalism which underlie our dual judicial system in this extraordinary case," DeWeerth v. Baldinger, 804 F.Supp. 539, 551 (S.D.N.Y. 192), therefore, Petitioner is entitled to Rule 60(b) relief.

Changes in state and federal[6] law have frequently warranted Rule 60(b) relief in federal court. Examples in which changes in state law warranted relief in federal court include: Overbee v. Van Waters, 765 F.2d 578 (6th Cir.1985) (relief in federal court after state supreme court reversed itself); Cincinnati Insurance Co. v. Byers, 151 F.3d 574 (6th. Cir. 1998) (same) Schmitt, supra (same); Heirs-at-Law & Beneficiaries v. Dresser Industries, 158 F.R.D. 89 (D.Miss. 1993) (same); Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975) (en banc decision

[6] Examples in which changes in federal law warranted relief in federal court: Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989) (change in relevant case law by United States Supreme Court warranted relief pursuant to Rule 60(b)(6)); McGrath v. Potash, 199 F.2d 166 (D.C.Cir. 1952) (intervening Congressional statute mandated relief from judgment under 60(b)(6)); Manhattan Cable Television Inc. v. Cable Doctor, 824 F.Supp. 34 (S.D.N.Y. 1993) (relief from judgment under 60(b)(6)); Manhattan Cable Television Inc. v. Cable Doctor, 824 F.Supp. 34 (S.D.N.Y 1993) (relief from judgment granted in light of new federal legislation).

that Rule 60(b)(6) relief was appropriate to ensure justice after state supreme court established that federal court misunderstood state law); DeWeerth v. Baldinger, supra, 804 F.Supp. at 541 (S.D.N.Y. 1992) ("Because of the primacy of the state courts in determining interpretation of state law under principles of federalism," an intervening action by a state supreme court "is a new development justifying Rule 60 relief."); First American Bank v. Bonded Elevator Inc., 1986 U.S.Dist.Lexis 22885 (W.D.Ky. 1986) (relief from judgment ordered where Kentucky state court rendered decision adverse to prior federal ruling); Sargent v. Columbia Forest Prod. Inc., 75 F.3d 86, 139 (2d Cir. 1996) (mandate recalled where intervening state court decision inconsistent with prior federal judgment); and In Re Calano, 2000 U.S.Dist.Lexis 1549 (E.D.La. 2000) (Rule 60(b) granted given intervening state statute).

In the present case, there is not even a change instate law. Rule 39 merely memorializes what has been the law in Tennessee since 1967 gives this Court the opportunity to correct the mistake made in its 1998 decision. The United States Supreme Court's decision in O'Sullivan v. Boerckel, the Tennessee Supreme Court through the promulgation of new Rule 39, and the application of old Rule 11 make this a classic case in which a relief from judgment should be sought with this Court pursuant to a Rule 60(b)(6).

E. This Rule 60(b) motion is not a second or successive habeas corpus petition because it raises no new claims, no new facts, and does not rely on new law.

Because it does not raise any new claims, this Rule 60(b) motion should not be treated by this Court as a second or successive habeas corpus petition. In Rodriguez v. Mitchell, 252 F.3d 191,199 (2nd Cir. 2001), the Court found:

> 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).

Id., 252 F.3d at 198. See, also, e.g., Ritter v. Smith, 811 F.2d 1398 (1lth Cir.1987) (following grant of habeas relief which became final, granting state's motion for relief from judgment based upon intervening United States Supreme Court decision calling into question validity of district court's initial grant of writ); Scott v. Sin lea tare, 870 F. Supp. 328 (S.D.Fla. 1994). The Court in Rodriguez also stated:

> [T]he procedural object of the motion authorized by Rule 60(b) is simply to vacate the federal judgment dismissing the habeas petition, not to vacate the state conviction. The fact that the court to which the motion is addressed might conceivably go farther and grant the habeas in response to the motion does not in our view make such a motion second habeas petition. The same would be true if, in the course of litigating the habeas, the petitioner moved for summary adjudication of his claim, or moved to quash the respondent's asserted defenses. In ruling on the motion in petitioner's favor, the court might go so far as to grant habeas, ruling that the conviction be vacated. It does not follow that such a motion should be considered a second petition.

Id.

This Rule 60(b) motion is unlike the Rule 60(b) relief sought in McQueen v. Scroggy, 99 F.3d 1302 (6th Cir.1996), in which "approximately sixty additional issues [had been] raised by McQueen." Id. at 1334. Petitioner McQueen was "advancing new claims never included in the initial petition," id. at 1335, and, thus, the Rule 60(b) motion in that case was, in fact, "the practical equivalent of a successive habeas corpus petition." Id.

In this matter, unlike the case in McQueen, Petitioner is raising no new claims. Moreover, Petitioner is presenting no new facts in support of the claims identified in his Rule 60 motion. All of the facts supporting these claims are established by the proof introduced in this Court's 1998 evidentiary hearing when Petitioner was presenting these very same claims. Nor is the Petitioner relying on new law under Tenn.S.Ct.Rule 39, which only memorializes pre-

existing law that this Court previously misapplied.

F. This Court has the jurisdiction to entertain this Rule 60(b) motion, given the procedural status of this case.

This Court's jurisdiction to entertain the Rule 60(b) motion is clear, regardless of the current procedural status of this case. In Herring v. Kennedy-Herring Hardware Co., Inc., 261 F.2d 202 (6th Cir. 1958), the Sixth Circuit Court of Appeals stated:

> The authority to grant a new trial under Rule 59(a) or to relieve a party from a final judgment under Rule 60(b), rules of Civil Procedure, rests with the District Court, not the Court of Appeals. In accordance with the procedure in an analogous situation, approved in Smith v. Pollin, 90 U.S.App.D.C. 178, 194 F.2d 349; see also: Metcalf v. Untied States, 6 Cir., 195 F.2d 213, 218; Hamel v. United States, 6 Cir., 135 F. 2d 969; appellant's motion seeking a new trial or relief from final judgment under either of those rules should be addressed to the District Court.

261 F. 2d at 203. Petitioner, therefore, may bring his Rule 60(b) motion to the attention of the District Court when it is ripe, notwithstanding the pendency of an appeal in the case. On a habeas corpus petition challenging a state court conviction, the Court in Browder v. Dir., Dept. of Corrections of Illinois, 98 S.Ct. 556 (1978), recognized that a motion for relief from judgment is appropriate even after the district court has lost jurisdiction to grant relief on the petition. In Cochran v. Birkel, 651 F.2d 1219, 1221 (6th Cir. 1991), the Sixth Circuit stated that it "has consistently held that a district court retains jurisdiction to proceed with matters that are in aid of the appeal."

> The district court is the proper forum to determine in the first instance whether there is sufficient basis to overturn the judgments." Furthermore, litigants who seek Rule 60(b) relief typically cannot wait until an appeal has been concluded to request such relief because the period during which the case is on appeal counts toward determining whether a Rule 60(b) motion is timely filed. For this reason,

> as the parties agree, litigants must be permitted to file these motions in the district court even while an appeal is pending.

Fobian v. Storage Technology Corp., 164 F.3d 887, 889 (4th Cir.1999)(internal citations omitted). In First Nat'l Bank Salem, Ohio v Hirsch, 535 F.2d 343 (6th Cir. 1976), the Sixth Circuit panel stated: "If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand" in the Sixth Circuit Court of Appeals if an appeal is pending. Id., 535 F.2d at 346. See, also, Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979); Carriger v. Lewis, 971 F.2d 329, 332 (9th Cir. 1992).

In accordance with the foregoing authorities, therefore, Petitioner is requesting this Court to make an initial determination concerning its inclination to hear Petitioner's Rule 60 motion. If this Court elects to hear the motion, it could notify Petitioner and Petitioner will move the Sixth Circuit Court of Appeals to remand the case to this Court to decide the motion. Further, if the record has been filed in the Court of Appeals and this Court needs the record in order to rule on the Rule 60(b) motion, "the district court may certify an order to the court of appeals requesting that the district court record be returned so that the Rule 60(b) motion may be decided. See, e.g., Kelley v. Metropolitan City Board of Education of Nashville, Tenn., 463 F.2d 732, 745 n. 3 (6th Cir. 1972), cert. denied 409 U.S. 1001, 93 S.Ct. 322, 34 L.Ed.2d 262 (1972)." First Nat'l Bank Salem, Ohio, supra, 535 F.2d at 346 n. 2.

III. The applicable legal standards for prosecutorial misconduct and ineffective assistance of counsel

> *The prosecutor must act as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to*

> *govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.* Judge v. State, 539 .W.2d 340, 344 (Tenn. Crim. Ap. 1976) (quoting Berger v. United States, 295 U.S. at 88.).
>
> *He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, anymore than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence. . . .* Fout v. State, 4 Tenn. 98, 99 (1816)[7]

A. The standards for measuring prosecutorial misconduct and ineffective assistance of counsel are the same.

The same legal standard applies to measure both the materiality resulting from prosecutorial misconduct and the prejudice resulting from the ineffectiveness of counsel. As this Court has noted, the applicable standard for both general categories of constitutional violations is: "a reasonable probability that . . . the result of the proceeding would have been different," but for the misconduct of the prosecutor, see Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1088 (M.D.Tenn. 1998), and the failures of counsel, see id., at 1092. See, also, Kyles v. Whitley, 115 S.Ct. 1555, 1565 (1995) (application of the above-quoted standard as the test for materiality for Brady claims); Strickland v. Washington, 104 S.Ct. 2052, 2068 (1984) (application of the standard for the test of materiality in prosecutorial misconduct claims is the same standard as the

[7] This quote from Fout v. State introduces the "Death Penalty Guidelines," issued October 18, 2001 by the Office of the District Attorney General of the 20th Judicial District, the same office that employs ADA John Zimmermann, who prosecuted this case. See, Appendix C.

test for prejudice resulting from ineffective assistance of counsel)[8]. As this Court has noted, a probability is "reasonable" if it "undermines confidence in the outcome," whether with reference to claims of prosecutorial misconduct, Abdur'Rahman, supra, 999 F.Supp. at 1090, or claims of ineffective assistance of counsel, id. at 1092.

B. The Brady and Strickland tests do not require Petitioner to demonstrate that, but for the errors, the outcome of the trial would have been different.

The test is not an outcome determinative test. Petitioner is only required to demonstrate that doubt is cast on the result of the trial so that it undermines confidence in its outcome because of the errors. As the Sixth Circuit has recognized:

> [T]he "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." [Kyles v. Whitley], at 434, 115 S.Ct. 1555; Frost, 125 F.3d at 382-83 (6th Cir. 1997). Nor does the defendant need to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles, 514 U.S. at 434-35, 115 S.Ct. 1555; United States v. Smith, 77 F.3d 511, 515 (D.C.Cir. 1996) (materiality requirement is not a sufficiency-of-the-evidence test.)

Schledwitz v. United States, 169 F.3d 1003, 1012 (6th Cir. 1999).

C. Brady and Strickland errors are to be considered collectively or cumulatively and the ultimate question is whether the trial was rendered unfair by the cumulation of error.

> *We consider the cumulative effect of multiple trial errors in determining whether relief is warranted.* Phillips v. Woodford, 2001 WL 1230674, 9th Cir. No. 98-99022, filed October 15, 2001, at 15.

