

01-9094 ABDUR'RAHMAN, ABU-ALI V. BELL, WARDEN

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.

### QUESTIONS PRESENTED

The district court in this case held that it was powerless to consider many of Petitioner's federal habeas claims because they had not been sufficiently presented in a petition for discretionary review to the Tennessee Supreme Court. The district court granted Petitioner relief as to other claims in a ruling that was later reversed on appeal. While the appeal was pending, however, the Tennessee Supreme Court issued Rule 39 ("TN Rule 39"), which on its face applies to Petitioner's case, and which expressly "clarif[ies]" that such a discretionary application is *not* required for "exhaustion of state remedies for federal habeas corpus purposes." Petitioner's claims thus had properly been exhausted. See *Randolph v Kemna*, 276 F.3d 401 (CA8 2002) (applying similar Missouri rule); *Swoopes v. Sublett*, 196 F.3d 1008 (CA9 1999) (Arizona), *cert. denied*, 529 U.S. 1124 (2000).

The Sixth Circuit nonetheless categorically refused to permit the district court to consider TN Rule 39 and thus to consider the merits of the claims the district court had erroneously held to be defaulted. Petitioner moved in the district court for relief from judgment pursuant to Fed. R. Civ. P. 60(b), but the court of appeals held that every such motion is prohibited as a matter of law as a "second or successive" habeas application. In addition, before the mandate issued in the prior appeal, Petitioner separately moved in the court of appeals for a remand so the district court could apply TN Rule 39. But the court of appeals refused, notwithstanding that Petitioner would otherwise be prohibited from receiving any adjudication of his constitutional claims on the merits and would be executed as a result.

The Questions Presented are:

1. Whether the Sixth Circuit erred in holding, in square conflict with decisions of this Court and of other circuits, that every Rule 60(b) Motion constitutes a prohibited "second or successive" habeas petition as a matter of law.
2. Whether a court of appeals abuses its discretion in refusing to permit consideration of a vital intervening legal development when the failure to do so precludes a habeas petitioner from ever receiving any adjudication of his claims on the merits.