[8] The Court in Strickland specifically recognized that "the appropriate test for prejudice finds its roots in the test for materiality if exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 96 S.Ct. 2392, 2397 (1976) . . . ." Strickland, supra, 104 S.Ct. at 2068.

Whether ineffective assistance of counsel, prosecutorial misconduct, or both are under review, the fundamental question is whether the trial was fair; and whether errors committed during the course of the trial, considered together, rendered the trial unfair. The United States Supreme Court noted in Strickland v. Washington, supra, 466 U.S. at 696, that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged;" and in United States v. Bagley, 473 U.S. 667, 674-75 (1985), a progeny of Brady, the Court stated: "'A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.' (quoting United States v. Agurs, 427 U. S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)."

In order to judge the fairness of the trial and the reliability of its outcome, it is incumbent on the reviewing court to consider the cumulative effect of multiple errors committed in the trial. In Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), the Court stated:

> We do not need to decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel affirmance of the district court's grant of habeas corpus as to the sentence of death. See United States v. Tucker, 716 F.2d 576, 595 (9th Cir. 1983) ("a court may find unfairness -- and thus prejudice -- from the totality of counsel's errors and omissions"); Ewing v. Williams, 596 F.2d 391, 395 (9th Cir. 1979)("prejudice may result from the cumulative impact of multiple deficiencies", quoting Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

Id. at 622. In Gonzales v. McKune, 247 F.3d 1066, 1078 (10th Cir. 2001), the Court found that the outcome of the trial "would likely have changed in light of a combination of Strickland and Brady errors, even though neither test would individually support a petitioner's claim for habeas relief." In that case, the Court also stated: "[B]oth tests[Strickland and Brady] were established to preserve the integrity of the process, and they adopt similar standards to reach this goal." id., 247 F.3d at 1078. See also Phillips v. Woodford, 2001 WL 1230674, 9th Cir. No. 98-99022, filed October 15, 2001, at 15-16 (Court cumulated prejudice as a result of ineffective assistance of counsel with the materiality resulting from Brady-like claim, i.e. prosecution allowed its witness to falsely testify that he had no deals.).

The Sixth Circuit Court of Appeals has recognized that "a reviewing court is to consider

the collective effect" of the errors. Schledwitz, supra, 169 F.3d at 1088. Relying on the United States Supreme Court's ruling in Kyles v. Whitley, supra, the Sixth Circuit Court of Appeals stated in Schledwitz:

> [I]n determining whether undisclosed evidence is material, the suppressed evidence is considered collectively, rather than item-by-item, to determine if the "reasonable probability" test is met." Kyles, 514 U.S. at 436, 115 S.Ct. 1555; Frost, 125 F.3d at 383.

169 F.3d at 1012.

This approach reflects the common sense reality that the jury's verdicts at guilt and sentencing were the product of the total body of evidence presented to them and not merely isolated parts of that body of evidence. It is incumbent on the reviewing court "to consider the collective effect," id., of the various errors in its determination of whether the errors "undermine[] confidence in the outcome," Id., Abdur'Rahman v. Bell, 999 F.Supp. at 1090.

D. Particularly because the prosecution intentionally deceived the court and jury, a new trial is required.

> *[D]eliberate deception of a court and jurors by the presentation of known false evidence cannot be reconciled with the rudimentary demands of justice.* Mooney v. Holohan, 55 S.Ct. 340 (1935).

The Due Process Clause of the Fourteenth Amendment prohibits a conviction obtained through the use of false evidence. See, e.g., Pyle v. Kansas, 63 S.Ct. 177 (1942); Napue v. Illinois, 79 S.Ct. 1173 (1959). The same is true for a conviction obtained when the prosecution solicits false evidence and allows it to go uncorrected when it appears. See, e.g., Alcorta v. State of Texas, 78 S.Ct. 103 (1957); Napue, 79 S.Ct. at 1177. "The principle that a State may not use false evidence, including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty." Id..

> Indeed, if it is established that the government knowingly permitted the introduction of false testimony, reversal is "virtually automatic." United States v. Stofsky, 527 F.2d 237, 243 (2nd Cir. 1975) (citing Napue v. Illinois, citation omitted).

United States v. Wallach, 935 F.2d 445, 456 (2nd Cir. 1991).

The prosecutor has an obligation to refrain from intentional deception, an obligation higher even than his obligation to provide exculpatory evidence in compliance with Brady. This obligation to refrain from intentional deception applies to intentional misrepresentations as well as the presentation of false testimony. In United States v. Valentine, 830 F.2d 565 (2nd Cir. 1987), the Court specifically found that the prosecution had violated "the due process prohibition against a prosecutor's making 'knowing use of false evidence', including by misrepresenting the nature of nontestimonial evidence." 830 F.2d at 570-71. The Court stated:

> In analyzing severity [of prosecutorial misconduct], among the elements to consider is the "extent to which the misconduct was intentional". Id. [i.e. United States v. Mordica, 663 F.2d 1173, 1181 (2nd Cir. 1981) per curiam] See United States v. Universita, 298 F.2d 365, 367 (2nd Cir.) ("The prosecutor has a special duty not to mislead; the government should, of course, never make affirmative statements contrary to what it knows to be the truth.")

Id. at 570. In Davis v. Zant, 36 F.3d 1538 (11th cir. 1994), the Court stated:

> [T]he prosecutor's misrepresentations were deliberately placed before the jury. In this particular case, the clearly intentional nature of the misrepresentations weighs heavily in favor of [the habeas Petitioner]; such as a patently dishonest argument brings this case close to the more traditionally established forms of misconduct such as the proscription against a prosecutor's knowing use of false testimony (citations omitted), or the knowing use of false evidence. See, Brooks, 762 F.2d at 1402, n. 26 ("... [T]here may be cases where the prosecutor's intentional conduct rises to a level equivalent to a knowing use of false evidence.")

36 F. 3d at 1550.[9]

The standard imposed on the prosecution is greater and a conviction thereby obtained is

[9] Prosecutorial misconduct is also less acceptable under the Constitution when it is aimed at the core of the defense's case. See, e.g., United States v. Harp, 536 F.2d 601 (5th Cir. 1976) (A prosecutor's comment during closing argument regarding defendant's post-arrest silence would not be harmless error because it struck at the jugular of the defense.) relied on in Davis v. Zant, supra, 36 F.3d at 1550 n. 17.

more likely reversed when the prosecution knowingly and intentionally deceives the court. As established by the United States Supreme Court, the proper standard to apply is as follows:

> [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

Kyles, supra, 115 S.Ct. at 1565 n. 7 (1995); United States v. Bagley, 473 U.S. 667, 679 n. 9 (1985); United States v. Agurs, 96 S.Ct. 2392, 2397 (1976); United States v. O'Dell, 805 F.2d 637, 641 (6th Cir. 1986); Brown v. Wainwright, 785 F.2d 1457, 1463 (11th Cir. 1986). If the prosecutor intentionally misrepresents to the extent that Zimmermann did in this case, it is not necessary for Petitioner to show that there was "a reasonable **probability** that the outcome **would have been different**," as it would be if the prosecutor committed a Brady violation by withholding evidence. Petitioner must only show that there is a **possibility**[10] that the outcome **could have been affected** when the prosecutor intentionally misrepresents.

E. Brady and Strickland claims are subject to *de novo* review; and, since Petitioner seeks no finding of purely historical fact in support of these claims that is inconsistent with state court findings, the § 2254(b) "presumption of correctness" does not apply.

"[W]hether Petitioner received effective assistance of counsel is a mixed question of fact and law, which is reviewed de novo." Strickland v. Washington, supra, 104 S.Ct. at 2070; Abur'Rahman v. Bell, supra, 999 F.Supp. at 1092. Allegations of prosecutorial misconduct are mixed questions of law and fact and are thus, also, reviewed by this Court *de novo*. See, e.g., Jones v. Gibson, 206 F.3d 946, 958 (10th Cir. 2000). Since allegations of both ineffective assistant of counsel and prosecutorial misconduct involve mixed questions of law and fact, the §

[10] The word "possibility" is used here in the same sense that "any reasonable likelihood" was used in the above-cited quote from Kyles, supra, 115 S.Ct. at 1565 n. 7.

2254(d) "presumption of correctness" that attaches to state court findings of purely historical fact, does not apply to the questions raised by this motion. See, e.g., Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764 (1981).

Further, Petitioner does not even seek any finding of fact regarding ineffective assistance of counsel and prosecutorial misconduct claims that is inconsistent with state court findings of fact. As the Sixth Circuit Court of Appeals found in this case, Petitioner seeks no factual findings by this Court with regard to the ineffective assistance of counsel claims that is inconsistent with or contradictory to any state court finding of fact, including purely historical facts. See, Abdur'Rahman v. Bell, supra, 226 F.3d at 708. Petitioner has been unable to find any state court findings of purely historical fact with regard to claims of prosecutorial misconduct. In any event, Petitioner seeks of this Court no factual finding that is contradictory with any state court finding of fact with regard to prosecutorial misconduct or ineffective assistance of counsel.

For the reasons set out above, this Court is free to conduct a *de novo* review of the law of ineffective assistance of counsel and prosecutorial misconduct as applied to the facts presented to this Court in support of those claims.

IV. Petitioner's Properly Presented and Exhausted Claims of Prosecutorial Misconduct

As this Court previously found, this is a case where "abundant" and "compelling" evidence was never investigated by Petitioner's trial counsel and therefore never presented to the jury. But when all of Petitioner's claims are viewed cumulatively and in context, the unfaimess of the trial and the unreliability of the outcome are even more appalling. The instances of prosecutorial misconduct in this case, when considered in their totality, establish more than just

the withholding of significant and compelling evidence, and even more than individual instances of intentional prosecutorial deception. They establish a deliberate pattern and scheme of prosecutorial fraud from indictment to sentencing, with regard to both the 1986 offense for which Petitioner was tried in this case and the prior 1972 offense which served as the most important aggravator relied upon by the prosecution in seeking the death penalty. As explained below, this persistent and deceptive scheme of prosecutorial misconduct did more than to keep the jury from hearing all the evidence; the ultimate effect was to portray an entirely false and misleading picture of every important aspect of this case.

A. The Context of the Prosecutorial Misconduct in this Case.

The prosecutorial misconduct in this case was perpetrated primarily by Assistant District Attorney John Zimmermann, a prosecutor with a long history of engaging in various forms of misconduct and deceptive practices.[11]

Zimmermann knew that obtaining a death sentence in this case would be problematic. He testified before this Court that in any capital case the prosecution must "explain everything to the jury." (FT 905). Zimmermann also perceived that in Davidson County, at least, capital jurors must be convinced "not beyond a reasonable doubt, but beyond a shadow of a doubt" if they are to impose a sentence of death. (FT 905-908).

Further, Zimmermann knew that this case presented its own specific problems that would make it particularly difficult to obtain a death sentence. In a memo to Assistant District Attorney Eddie Barnard (FEx. 42), and in his testimony in this Court (FT 908-09, 912-13), Zimmermann

[11] Attached hereto as Appendix D is a memorandum describing instances in which courts in other cases have reprimanded Zimmermann for engaging in many of the same kinds of prosecutorial misconduct that occurred in Petitioner's case.

specifically identified some of the weaknesses in the prosecution's case, such as the following: (i) no one other than co-defendant Devalle Miller could identify Petitioner as the assailant; (ii) because only Miller could identify Petitioner as the assailant, it would be necessary to cut a deal with Miller in exchange for his testimony;[12] and, (iii) although "photographs of the decedent's house show blood spattering all over the kitchen … [if Petitioner] did wear his coat the entire time he obviously was not present when the stabbing occurred." (FEx 42 at Bates stamp pp. 000677-8).[13] Zimmermann acknowledged in his memo that, "The case is not open and shut on the issue of guilt." (Id. at p. 000681). In this same memo and in other documents in his file, Zimmermann also was aware that Petitioner had potential mental state defenses that could be raised at both the guilt and sentencing stages of the case. (Id. at 000678-81).

Because of these and other problems with the case, Zimmermann violated his ethical and legal obligations to present the truth. He withheld key information and he invented his own facts to suit what he considered to be a winning theory for the prosecution.

B. The Types of Prosecutorial Misconduct in this Case.

The properly exhausted and presented prosecutorial misconduct claims in this case can be divided into four general categories: (i) pretrial misrepresentations; (ii) Brady violations; (iii) improper manipulation of key witness testimony; and (iv) deceptive presentation of inadmissible evidence.

[12] It should be noted that pursuant to the recently issued policy of the Davidson County District Attorney General, "The death penalty will not be sought in cases where the evidence consists of the uncorroborated testimony of a single eyewitness or of a cooperating codefendant or accomplice." See, *Office of the District Attorney General, 20th Judicial District, Death Penalty Guidelines*, ¶ 9 (attached as Appendix C hereto) (emphasis added).

[13] See, also, Evidence That Petitioner Was Not The Assailant, Appendix E hereto.

(i) Pretrial Misrepresentations.

(a) MTMHI Letter. (Claim D.2.(2))

The first set of prosecutorial pretrial misrepresentations can be found in Zimmermann's February 10, 1987 letter to Middle Tennessee Mental Health Institute ("MTMHI") in connection with its psychological evaluation of Petitioner. (FEx. 34). At the time, Petitioner was not being represented by any attorney: his first attorney, Neal McAlpin, had effectively withdrawn from the case and his trial attorney, Lionel Barrett, had deliberately refrained from working on the case while awaiting the $10,000 balance of the promised retainer which he never received. (FT 694-5). Zimmermann's letter, therefore, was MTMHI's only outside source of information about Petitioner's prior criminal history and the circumstances surrounding the offense, and it was filled with fabrications.

First, with regard to the Petitioner's prior murder conviction, the letter states:

> During those proceedings, and according to Court records, the defendant, through his counsel, moved the Court for a competency hearing and psychiatric evaluation as to his sanity. After those examinations were concluded the Court ruled that the defendant was competent and the Court directed the defendant to proceed to trial. There appears to be no evidence from the records submitted to us in that proceeding that the defendant relied upon an insanity defense at trial.

(FEx. 34, p. 3). This was a deliberate falsehood. According to the transcript of the 1972 trial, which was in the prosecution's file, the Petitioner did rely on the insanity defense. (FEx. 131). Indeed, as reflected in this transcript, at the 1972 trial Petitioner presented expert psychiatric testimony that he was insane, and the government's own psychiatric expert conceded that he could not be sure that Petitioner was able to control his behavior at the time of that offense.[14] Even Zimmermann's internal memorandum to Assistant District Attorney Eddie Bernard referred to the fact that Petitioner raised an insanity defense at his 1972 trial. (FEx. 42 at Bates stamp p.000679).

Second, the letter states that Petitioner "was not associated with [] particular religious organization." (Id. at p. 3). That was not true, for Petitioner was associated with the Southeaster Gospel Ministry (the "SGM"), a religiously oriented organization. It is not clear what Zimmermann knew about the SGM at the time he wrote the letter, but there is nothing in the prosecution's file that would support this statement. Zimmermann ultimately learned from Devalle Miller about the involvement of the SGM, but he never gave any of that information to

[14] Under the Tennessee definition of insanity at the time, the testimony given by both psychiatrists in Petitioner's 1972 trial would have supported an insanity defense. See Graham v. State, 547 S.W.2d 531 (Tenn. 1977) (Tennessee definition of insanity); State v. Clayton, 656 S.W.2d 344, 346 (Tenn. 1983) (burden of proof is on the state to prove sanity beyond a reasonable doubt).

the defense or MTMHI. (P-CT, Vol. III, pp. 13-43, discussed below).

Third, the letter states: "The police theorize that the defendant was relatively new to Nashville and making attempts to become entrenched as a drug distributor in Nashville;" and "Essentially, the victim in this case was wholesaling the Marijuana and that is the position the defendant wanted to assume." (Id. at 3-4). Such a theory was pure invention. It is not reflected in the police files. It is patently false and the State can point to no evidence that might support the theory.

Fourth, the letter states, "The victim in this case distributed marijuana from his home but did not distribute Cocaine." (Id. at 3). In fact, Daniels did distribute cocaine as reflected by the information obtained by the prosecution from the victim's brother. (FEx. 57). See also the police report describing "white powder" in one of the bathrooms (FEx. 3), the police report identifying a hypo syringe cap taken from Norma Norman (FEx. 4), and the autopsy report indicating that cocaine was found in the victim's urine (FEx. 14). (As discussed below, these police reports were never turned over to the defense.)

Fifth, the letter states, "The defendant had taken on the name of Scarface in the local drug community and that is all many of the people knew him by." (Id. at 4). If in fact the police ever thought that the Petitioner had been called Scarface, there is no reference in the prosecution's file, the police file, or any other known place, indicating that the Petitioner had assumed that name in the "drug community" or that that was the only name by which some people knew him.

Sixth, the letter states:

> He [the Petitioner] had advised the police and his attorney that the man he murdered in prison was a homosexual and that he murdered him in self-defense to prevent being raped. Further checking of court

> records reflect that the defendant was a leader of a prison gang attempting to gain control over the victim's gang and that the murder was a cold blooded premeditated murder, which reflects why the Federal judge gave the defendant the maximum punishment of life imprisonment when he could have sentenced the defendant to as little as ten (10) years for Murder in the Second Degree.

This, perhaps the most damaging of Zimmermann's statements to MTMHI, is a deliberate falsehood in several respects and, like Zimmermann's drug distribution theory mentioned above, is pure invention. The 1972 court records in fact confirm the Petitioner's claim that the 1972 murder was provoked by homosexual assaults on him. (FEx. 49 [Lowe's letter to Zimmermann], 131, 136 [Bishop deposition], and 142). There is no reference in the court records or federal prison records to any "prison gang." (See Bishop Deposition, FEx. 136). The term "gang" was Zimmermann's own creation out of thin air. (See Zimmermann's testimony, FT 1018-9). There was no evidence or testimony in the 1972 trial that the prior murder was a "cold blooded premeditated murder." In fact, both the prosecution psychiatrist and the defense psychiatrist who testified in that trial agreed that the killing was likely the result of a loss of control on the Petitioner's part. Finally, this statement fails to mention that the 1972 trial judge recommended in his final judgment that Petitioner be committed to an institution where he may receive psychiatric treatment. (FEx. 131).

While Zimmermann presented his false theories in his letter to MTMHI, he never furnished MTMHI (or the defense) with actual relevant information sitting in his file. For example, Zimmermann never informed MTMHI that shortly after the Petitioner's arrest and within forty-eight hours of the offense, Petitioner banged his head against the wall and the floor and was placed in a padded cell for two days. (FEx. 7, 8). Zimmermann also never furnished MTMHI with any of the

records pertaining to Petitioner's 1972 prior murder conviction, where Petitioner presented a viable insanity defense, or Petitioner's 1970 prior assault conviction, which included a motion of the prosecution for a psychological evaluation prompted in part by the Petitioner's headbanging. (FEx. 49, 131).

Zimmermann's statements to MTMHI go beyond zealous advocacy. They step over the line into pure fraud and deception. These statements were of significance in MTMHI's evaluation of the Petitioner. As Dr. Craddock testified, MTMHI had virtually none of the Petitioner's prior institutional records, and MTMHI relied entirely upon Zimmermann's letter for information regarding the circumstances surrounding the offense. (FT 105-6, 109, 151-2).

(b) <u>Misrepresentations About Prior 1972 Murder</u>. (Claim D.3)

Zimmermann defrauded Mr. Barrett regarding Petitioner's prior 1972 murder conviction. Zimmermann falsely told Barrett that the 1972 murder was not a response to homosexual rape, as Petitioner claimed (and as was the case), but rather was part of a "turf war in the prison between the two gangs as to who would control the drug trade in the prison." (P-CT, Vol. III, p 169, FEx. 130). In the post-conviction proceeding, Zimmermann explained his strategy:

> "My purpose on that was to hopefully keep from getting into this 1972 murder, and if Mr. Barrett could see what we had and understand what kind of potential rebuttal evidence that it would confine the defendant's testimony since I'd already provided to him the documentary evidence as part of discovery. I wasn't concerned about a discovery violation. But it was basically a tactic that I've learned that in cases like this if you have evidence that is a little bit questionable, that could raise an appellate issue if it's introduced --"

(P-CT, Vol. III, p. 170, FEx. 130).[15]

In fact, contrary to Zimmermann's testimony in the post-conviction hearing, he had not provided Mr. Barrett with "the documentary evidence as part of discovery." Zimmermann had not provided Mr. Barrett with either the 1972 trial transcript or the letter Zimmermann had received from Magistrate David Lowe, the attorney who prosecuted the 1972 case. (FEx. 45). This documentary evidence, which should have been turned over under Brady, supported Petitioner's version of the circumstances surrounding the 1972 murder, and it contradicted Zimmermann's statement that the murder was part of a "turf war" between "gangs" over the "drug trade" in the prison. None of the evidence mentioned either a turf war, gangs, or drugs. Instead, all of the documentary and testimonial evidence confirmed that the 1972 murder was related to homosexual attacks on the Petitioner.

Zimmermann attempted to justify his false statements to Mr. Barrett regarding the 1972 killing by claiming that he received his information from Mr. Delagrange, the F.B.I. agent Zimmermann brought to the Petitioner's trial. (FT 976-7). There are at least four problems with Zimmermann's attempted justification.

First, Zimmermann developed his theory about the 1972 killing, that it was part of a gang war over the drugs in the prison, before he ever talked to Delagrange. As mentioned above, Zimmermann set out this fabricated theory in his February 10, 1987, letter to MTMHI. (FEx. 34). It appears from the records in this case and Mr. Delagrange's testimony, however, that Zimmermann did not talk to Mr. Delagrange until after June 4, 1987. (See FEx. 61, 66, 70, and Delagrange's

[15] Zimmermann called himself to the stand over the objection of Petitioner's state post-conviction counsel. The Court overruled the objection and permitted Zimmermann to testify even though he was an attorney representing the State at the hearing and he had given no prior notice that he intended to testify.

Depos., FEx. 136, at p. 21).

In this connection, it should be pointed out that according to correspondence in the prosecution's file, Zimmermann was attempting to portray the 1972 killing as a drug-related event before he ever talked to Delagrange . In his March 30, 1987 letter to David Lowe, Zimmermann said:

> I find it very difficult to believe that a Federal Judge would sentence an inmate to a life sentence in what purports to be nothing more than a defensive killing. Particularly when the circumstances underlying the killing involve a sexual attack upon the defendant. Therefore, it is imperative that we obtain information regarding the facts of this case and be prepared to offer them during the penalty phase of the trial.

(FEx. 45). In his April 10, 1987, letter to U.S. Attorney Henry Hudson, seeking permission to talk to David Lowe about the case, Zimmermann wrote:

> I am also interested in the fact that the previous Murder for which the defendant received a life sentence may pattern somewhat the manner in which the present case occurred.

(FEx. 48). From this correspondence and the other circumstances involved in this matter, it is clear that Zimmermann was actively pursuing information about the 1972 murder that would fit his fabricated theory that Petitioner was involved in "drug turf" wars. It is therefore clear that Zimmermann's false statements to Mr. Barrett about the 1972 murder were not the product of mere mistake on Zimmermann's part.

Second, Zimmermann gave this story to Mr. Barrett before the trial, and therefore before he brought Delagrange to Nashville. (Barrett testimony, FT 294-5).

Third, Delagrange had no knowledge of drugs or "gangs" in the prison. He therefore had no basis whatsoever for affirming the theory Zimmermann was advancing to Mr. Barrett. (See

Delagrange's Depos., FEx. 136, at pp. 17-20). After Zimmermann made his first contact with Mr. Delagrange, he interviewed Mr. Delagrange maybe two or three times over the telephone and again after Mr. Delagrange came to Nashville. Zimmermann, therefore, had the opportunity to find out from Mr. Delagrange what his knowledge was and the basis of his knowledge. (Delagrange Depos., FEx. 136, at p. 34). It must be presumed that when Zimmermann introduced Mr. Delagrange to Mr. Barrett, which occurred in the hall of the courthouse in the middle of trial, Zimmermann was aware that Mr. Delagrange did not have the knowledge that Zimmermann represented to Mr. Barrett.

Fourth, there can be no satisfactory reason or explanation for Zimmermann's deceptive strategy in light of the fact that Zimmermann possessed documentation that contradicted the story he was conveying to the defense.

Mr. Barrett relied upon Zimmermann's misrepresentations about the circumstances of the 1972 murder. (FT 299). Although Mr. Barrett would not use the word "deceived," he testified in this proceeding that he was certainly "misled" by Zimmermann "as to the strength of any potential testimony my client might give along those lines." (FT 308).

(ii) Brady Violations.

(a) 1972 Transcript. (Claim D.1.(1))

This Court has held that the prosecution's failure to turn over the 1972 transcript of Petitioner's prior murder trial constituted a Brady violation but that, "standing alone," this violation was not material and was therefore not grounds for relief. 999 F. Supp. at 1089-90. However, when viewed in the context of the other instances of prosecutorial misconduct, together with the ineffective assistance of defense counsel, this Brady violation takes on greater significance.

The prosecution was put on notice that the Petitioner's mental health might be an issue in the case. In response to Mr. McAlpin's motion, (FEx. 22), the trial court ordered the Petitioner's evaluation at MTMHI. (FEx. 28). On March 24, 1987, Mr. Barrett wrote Zimmermann and explained that he was "going to seriously look at my client's mental condition...." (FEx. 41). Zimmermann acknowledged receipt of this letter and the possibility that Mr. Barrett might raise an insanity defense. (FEx. 46). On July 1, 1987, Mr. Barrett wrote to Zimmermann stating that the defense might offer "some proof as to Mr. Jones' psychiatric status...." (FEx. 72).

The prosecution was aware of the possibility of mental state defenses from other sources as well. In his internal memo to Assistant District Attorney Eddie Barnard, "Team Leader," dated March 24, 1987 (FEx.42), Zimmermann made such statements as: "The defendant is just plain weird" (Bates stamp p. 000678); "I have received a copy of a transcript of the defendant's first trial where he plead not guilty by reason of insanity" (Bates stamp p. 000679); and "The Scarface element will undoubtedly have to be dealt with in some way so that the jury doesn't think the guy is plain wacko" (Bates stamp p. 000681).

Notwithstanding all of this, the prosecution deliberately withheld and actively concealed exculpatory information relating to the Petitioner's mental state, including the 1972 transcript.

As indicated in his internal memo to Eddie Barnard (FEx. 42), at least as early as March 24, 1987, Zimmermann had the 1972 transcript in his file. (FEx. 131). This transcript indicated that Dr. A.M. Masri, a psychiatrist, examined the Petitioner and testified for the defense, concluding that he "is basically a schizoid human being.... [W]e consider this an illness.... [H]e is a sick man." (FEx. 131, Bates stamp 767). Dr. Masri testified that the Petitioner was mentally ill and that as a result of this mental illness, he was unable to control himself under times of stress. On cross examination, based in part on testing conducted on the Petitioner, Dr. Masri testified that the Petitioner had a mental disease which consisted of "delusional thinking and paranoid and schizoid personality and inability to withstand pressure and have [sic] no control." (FEx. 131, Bates stamp 771). Dr. Masri, as did Drs. Sadoff and McCoy before this Court, concluded that the Petitioner suffered from "borderline personality with periodic decompensation with loss of control, of ego control." (FEx. 131, Bates stamp p. 773). Even the psychiatrist who testified for the prosecution in the 1972 case, Dr. Robert J. Eardley, testified that the Petitioner lost control under the stress of the moment and, when asked if the Petitioner had been temporarily insane at the time, testified that he did not know. (See FEx 131, Bates stamp p. 781). The record of the 1972 case clearly indicates that Petitioner's mental state is, at the least, an exculpatory subject of relevant inquiry and consideration.

Zimmermann could give no satisfactory explanation for his failure to turn over the 1972 transcript. (FT 1014-7). Basically, all that Zimmermann could say was, "I didn't see the two as proving -- as what happened in '72 as proving what happened in '86. That was just my

interpretation." (FT 1017).[16] To be exculpatory, however, evidence does not have to "prove" what happened at the time of the offense. It is improper for the prosecutor to make his own judgment as to the force of the evidence in determining whether he must turn it over to the defense. Zimmermann found that the 1972 transcript was significant enough to make reference to it in his memo to Eddie Barnard where he evaluated the strengths and weaknesses of their case against the Petitioner. (FEx. 42, Bates stamp p. 000679). This was clearly exculpatory information, and there is no valid excuse or reason for the prosecution's decision to withhold this transcript from the defense.

The prosecution's decision to withhold the 1972 transcript radically altered the course of the case. Mr. Barrett gave the following testimony in this proceeding:

> Q. If you had had the transcript of the 1972 trial and you had been aware in the 1972 trial James Jones had raised an insanity defense and you had been aware even the prosecution's expert witness said he may have lost control at the time of the incident, would you have handled this case differently?
>
> A. I very well might have. You have to break down as to the guilt or innocence phase and the sentencing phase.
>
> Certainly this information would have some bearing on both the guilt or innocence phase and the sentencing phase.
>
> I believe that had I had this information that I would have certainly taken a much closer look at any potential psychiatric defense that might be available to Mr. Jones both at the guilt and innocence phase and certainly as mitigation at the sentencing phase.

[16] Zimmermann's attempted explanation for failing to turn over the 1972 transcript is strikingly similar to the explanation he gave in Garrett v. State, 2001 Tenn.Crim.App.LEXIS 206 (2001), for his decision to withhold exculpatory evidence in that case. In Garrett, the Tennessee Court of Criminal Appeals reversed a first degree murder conviction based upon Zimmermann's deceit. The Court said, "This Court is extremely troubled with General Zimmerman's decision to himself determine the reliability of the evidence and to refuse to turn [it] over," and further found that Zimmermann had "intentionally withheld" information and had misled the defense. See Appendix D, pp. 3-4, hereto.

Q. Would you have gone to the judge for money for psychiatric services?

A. Based upon what I see here, I believe I would have, sir, yes.

(FT 309).

Zimmermann's decision to withhold the 1972 transcript is made more egregious by the fact that Zimmermann had in his file a letter dated April 15, 1987 which he received from Magistrate David G. Lowe, the person who was the prosecuting attorney in the Petitioner's 1972 case. (FEx. 49). This letter was in response to Zimmermann's request for information about the 1972 prior murder conviction. This letter stated that the 1972 killing was a response to homosexual attacks on the Petitioner. This information would have corroborated the Petitioner's version of what happened in 1972; it would have mitigated the effect of the prior murder conviction; and if it had been disclosed to the defense, it likely would have kept Zimmermann from making misrepresentations to Mr. Barrett about the 1972 case, as discussed above.

The information Zimmermann possessed about the 1972 case was significant for two reasons: it mitigated the effect of the prior murder conviction, which the prosecution used as an aggravator supporting their request for the death sentence; and, it established the existence of Petitioner's mental illnesses and emotional instability and the likelihood of the existence of viable mental state defenses to the 1986 offense. Zimmermann's decision to withhold this information from the defense (and from MTMHI) can be explained in only one way, especially when viewed in the context of the other instances of prosecutorial misconduct: this was part of his successful scheme to fraudulently mislead first the defense lawyers, MTMHI, and then the court and jury about the nature of the 1972 case and about Petitioner's mental condition and character.

(b) Police Reports On Petitioner's Condition at Time of Arrest. (Claim D.1.(6))

The prosecution also withheld important information about Petitioner's mental state at the time of his arrest less than forty-eight (48) hours after the offense. Detective Garafola had prepared a police report that described the Petitioner at the police station upon Petitioner's arrest in the afternoon of February 19, 1986. (FEx 7). This report described the Petitioner as crying and went on to say:

> "He then started to hit his head on the table and then he jumped up still handcuffed to the chair and banged his head up against the wall. We got him under control and then took him to the booking room. In the booking room he started to bang his head on the wall again. Det. Elmore was able to control him."

This report was not turned over to the defense as Brady material prior to trial. When the report was turned over to the defense as Jencks material in connection with Detective Garafola's testimony, this portion of the report was redacted.

Second, there was an Incident Report regarding an incident that took place at 21:40 (9:40 p.m). on February 19, 1986, just hours after the arrest. This report stated that the Petitioner again started "beating his head against the floor," and that he was taken to a padded cell with instructions to an officer to check on him every half hour. The next Incident Report indicates that the Petitioner was not taken from the padded cell until two days later, on February 21, 1986, at 3:15 p.m. (FEx. 8). This collection of documents also was not turned over to the defense either before or during the trial.

This was not a case of mere non-disclosure. By redacting the first report of head banging, the prosecution actively concealed this information from the defense. This was important

information. According to the testimony in this case by Dr. Craddock of MTMHI, the State's mental health expert, headbanging is an "extremely unusual behavior" for adults with normal intelligence, (FT 125), and this kind of self-mutilating behavior is a possible sign of mental health problems such as Borderline Personality Disorder. (FT 130-2).

By deciding to withhold this information, the prosecution created for themselves the opportunity to falsely argue to the jury that Petitioner showed no emotion, was neither mentally ill nor emotionally unstable, but instead was just a depraved murderer who committed the act out of pure pleasure and enjoyment. If this information had been disclosed, the prosecution would not have been in a position to make these kinds of false and misleading arguments with any effect.

(c) Transcript of Miller's First Statement to Police. (Claim D.1.(4))

The prosecution also failed to turn over to the defense prior to trial, as Brady material, the transcript of the April 23, 1987 tape recorded interview conducted by the prosecution of the co-defendant Devalle Miller. (FEx. 51). This transcript contains descriptions by Miller of the Petitioner that suggest a possible mental state defense.[17] For example, Devalle Miller gave the following descriptions in his statement:

> "... and I was standing there and its like James went from day to night." (Bates stamp p. 000166).
>
> "...he was babbling on and on and on..." (Bates stamp p. 000167).
>
> "... because I was riding a uh uh to what I perceived as a maniac." (Bates stamp p. 171).
>
> "I really didn't want him in my house for the simple fact I didn't

[17] This transcript was exculpatory for two reasons: (i) as discussed in this part of this Brief, it contained exculpatory information relevant to the Petitioner's mental state; and (ii) as explained below, it contained statements that contradicted Devalle Miller's trial testimony.

know if he was going to turn himself on back in my house with me and my family ..." (Bates stamp p. 000173).

The prosecutors themselves explicitly acknowledged that Devalle Miller's statements might raise a question about the Petitioner's mental health. In the margin of the transcript next to Miller's statement about how he perceived the Petitioner as a "maniac" (Bates stamp p. 000171), ADA Eddie Barnard had handwritten the comment: "Insanity + mitigating factor."

Although the prosecution did turn over this transcript as Jencks material during the course of the trial, that did not satisfy the prosecution's obligation under Brady. Exculpatory information about a defendant's mental state must be turned over sufficiently in advance of the trial to enable the defense to consider the defendant's potential guilt and sentencing stage defenses, to take steps to obtain a professional evaluation, and to prepare the case for trial.

(d) Miller's Statements to Prosecution about the SGM. (Claim D.1.(3))

As discussed below, the prosecution spent hours with Miller preparing him to testify. From the testimony given by Miller in Miller's own sentencing hearing (FEx. 93) and in Petitioner's state post-conviction hearing (P-CT, Vol. III, pp. 13-43), it is now apparent that Miller gave the prosecution at least the following information concerning the SGM and its involvement in the offense:

- that Miller and Petitioner joined the SGM, a racial identity religious organization devoted to bettering the Black community (P-CT, Vol. III, at 15);
- that Miller and Petitioner were "brainwashed" by the organization (Id. at 37);
- that there was a paramilitary group within the SGM that consisted of Allen Boyd, William Beard, Miller and Petitioner (Id. at 15);

- that Miller and Petitioner went to Daniels' apartment on the evening of the offense as part of an SGM mission to intimidate Daniels into ceasing his drug selling activities, which was part of the SGM's larger mission to rid the community of drug dealing (Id. at 19);

- that William Beard gave Miller a pistol to be used in "operations to clean up the Black neighborhoods (Id. at 16);

- that Petitioner told Miller that he, Petitioner, got his shotgun from Allen Boyd (Id. at 17);[18]

- that on the night of the killing, after leaving Daniels' house, Miller and Petitioner went to Miller's apartment and Petitioner made a telephone call from a booth; and Allen Boyd showed up a short time later (Id. at 26);

- that after leaving the victims' apartment, Miller heard Boyd say something to the effect of "just be cool and go back to work." (Id. at 28);

- that after Petitioner's arrest, Miller went to Beard who gave him getaway money (Id. at 29-31);

- that Miller intentionally misled Beard as to where he was going because he feared that Beard, Boyd and the SGM might kill him; Miller also told others while on the run that he was fearful of Boyd, Beard and Mitchell Hollie, all of the SGM (Id. at 31, 36-7); and

- that members of the SGM provided Miller's wife, Karen, with financial assistance while Miller was on the run. (Id. at 35-6).

Miller confirmed in his post-conviction testimony that he related all of this information to Zimmermann; and Zimmermann never disputed this either during his very brief cross-examination of Miller or elsewhere. (Id. at 33-5).

By deciding to withhold this Brady information from the defense, the prosecution created for themselves the opportunity to falsely portray Petitioner as the sole planner and decision-

[18] The fact that Petitioner obtained his gun from Boyd was verified from the F.B.I. gun trace introduced into evidence in this proceeding. See *Motion to Expand Record* and *Order* entered April 8, 1998 (Docket Nos. 202, 204).

maker relating to the events surrounding the offense, and to "debunk" any effort by Petitioner to mention the SGM during his sentencing hearing.

(e) Lab Reports about Blood Evidence. (Claim D.1.(7))

This Court previously considered the merits of Petitioner's Brady claim relating to the T.B.I. lab report which found that no blood was found on clothing seized from petitioner's apartment, including Petitioner's long dark wool coat. This Court rejected this Brady claim on the ground that the lab report had been provided to Petitioner's first counsel, Mr. Neal McAlpin and had been filed with the trial court. 999 F.Supp. at 1090.

Although this Court has rejected this Brady claim, Zimmermann's conduct around the blood evidence was deceptive and further evidences both the prosecution's persistent and deliberate

scheme to deceive and the prejudicial effect of that scheme, especially when viewed cumulatively with the ineffective assistance of Petitioner's trial counsel.[19]

Zimmermann was fully aware of the significance of the lab report. In his internal memo to Assistant District Attorney Eddie Barnard, Zimmermann identified the lab report as a "weakness in [the] case" as follows:

> T.B.I. Lab Report was unable to find any blood staining on the long wool coat worn by Jones. Photographs of the decedent's house show blood spattering all over the kitchen….[I]f the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred. Also, the police seized a pair of work pants during the search of the defendant's apartment which had red spots all over it which was found not to contain any human blood stain. The red particles on the defendant's pants came from red dye used at the publishing Board where the defendant worked.

(FEx 42 at Bates stamp p. 677). The police reports describing the crime scene, which were never

[19] This Court found that trial defense counsel had an opportunity to know about the blood evidence and to present it to the jury, and that it was not the prosecutor's fault that the evidence was not presented to the jury. See, 999 F.Supp. at 1090. It is surely one or the other. If this failure was the fault of the defense attorney, and not the prosecutor, this Court should grant relief due to counsel's ineffectiveness, rather than prosecutorial misconduct. The materiality and the prejudice resulting from the jury's inability to consider the blood evidence is obvious. See, Juror Affidavits, being filed contemporaneously herewith. The resulting prejudice accrues to Petitioner with regard to the jury's verdict of guilt and its verdict at the sentencing stage of a sentence of death. See, Evidence That Petitioner Was Not The Assailant, Appendix E. As the Court observed in Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995):

> Mr. Banks has framed his *Brady* and ineffective assistance arguments before this court in the alternative. He argues that the State withheld exculpatory evidence in violation of *Brady*. Alternatively, he argues that if the State did not withhold the evidence, then his trial counsel was ineffective for failing to use the evidence in his defense. Under either analysis, our final inquiry is the same: has our confidence in the outcome been undermined? *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068 (ineffective assistance of counsel); *United States v. Agurs*, *427 U.S. 97, 1094, 96 S.Ct. 2397098, 49 L.E.2d 342 (1972) Brady* violation).

54 F.3d at 1515, n. 14. Likewise, Petitioner "framed his *Brady* and ineffective assistance arguments in the altemative" on the issue concerning the blood evidence from the state laboratory and its significance on the question of the identity of the assailant. See, Amended Petition, ¶¶ D.(1)(7) (prosecutorial misconduct); and, A.(1) and (2); E.(2)(a) and (e) (ineffective assistance of counsel).

turned over to the defense, also described the extensive blood splattering.

This "weakness" in the prosecution's case was confirmed by the evidence introduced before this Court. Zimmermann testified, "I think when you have a murder with this much splatter, you would think some would have gotten on the defendant, yes." (FT 917). Dr. Kris Sperry, the Medical Examiner for the State of Georgia, also testified before this Court that, based on his review of the autopsy report, the T.B.I. file, and the blood evidence, the assailant would have had blood stains on his clothes. Dr. Sperry also testified that the blood stains would not have been removed by cleaning or washing and would have been detected by the tests employed by the T.B.I.. (FT 38-61).

Although the prosecution may have provided the T.B.I. lab report to Mr. McAlpin, Petitioner's original counsel, Zimmermann deceptively managed to keep the lab report out of Mr. Barrett's view. Prior to the trial Mr. Barrett filed with the court and served on the prosecutor a request for all exculpatory information. (FEx 63). The prosecution responded to this request by turning over to Mr. Barrett the results of the comparison tests of Petitioner's clothing to crime scene soil samples (FEx 62), which were of no exculpatory significance because Petitioner had always conceded that he was at the crime scene. But Zimmermann withheld the T.B.I. lab report. Further, in a letter from Zimmermann to Mr. Barrett dated March 30, 1987, in response to Mr. Barrett's "form discovery request," Zimmermann responded only to a specific Brady request for the identity of "other subjects or suspects that may be involved." (FEx 41, 46). Again, Zimmermann never notified Mr. Barrett about the exculpatory blood evidence. Whether or not these actions amount to a specific Brady violation, Zimmermann's conduct through this period prior to trial was not forthright and certainly was inconsistent with the prosecutor's duty

to seek justice.

Zimmermann's ploy worked. Barrett never became aware of the T.B.I. lab report and therefore never raised any question at trial about the blood evidence.

As a consequence, Zimmermann was free to falsely use Petitioner's long dark wool coat at trial to help satisfy his need to identify Petitioner as the assailant, even though this coat tested negative for blood. Both of the prosecution's key witnesses at the trial testified that Petitioner was wearing his long black wool coat throughout the time period when the offense occurred. The prosecution introduced the coat into evidence during Norma Norman's testimony. (T 1333, trial exhibit 12). On at least five separate occasions during her testimony, she described Petitioner as wearing the "long black coat." (T 1332, 1334, 1343, 1364, 1366-7). The co-defendant Devalle Miller, on at least two separate occasions during his testimony, described Petitioner as wearing the coat during the time of the offense, and he too identified trial exhibit 12 as the coat Petitioner was wearing. (T 1451, 1454-5). During the guilt stage closing argument, the prosecution displayed the coat to the jury, repeatedly describing it as the "gangster coat" that Petitioner wore at the time of the offense. (T 1672-3). Significantly, although the prosecution was aware of the weakness in their case from the lack of blood stains on the coat, and although as explained below they spent long hours on several occasions preparing (manipulating) Miller for his testimony, no one ever indicated that Petitioner ever took the coat off at any time while

the offense occurred.[20]

(f) Other Police Reports. (Claim D.1.(8))

Several other police reports were not turned over to the defense even though they contained exculpatory information. (FEx. 1-8, 9). Among other things, these police reports indicate that: blood was splattered on the walls of Daniels' apartment, which is exculpatory information relating to the question whether Petitioner actually performed the stabbings; "The chest of drawers in [the master bedroom] had not been opened. It did not appear that the room had been searched by anyone," which is exculpatory information relating to the question of whether Petitioner took the $300, which Norman had testified was taken from that location; and that when the first officers arrived at the scene, there were a number of people who had already been in the apartment, which is exculpatory evidence raising a question about whether, if $300 was stolen, Petitioner was the one who took the money. (See discussion below on the prosecution's manipulation of Norman's testimony on this point.)

[20] The failure to present the blood evidence was prejudicial to Petitioner at both the guilt and sentencing stages. At guilt, it would have raised at least reasonable doubt about whether Petitioner was the assailant and therefore whether he was guilty of premeditated murder. (For a further explanation of Petitioner's guilt stage defense based on the blood evidence, see Appendix E hereto). For the same reasons, at sentencing it would have raised at least "residual doubt" about whether he was the assailant, which is a mitigating factor to be considered by the jury. State v. Teague, 897 S.W.2d 248, 256 (Tenn. 1995); State v. Hartman, 42 S.W.3d 44 (Tenn. 2001). The jury affidavits in this case demonstrate that the blood evidence is a powerful mitigating factor.

(iii) Altering Testimony.

(a) Miller's Testimony. (Claim D.2.(1))

There were clear and obvious inconsistencies between Miller's April 23 statement (FEx. 51) and Miller's trial testimony. The circumstances of this case demonstrate that the prosecution improperly manipulated Miller's testimony to conform to the false picture the prosecution presented to the jury.

Brady requires the prosecution to disclose information that could be used to impeach the credibility of the prosecution's witness. In this case, the prosecution violated Brady by failing to disclose to the defense, prior to trial, the fact that Devalle Miller changed his story to the prosecution, and that his trial testimony would contradict in many material respects the statements he previously gave to the prosecution.

It goes without saying that in a case of this sort, the credibility of a co-defendant's testimony will be suspect. As Zimmermann said, "[W]hen you have co-defendants they always want to point the finger at each other." (FT 912).

Because of the problems with the blood evidence and the lack of other evidence that might establish the Petitioner as the assailant, the prosecution realized that Miller was a crucial witness to them. The prosecution, therefore, worked on Miller intensively.

They took advantage of the one day Miller was in Tennessee unrepresented by counsel, April 23, 1987, to interview him. See Ross Alderman's testimony (FT 1026-30). Zimmermann testified before this Court that he would not interview somebody charged with murder if they are unrepresented by counsel unless they "execute a waiver of counsel." (FT 934). Yet, there is no indication that Miller executed a waiver of counsel when the prosecution interviewed him on that

day. The following day Miller was appointed counsel when he appeared for the first time in court on the jail docket and he was represented continuously thereafter.

Subsequently, the prosecution was advised that Miller's story had changed. Miller's attorney, Ross Alderman, told Zimmermann that there were discrepancies between Miller's version of what happened as compared to the version Miller set forth in his April 23 interview. (FT 1033). The prosecution then decided to spend time with Miller. Zimmermann testified before this Court that if he had to interview a co-defendant witness more than once or twice, it would be "because, in my opinion, I am trying to find additional evidence, other leads, things to corroborate their testimony." (FT 938). It is clear from the facts of this case, however, that Zimmermann did more with Miller than pursue additional evidence or other leads. He coached Miller to shape his testimony. (See, e.g., FT 1037).

Consequently, the prosecution met with Miller to prepare his testimony. Zimmermann testified before this Court that he could "only remember one time where we had what I would call a pretrial preparation meeting." (FT 938). In fact, according to Mr. Alderman's testimony, in addition to the April 23 interview and the mid-June meeting, the prosecution also met with Miller on July 6 for 3.4 hours, July 7 for 3.5 hours, July 9 for 3.6 hours, and July 12 for 2.5 hours, for a total of 13 hours during the days immediately preceding the guilt stage of the trial where Miller testified. (FT 1034-8). Mr. Alderman testified that it seemed as if Zimmermann was spending a "long time" preparing Miller to testify. (FT 1036-7). During those meetings Zimmermann explained to Miller what other witnesses were going to say. (Id.) Mr. Alderman further testified in this proceeding that there were significant discrepancies between the version of the facts described by Miller in these meetings and the version he gave in his April 23

statement. (Id.) Also during these interviews Miller told Zimmermann about the SGM. (FT 1038-40). He described the group as a paramilitary arm of the Gospel Ministry which had a plan to drive drug dealers out of the community. (FT 1039). He identified the leaders of this group as Boyd, Beard and Hollie, and he expressed concern or fear of what others might do to him if he testified. (FT 1040). Zimmermann never disclosed before trial the fact that Miller had changed his story or any of the information Zimmermann acquired during the course of his interviews of Miller.[21]

[21] To induce Miller to give the testimony the prosecution was looking for, the prosecution offered Miller a deal. Miller was charged along with the Petitioner with capital first degree murder, assault with intent to commit murder in the first degree with bodily injury, and armed robbery. (FEx. 44). In exchange for his testimony, the prosecution offered a plea bargain that would reduce the original three charges to the two reduced charges of second degree murder and armed robbery. (FEx. 92; Alderman testimony, FT 1041-3). Instead of a possible death sentence or life sentence, the reduced charges would carry sentences ranging from 10 to 35 years with the possibility of earlier parole. (FT 1044; FEx. 93).

The defense requested the terms of any settlement agreement between the State and any witness in return for the witness's testimony. (FEx. 42, Discovery Requests, ¶ 12). Prior to the trial the prosecution filed a RESPONSE TO MOTION FOR EXCULPATORY MATERIAL REGARDING PROMISES TO STATE'S WITNESSES, in which the prosecution purported to set forth the terms of its agreement with Miller. (FEx. 67). This Response disclosed only that the prosecution had agreed not to seek the death penalty. This Response failed to disclose that the prosecution had also agreed to a plea to reduced charges that would limit the length of any prison sentence Miller might receive. By failing to disclose all of the terms of the plea agreement that were favorable to Miller to induce his testimony, the State violated the Petitioner's due process rights under Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104.

(b) Norman's Testimony. (Claim D.2.(3))

The indictment against Petitioner included a count charging that Petitioner "did steal, take and carry away from the person and against the will of Patrick Daniels, certain personal property, to wit, approximately three hundred dollars …" (T. 1270-1). In addition to seeking a conviction against Petitioner on this charge, the prosecution also included this charge as one of the aggravating circumstances supporting their request for the death penalty. There was, however, no evidence that anyone took any money from Patrick Daniels. At the time of trial, there was only a suggestion that money may have been stolen from Norma Norman, and not from "the person of Patrick Daniels."

To get around this problem, the prosecution determined to manipulate Norman's testimony by asking falsely misleading questions. In their trial notes, the prosecutors wrote with regard to this matter, "Items taken - $300 cash and anytime teller card (leading questions to make her say it was theirs)," and "$300 and anytime teller card (leading question to say cash was theirs)." (FEx. 77)>

The leading questions by the prosecution worked, for Norman gave the desired response to the leading questions. (See T. 1390). Through their improper use of false leading questions, the prosecution managed to conform Norman's testimony to the indictment.

In this context, it should be further pointed out that a careful reading of Norman's testimony establishes either that the $300 never existed or, if it did, Petitioner was not the person who took it. Earlier, Norman testified that the $300 was in the chest of drawers in the bedroom. (T. 1389). She offered no testimony that Petitioner or Miller ever went into this bedroom. Her only testimony on the alleged "theft" of the money was:

Q. Was the [$300] there when they left?

A. Not that I know of.

Q. Did they take it?

A. Not that I know of.

(T. 1390). Notwithstanding this testimony, and the absence of any other proof on the subject, Zimmermann proceeded to falsely argue at closing that Petitioner "was the only one that went through the bedroom…. Ms. Norman said, he went and rummaged through the room." (T. 1669).

This represents but one more example of the ineffective assistance of Petitioner's trial counsel, Zimmermann's unethical opportunism in taking advantage of defense counsel's failings, and the resulting false picture that was presented to the jury.

(iv) <u>Inadmissible Information to the Jury</u>. (Claim D.6)

This claim was presented to the Tennessee Supreme Court on the direct appeal where it was held that the prosecution had, in fact, acted improperly. The Tennessee Supreme Court found that this constituted prosecutorial misconduct. Describing Zimmermann's behavior, the Tennessee Supreme Court found:

> Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. Defendant's parole officer, who was identified only as an employee of the U.S. District Court in Nashville, testified to introduce the fact of defendant's two prior convictions for second degree murder and assault with a deadly weapon. The State was allowed over defense objection to ask the nature of the deadly weapon. The witness answered that it was a knife. The State's attorney then passed to the jury the record of defendant's conviction for

> assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.
>
> The defense objection was appropriate. The conduct of the State's attorney **bordered on deception** by which he was able to get before the jury information which was not evidence in the case they had under consideration. The action of the State was **improper**.

State v. Jones, 789 S.W.2d 545, 551-2 (Tenn.1990).[22]

This Court previously addressed this claim only in isolation, and not in the context of Petitioner's other prosecutorial misconduct claims together with Petitioner's ineffective assistance of counsel claims. The facts surrounding this claim, as found by the Tennessee Supreme Court, constitute further evidence of the fraudulent and deceptive practices of the prosecution in Petitioner's case; and the prejudice from this misconduct on the part of the prosecution must be cumulated with the prejudice caused by all of the other errors in this case.

[22] In the direct appeal, of course, this was the only prosecutorial misconduct claim presented to the Tennessee Supreme Court. This misconduct obviously represents only a fraction of the total body of prosecutorial misconduct that was later discovered during collateral litigation.

C. Effect of Prosecutorial Misconduct: False Picture of the Case.

The prosecution's persistent pattern of fraud and deception combined with the ineffective assistance of defense counsel, presented the jury with a completely false picture of every aspect of this case. Among other things, the jury was given a false picture of: (i) the Petitioner as a person; (ii) the nature of the prior 1972 conviction; (iii) the circumstances surrounding the offense including Petitioner's motivation and the identity of the assailant; and (iv) Petitioner's attitude towards the offense.

In other words, this is not merely a case where the jury failed to hear everything that it should have heard. This is a case where what the jury did hear was patently false, misleading and grossly prejudicial.

(i) False Picture of the Petitioner as a Person.

The effect of obfuscating the blood evidence, misrepresenting to MTMHI and defense counsel the circumstances surrounding Petitioner's prior murder conviction, and withholding evidence on these matters, was to paint a false and misleading picture of Petitioner as a person.

The defense was oblivious to the fact that Petitioner's coat tested negative for blood stains and to the significance of any of the blood evidence in the case (especially in light of the withheld police reports describing the extent of blood splattering at the scene of the offense). The prosecution took advantage of defense counsel's oblivion by using the coat to graphically mischaracterize Petitioner as merely a drug stealing "gangster." Throughout the trial the prosecution relied upon the coat as the item of clothing Petitioner wore during the offense and referred to it as the "gangster coat."

In the trial, the prosecution introduced Petitioner's coat as Exhibit 12 (T. 1333) and

elicited the following testimony from Norma Norman:

> A. …Mr. Jones had on this **long black coat**,…

(T. 1332).

> Q. Anything about that coat cause you any concern?
>
> A. First thing I thought, it was a **gangster coat**.
>
> Q. A **gangster coat**?
>
> A. Yes.

(T. 1334).

> A. And Mr. Jones walks in [to the apartment] and he had on this **long black coat**.
>
> Q. Same coat that you described for the ladies and gentlemen of the jury?
>
> A. Right."

(T. 1343).

The prosecution then referred to the "gangster coat" in their guilt stage closing argument:

> He had a **gangster coat** on, is what she called it – a **gangster coat**. And she noticed that. Now, I don't know what you call a **gangster coat**, but that is what she saw (**indicating exhibit**), and she remembered it. **And he wore it that night**.

(T. 1672-3).

> Listen to this, ladies and gentlemen, the man, the next night, when he goes over there and he says we're going to stab these people, he goes by his house, and what does he do, he changes into his **gangster uniform**.

(T. 1673).

If the blood evidence had been disclosed in a forthright manner, and if the defense had

properly evaluated that evidence, the prosecution would have been unable to use the coat in this manner to wrongfully characterize Petitioner as a "gangster." Zimmermann was well aware that the victim's blood was not on the coat and, as pointed out above, in an internal memo he specifically referred to that fact as a weakness in the case. (FEx. 42, Bates stamp 000678). It was therefore a deceit for him to display the coat to the jury, representing that Petitioner wore the coat that evening, while at the same time withholding the information that the coat had tested negative for blood stains.

(ii) <u>False Portrayal of 1972 Conviction</u>.

The prosecution also took advantage of the effect of their misconduct to mischaracterize Petitioner's prior murder as a premeditated, deliberate murder, contrary to all of the evidence in the 1972 case.

> Because you see, he had faced this jury before; not you, but he had faced a jury before and heard the very same thing before, when he murdered someone else, **willfully, deliberately with malice aforethought**.

(Sentencing stage closing argument, T. 1979).

> Ladies and gentlemen, he was a murderer, and he was a murderer before he ever got in that group – just a low down murderer, no morals – no morals.

(Sentencing stage closing argument, T. 1982).

If the prosecution had refrained from misrepresenting the circumstances surrounding the 1972 conviction and had disclosed the exculpatory evidence in their files about the 1972 case, and if Petitioner's counsel had properly investigated the 1972 case, then this false characterization never would have been presented to the jury. Instead, the jury would have been

told the truth: that the 1972 murder was an emotionally charged response by a mentally ill person to repeated homosexual rape in prison and, that under the Tennessee definition of insanity at least, Petitioner probably was insane at the time of that offense. The prosecution never would have gotten away with mischaracterizing the 1972 murder in a prejudicial way as a "deliberate" murder.

(iii) False Picture of the Circumstances Surrounding the 1986 Offense.

By failing to turn over Brady material regarding Miller's prior statements to the prosecution and information about the SGM, and by improperly manipulating Miller to give false and misleading testimony, the prosecution created the situation where they could deliberately misrepresent to the jury the circumstances surrounding the offense in this case. Although Petitioner and Miller went to Daniels' apartment as part of a mission organized by the SGM (including Allen Boyd and William Beard) with the altruistic (albeit misguided) purpose of ridding the community of drugs, the prosecution mischaracterized the offense as a pure drug robbery entirely designed and led by Petitioner.

The prosecution began the mischaracterization of the offense in their guilt stage opening statement:

> And later that evening the defendant told Mr. Miller that he knew of a guy that they can roll, that they could rob, that they could gangster him and steal his drugs.

(T. 1275).

The prosecution, through Miller's manipulated testimony, further characterized the offense as a drug robbery without any reference to the SGM or the motives behind the event:

> A little bit later on he had pulled me off to the side and he

> said, you know, this little punk over here that I got this from has got some pretty good reefer, you know, I think we can probably go over there and … He told me that he had got some good weed from the guy. The guy had some good weed. And he had reason to believe that he had more. And he said that the guy was a little punk and we could probably go gangster him…. To me that meant, going, taking his dope, his marijuana – rousting him up and, you know, taking his –- [Robbing him?] Yes.

(T. 1449-50).

Also through Miller's manipulated testimony, the prosecution characterized the "plan" as entirely Petitioner's, again without reference to the SGM:

> Q. Did you agree to that plan?
>
> A. Yes, I did.
>
> Q. Whose plan was it?
>
> A. It was the defendant's.

(T. 1451).

This false characterization was carried into the prosecution's guilt stage closing argument where the prosecution misrepresented to the jury:

> And who was the leader of this whole thing? Who gave all the orders? Who gave all of the commands?" [Referring to Petitioner.]

(T. 1706).

The multiple instances of prosecutorial misconduct finally enabled the prosecution, in the sentencing stage closing argument, to discredit as "bunk" any notion that the SGM was involved, even though the prosecution was told about the SGM's involvement:

> [H]e [the Petitioner] knows that that story about being a religious cause will be rejected by you as bunk.

(T. 1982-3).

If the prosecution had honored their Brady obligation by turning over to the defense prior to trial the statements made to them by Miller and the information they had received about the SGM, and if defense counsel had properly investigated this case, the prosecution never would have been in a position to paint this kind of false and prejudicial picture to the jury.

(iv) False Picture of Petitioner's Attitude Towards the Offense.

By deliberately making misrepresentations to MTMHI and to defense counsel regarding petitioner's prior 1972 murder conviction, and by withholding Brady material regarding both the prior conviction and the other signs of Petitioner's mental illnesses and emotional instability, the prosecution was able to invent for the jury the prosecution's own false picture of Petitioner as a "depraved killer" who had no psychological or emotional problems.

The prosecution repeatedly misrepresented to the jury that Petitioner had no emotional or psychological problems and therefore was just a "depraved" completely immoral person, which clearly is not the case. The prosecution established this false theme at the outset of the sentencing hearing:

> [I]t showed the depraved mind the defendant really has. Not a sick mind. **Not so sick of a mind that he is mentally ill**, just depraved – just depraved.

(Sentencing stage opening statement, T. 1805).

This theme was carried through to the sentencing stage closing argument:

> That's because, ladies and gentlemen, you're looking at a depraved man, **not someone suffering from severe extreme emotional disturbance**, a depraved man.

(Sentencing stage closing argument, T. 1981).

> [N]ow, he [defense counsel] voir dired you on, would you believe a psychiatrist, or a psychiatric examination or whatever, about **extreme emotional disturbance or whatever? There is none of that here today**.

(Sentencing stage closing argument, T. 1981-2).[23]

Because the prosecution's pattern of misconduct, combined with the ineffectiveness of defense counsel, allowed the prosecution to falsely portray Petitioner as being a person without mental illness or emotional disturbance, the prosecution created a situation where it could falsely claim in a highly prejudicial manner that Petitioner killed for "pure pleasure" and "enjoyment". The prosecution struck this theme in the guilt stage of the case and carried over to the sentencing stage through effective repetition:

> Whoever did that, ladies and gentlemen, **enjoyed it**, had to have.

(Guilt stage closing argument, T. 1679).

---

[23] In fact, there is abundant and irrefutable evidence that Petitioner suffers from mental illness and that he had mental state guilt stage defenses available to him at the time of his trial. Petitioner has a long documented history of displaying symptoms of mental illness, of being institutionalized for and receiving diagnoses of mental illness, and of being administered powerful antipsychotic and other medications for mental illness. See Social History (FEx. 141). As pointed out elsewhere, in Petitioner's 1972 trial Dr. Masri, a psychiatrist, gave Petitioner a borderline personality diagnosis and testified further that Petitioner "decompensates" when under stress – an evaluation similar to Dr. Sadoff's evaluation presented to this Court. Even the psychiatrist who testified for the prosecution in the 1972 case, Dr. Robert J. Eardley, testified that the Petitioner lost control under the stress of the moment and, when asked if the Petitioner had been temporarily insane at the time, testified that he did not know. (See FEx. 131, Bates stamp p. 781). In Petitioner's state post-conviction hearing, Dr. Nurcombe, a psychiatrist, similarly diagnosed Petitioner with Post-Traumatic Stress Disorder. Dr. Nurcombe's testimony went unchallenged by the state. In this habeas proceeding, both Dr. Sadoff and Dr. McCoy diagnosed Petitioner with mental illnesses. Although Dr. Craddock of MTMHI did not give Petitioner a diagnosis, he admitted that he did not have access to Petitioner's social history, and he acknowledged many of the symptoms of Petitioner's mental illness. (FT. 130-2). Dr. Craddock, therefore, testified before this Court that he "would not take issue" with a diagnosis of Borderline Personality Disorder for Petitioner. (FT. 140). Dr. Craddock acknowledged that persons with this kind of disorder can suffer dissociative and psychotic episodes. (FT. 129, 132: "That is what borderline personality disorder means. The borderline of becoming psychotic.") Dr. Craddock also admitted that he never reached an opinion on whether or not Petitioner had a diminished capacity mental state guilt stage defense, or whether or not Petitioner's mental condition might be a mitigating factor at sentencing. (FT. 142-3).

> It was all part of the **enjoyment** that person who did the stabbing had.

(Guilt stage closing argument, T. 1711).

> Is there any reason, is there any justification why he took the life of Patrick Daniels? Is there any? None, except **pure pleasure**.

(Sentencing stage closing argument, T. 1942).

> Ladies and gentlemen, as a man thinketh in his heart, so is he. And you saw the real James Jones in the picture. And now, when you saw those convictions, you know that's the real James Jones because that's how he is. and when he comes here from Chicago, he is not here two years before a vicious brutal murder at his hands – at his planning – **at his enjoyment** – and that's depraved.

(Sentencing stage closing argument, T. 1984-5).

The net effect of the prosecutorial misconduct together with the ineffective assistance of counsel, therefore, was to falsely paint Petitioner as the ideal candidate for a guilty verdict for premeditated murder and the death sentence: a cool-minded "depraved" "gangster" with "no morals" and free of any mental illness or emotional disturbance who singularly planned and led a drug robbery, designed purely for personal gain, and in the course of that robbery killed for pure pleasure and enjoyment. As the abundant and compelling evidence in this habeas proceeding shows, however, Petitioner is not that type of person, the SGM was deeply involved in directing Petitioner's actions, and the true circumstances surrounding the offense are entirely different from what the prosecution falsely portrayed to the jury. As the jury affidavits demonstrate, and as should be clear from the face of the record after considering the cumulative effect of all the errors in this case, if the jury had been presented with the true picture of Petitioner and the circumstances surrounding the offense, the result of the trial would have been completely

different.

V. The collective consideration of claims

Previously, in this Memorandum, Petitioner cited authority for the proposition that it is incumbent on this Court to cumulate error in the determination of whether this trial was fair and its result reliable. In the process of making this determination, as far as errors of the prosecutor and defense counsel are concerned, it is not necessary to demonstrate that the outcome would have been different, but for the errors. It is necessary only for this Court to ultimately determine that the errors "undermine[d] confidence in the outcome." Strickland, supra, 104 S.Ct. at 2068; and, Kyles, supra, 115 S.Ct. at 1565. If this Court's confidence in the outcome is "undermine[d]" by the errors committed, it must grant relief. The law requires that the final measure of whether this undermining of the confidence has occurred can only be taken upon a cumulative and collective consideration of the errors committed in the case that contributed to the result.

A. Prosecutorial misconduct claims erroneously deemed defaulted.

We have demonstrated in this Motion and Memorandum that recently promulgated Tenn. Sup. Ct. R. 39 made clear that this Court erred in its determination that claims raised in the appeal of right to the state Court of Criminal Appeals, but not in the Tenn. R. App. P. 11 discretionary appeal to the state Supreme Court, were defaulted and not preserved for federal review. Petitioner now asks this Court, pursuant to F. R. C. P. 60(b), to review on the merits those preserved claims. Specifically, the claims to which Petitioner refers are the prosecutorial misconduct claims made in Petitioner's Amended Petition, ¶¶ D.1.(2)-(4), (6)-(8), (12); D.2.(1)-

(3); D.3; D.6; and D.8.(4). See, Motion at ¶ 23. Petitioner has demonstrated the materiality of these instances of prosecutorial misconduct sufficient to require this Court to set aside the conviction and sentence in this case. When the above-listed instances of prosecutorial misconduct are considered collectively with the other errors in this case, including other errors of prosecutorial misconduct and errors of ineffective assistance of counsel previously recognized by this and other courts, there can be little doubt that this case must be reversed. See: (1) attached hereto, Appendix A: a chronological summary of the instances of prosecutorial misconduct and ineffective assistance of counsel and how they cumulated to eliminate any opportunity for a fair trial in this case; (2) attached hereto, Appendix E: a summary of record evidence that Petitioner was not the assailant; (3) filed in separate pleading: the Affidavits of eight jurors, who deliberated in this case, reflecting their reaction to the fact that they were not give an opportunity to consider critical, relevant evidence in the trial of this case.

B. Prosecutorial misconduct claims previously considered by this Court

From among these instances of prosecutorial nonfeasance and misfeasance, referred to above, this Court has already considered on the merits the claims found at ¶ D.1.(1) (the prosecution's failure to produce the 1972 murder trial transcript); and ¶ D.1.(7) (the prosecution's failure to produce lab reports indicating no blood stains on clothes).

With regard to ¶ D.1.(1) (the prosecution's failure to produce the 1972 murder trial transcript), this Court evaluated the claim in its opinion, 999 F.Supp. at 1089-90, and concluded that the 1972 transcript "would not have affected the result" of the guilt stage, id. at 1089, and was "not persuaded" that its absence "undermine[d] confidence in the outcome of the sentencing hearing," id. at 1090. The Court specifically noted that it reached this conclusion considering

the effect of the absence of the 1972 transcript "standing alone," id.. Petitioner asks this Court to reconsider that conclusion for the reasons set out in this memorandum upon consideration of the cumulative effect of other identified errors, and not "standing alone."

With regard to ¶D.1.1(7) (the prosecution's failure to produce lab reports indicating no blood stains on clothes), this court concluded that it was not a proper Brady claim, because defense counsel could have had access to the information from sources other than the prosecutor. Id. at 1090. If it is not a proper Brady claim, by this Court's own conclusion it is necessarily an instance of ineffective assistance of counsel. It is one or the other, see, Banks v Reynolds, 54 F.3d 1508, 1515, n. 14 (10th Cir. 1995) (recognizing the propriety of considering claims, such as this, as alternatively either prosecutorial misconduct or ineffective assistance of counsel); and, Petitioner has, in fact, plead it in the alternative, see, Amended Petition, §§ D.(1)(7) (prosecutorial misconduct); and, A.(1) and (2); E.(2)(a) and (e) (ineffective assistance of counsel). This Memorandum, and attached appendices, together with the reaction of jurors, as reflected by their Affidavits, filed separately, makes clear the prejudice suffered by Petitioner at guilt and at sentencing created by the absence of this evidence in the jury's deliberation.

C. Prosecutorial misconduct claims previously considered by the Tennessee Supreme Court.

In addition to the instances of prosecutorial misconduct identified, above, on the direct appeal of this case from trial, the Tennessee Supreme Court considered on the merits the fraction of prosecutorial misconduct claims that were revealed on the face of the trial court record. With regard to these relatively few instances of prosecutorial misconduct in the record at the time, the Tennessee Supreme Court found that the "conduct of the State's attorney [Zimmermann]

bordered on deception" and "was improper," but, nevertheless concluded that these instances of prosecutorial misconduct did not require reversal. State v Jones, 789 S.W.2d 545, 552 (Tenn. 1990). The Tennessee Supreme Court did not consider these instances of prosecutorial misconduct cumulatively and collectively with other instances of prosecutorial misconduct, all instances of ineffective assistance of counsel, and the other errors committed in this case. This Court is in a position to consider these claims along with other errors reflected in the record that is now complete.

D. Instances of ineffective assistance of counsel.

At the trial of this case, Petitioner had viable defenses in the guilt stage that he was not the assailant and that, whether he was the assailant or not, he was insane at the time of the offense, both of which would have been consistent and complementary with the mitigation that he had to present at the sentencing stage of the trial. In spite of the availability of these defenses, defense counsel did not investigate potential defenses and did not present any defense, did not call any witnesses, and did not present any proof at all. At the sentencing stage of the trial, Petitioner had an abundance of available mitigating evidence of which this Court is well familiar and which was addressed in this Court's opinion. See 999 F.Supp. at 1096-1102. Notwithstanding the availability of this abundance of mitigating evidence, defense counsel did not investigate it and was unaware of it. Consequently, he did not present it to the jury. See, Appendix A.

All of the state and federal courts sitting in collateral review of this conviction and sentence have agreed that the performance of counsel was constitutionally inadequate at both the guilt and sentencing stages. See, 999 F.Supp. at 1095. The only question among the courts was

that of whether sufficient prejudice was created by the failures of counsel to warrant reversal. Since the only question was the sufficiency of the prejudice caused by counsel's recognized failures, then a review of claims becomes only a question of measuring the degree and impact of the prejudice. Whatever degree of prejudice exists at the guilt stage, as well as at the sentencing stage, whether or not it is sufficient standing alone to warrant reversal, must be considered collectively and cumulatively with other errors committed in the case in order to determine whether the cumulation of error warrants reversal.

From among the reviewing federal judges, including this Court and the Circuit panel, two of the four judges, who have reviewed the case, have found the prejudice sufficient to set side the sentence of death. Yet, none of the federal judges, including the two who decided to set the sentence of death aside, considered any issue other than the single question of whether the sentence of death should be set aside due to counsel's ineffectiveness at the sentencing stage. None of the judges considered any of the other claims properly raised by Petitioner, including the errors of counsel other than those committed in the sentencing stage of the trial, including the myriad instances of prosecutorial misconduct, and including any other errors committed in this case, cumulatively and collectively with the claim of ineffective assistance of counsel at the sentencing stage of the trial.

Pursuant to T.C.A. § 39-2-203(h), a Tennessee capital defendant will avoid a sentence of death, if only a single juror holds out for a life sentence. Consequently, the prejudice determination involves only a determination of whether confidence in the outcome is sufficiently undermined so that "**one** juror **could** have found that he did not deserve the death penalty." (Emphasis added.) Carter v Bell, 218 F.3d 581, 592 (6th Cir. 2000) (single juror prejudice rule

applied in Tennessee case); see, also, Coleman v Mitchell, 2001 WL 1194919, Sixth Circuit No. 98-3545, filed October 10, 2001 at 28 (single juror prejudice rule applied in a Ohio case). This standard has easily been met upon a collective evaluation of the universe of error that occurred in this trial. See, Jurors Affidavits, filed in separate pleading.

Tennessee law specifically recognizes lingering or residual doubt about guilt as proper mitigating evidence. See, State v Teague, 897 S.W.2d 248 (Tenn. 1995). In fact, Tennessee law requires the jury to consider the proof presented in the guilt stage during its deliberation in the sentencing stage. See T. C. A. § 39-2-203(e) (jury is directed by the instructing court to consider "any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing or both"). If no defenses are presented during the guilt stage of the trial, as occurred in this case, nothing is presented in that stage for the jurors to consider in the sentencing stage, though viable defenses may have existed, as they did in this case.

The available and viable guilt stage defenses that trial counsel failed to present would have been persuasive mitigating evidence. Indeed, the available but unpresented guilt-stage defenses (*i.e.* that Petitioner was not the assailant, and that Petitioner did not have sufficient *mens rea*) may have been the strongest available mitigating evidence that Petitioner could have presented in this case. Assistant District Attorney John Zimmermann testified that he anticipated it would be difficult to persuade the jurors to impose a sentence of death in this case. He stated that, in order to obtain a death verdict, it would be necessary to convince the jurors that Petitioner was the assailant "not beyond a reasonable doubt, but beyond a shadow of a doubt," FT 905. See, generally, FT 905-908. His opinion in that regard is reflected to be true in other cases, as well. In a study entitled *Why Jurors Vote Life or Death: Operative Facts in Ten*

Florida Death Penalty Cases, Geimer and Amsterdam, 15 Am. J. Crim. Law 1 (1988), the authors concluded that the existence of some degree of doubt about the guilt of the accused was overwhelmingly the most often recurring factor in the juror's vote for a life sentence. See, particularly, 15 Am. J. Crim. Law at 28-34. In that study, 69% of the jurors interviewed identified "lingering" doubt about guilt as the "operative factor" in the vote for life. See, Table 2, 15 Am. J. Crim. Law at 27. Though guilt stage defenses may be considered to be the strongest mitigating evidence, in the determination of whether counsel was ineffective in this case, his failure to present guilt stage defenses has never been considered collectively with other errors in the determination of whether Petitioner's sentence of death should be set aside.

In order to properly evaluate the fairness and the reliability of this trial, it is incumbent on this Court to consider the total failures of defense counsel, both his failure to affirmatively present any of Petitioner's available defenses at both stages of the trial as well as his failure to rebut the fraudulent case presented by the prosecution, collectively and cumulatively with the instances of prosecutorial withholding of exculpatory evidence and the prosecutor's intentional deceit of Petitioner's evaluators, his defense counsel, the court, and the jury. Upon that evaluation, it is obvious that it would be a travesty of justice to allow this conviction and sentence to stand.

VI. Conclusion

For the foregoing reasons, this Court should grant Petitioner's Rule 60 motion and reverse its earlier dismissal of the substantial body of Petitioner's prosecutorial misconduct claims.

This Court should consider the merits of Petitioner's prosecutorial misconduct claims

based upon the evidentiary record already created in this case.

In addressing Petitioner's prosecutorial misconduct claims, this Court should consider the claims both individually and cumulatively with all of Petitioner's other claims, including the claims of ineffective assistance of counsel at both the guilt and sentencing stages of Petitioner's case. The proof in this habeas case establishes prosecutorial fraud and deceit which constitute *per se* violations of Petitioner's constitutional rights requiring reversal of Petitioner's convictions and his death sentence. Viewed cumulatively with the other errors in Petitioner's case, including but not limited to the errors arising from the ineffectiveness of Petitioner's trial counsel, the proof in this habeas case establishes that Petitioner was grossly prejudiced at both the guilt and sentencing stages of his case.

Accordingly, this Court, upon considering all of Petitioner's claims, must grant Petitioner a writ of habeas corpus setting aside Petitioner's convictions and death sentence.

Respectfully submitted,

Bradley A. MacLean (BPR # 9562)

STITES & HARBISON PLLC

SunTrust Center, Suite 1800

424 Church Street

Nashville, Tennessee 37219

(615) 244-5200

William P. Redick, Jr. (BPR #6376)

810 Broadway

Suite 201

Nashville, TN 37203

(615) 742-9865

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by first class mail, postage

prepaid, on this _____ day of November, 2001 upon:

Glenn R. Pruden, Esq.

Gordon W. Smith, Esq.

Office of the Tennessee Attorney General

425 Fifth Avenue North

Nashville, TN 37243

Bradley A. MacLean