IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	*	KNOX COUNTY
	*	
BILLY RAY IRICK	*	SUPREME COURT NO. 180
	*	
	*	DEATH PENALTY

PETITIONER'S REPLY IN SUPPORT OF HIS MOTION TO VACATE EXECUTION DATE

The petitioner, Billy Ray Irick, makes the following reply to the state's response:

As understood by petitioner's counsel, the state argues that the present execution date of December 7, 2010 should not be vacated for two reasons. The first reason urged by the state is that the question of whether the federal district court will reopen the federal *habeas* proceedings is speculative and, therefore, this court should take no action. However, petitioner respectfully submits that the United States Sixth Circuit Court of Appeals has found, as a matter of law, that Tennessee Supreme Court Rule 39 is an "extraordinary circumstance" warranting the reopening of a *habeas* case for purposes of a motion for relief from judgment pursuant to F.R.Civ.P. 60(b)(6). Thompson v. Bell, 580 F.3d 423, 442 (6th Cir. 2009).

In Thompson, the petitioner, as in this case, had completed the standard 3-tier appeal process. After the United States Supreme Court had denied Thompson's rehearing petition, the Tennessee Attorney General's office moved for an execution date. In response, Thompson filed objections and provided notice under Van Tran of his incompetence to be executed. The Tennessee Supreme Court denied relief, set an execution date, but remanded the issue of Thompson's competency to the trial court. Thompson, 580 F.3d at 428-29. Almost two years later and after various delays, Thompson filed a Rule 60(b) motion based on Tennessee Supreme Court Rule 39 seeking review of certain claims ruled procedurally defaulted by the federal district court. Id. at 433. However, the federal

district court dismissed the Rule 60(b) motion without reopening *habeas* proceedings. The Sixth Circuit reversed and remanded Thompson's 60(b) motion to the district court for a ruling on its merits. Id. at 443-444.

Similarly, in this case, the Sixth Circuit has remanded Irick's 60(b) motion to the district court to "proceed to rule...in the first instance." Therefore, under any possible scenario, petitioner's *habeas* proceedings will be reopened and will continue past the current execution date. For instance, should the federal district court grant petitioner relief pursuant to his Rule 60(b) motion, then, of course, his sentence of death may be set aside and/or the case will continue for further hearings and/or appeal. On the other hand, should the federal district court deny the motion, petitioner may appeal that decision and/or seek a certificate of appealability with the Sixth Circuit Court of Appeals. Thompson, 580 F.3d at 428, 433. See also, in general, Peeke v. First Nat'l Bank & Trust Co. of Marquette, 717 F.2d 1016, 1020 (6th Cir. 1983), holding that denial of a Rule 60(b) motion is an appealable order.

Respectfully, petitioner submits that there is nothing speculative about the inevitability of his federal *habeas* proceedings continuing. Furthermore, any competency proceedings undertaken now will be for naught with a consequent waste of money and time, since there will necessarily be a stay of the execution date of December 7, 2010.

The state also suggests as a second reason for not vacating the execution date that petitioner was not diligent in pursuing his 60(b) motion. Nothing could be further from the truth. The following is a chronology of relevant events which demonstrate that petitioner diligently pursued his 60(b) motion for relief and why petitioner's counsel believed that the 60(b) motion had been denied by the Sixth Circuit's order of January 30, 2008. (For the court's convenience, petitioner is providing copies of those pleadings preceded by *).

5/22/01	Petitioner files Application for Certificate of Appealability in Sixth Circuit Court of Appeals from district court's dismissal of habeas petition.
6/28/01	Tennessee Supreme Court promulgates Rule 39.
11/20/01	Petitioner files Rule 60(b)(6) Motion for Relief in the U.S. District Court based on Tenn.S.Ct. Rule 39. (copy previously provided)
11/23/01	*Petitioner files Notice of Supplemental Authority citing Tenn.S.Ct. Rule 39 as his basis for relief with the Sixth Circuit Court of Appeals.
11/23/01	*Petitioner files Motion to Hold Appeal in Abeyance in the Sixth Circuit Court of Appeals. In conclusion, petitioner states, "Based on this development [Supreme Court Rule 39] which occurred subsequent to the court's order of April 23, 2001, defendant respectfully requests that the Sixth Circuit delay its decision regarding his application for certificate of appealability to give the district court an opportunity to rule on his motion. In the alternative, defendant would request that the same arguments found in defendant's motion and memorandum of law now currently before the district court be incorporated and/or otherwise considered by the Sixth Circuit in his application for certificate of appealability...")
2/20/02	*Petitioner files Motion to Authorize Filing of Second Petition, etc. in the Sixth Circuit Court of Appeals, citing Tenn.S.Ct. Rule 39 as his basis for relief.
7/6/06	State files Response to Application for Certificate of Appealability.
7/21/06	*Petitioner files Reply with the Sixth Circuit Court of Appeals which again raises issue of the effect of Tenn.S.Ct. Rule 39 as to procedurally defaulted claims. (See pp. 29, 30, 32 and 42).
1/30/08	*Sixth Circuit Court of Appeals grants petitioner's Certificate of Appealability as to only two issues, neither of which implicates Rule 39 issues. Order does not address petitioner's Rule 39 arguments.
7/20/10	*Sixth Circuit Court of Appeals remands Petitioner's Rule 60(b) Motion to the District Court.

Based on these proceedings and the wording of the Sixth Circuit's order of January 30, 2008, counsel believed that granting a certificate of appealability as to only two issues had the effect of denying petitioner's 60(b) motion. Consequently, when petitioner applied for a writ of *certiorari* with the United States Supreme Court, he listed and argued as an appealable issue the effect of Tennessee Supreme Court Rule 39.[1] Petitioner submits that it was reasonable for counsel to believe that the 60(b) motion had been denied. Therefore, the state's unsubstantiated claims of lack of diligence should not be given any weight.

CONCLUSION

Therefore, petitioner respectfully prays that his execution be vacated and that competency proceedings be stayed until such time as petitioner has completed the 3-tiered process and, specifically, that his federal *habeas* claims have been disposed of.

SPEARS, MOORE, REBMAN & WILLIAMS

By:_____
C. Eugene Shiles, Jr., BPR #011678
P. O. Box 1749
Chattanooga, TN 37401-1749
(423) 756-7000

_____
Howell G. Clements, BPR# 001574
1010 Market Street, Suite 404
Chattanooga, TN 37402
(423) 757-5003

Attorneys for Petitioner

[1]A copy of the relevant portions of that pleading is being filed with this reply.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served on counsel for all parties at interest in this cause addressed as follows:

(615/532-7791)
James E. Gaylord
Assistant Attorney General
P.O. Box 20207
Nashville, TN 37202

This 28th day of July, 2010.

SPEARS, MOORE, REBMAN & WILLIAMS

By: M. Dillon

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 02-5105

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE BILLY RAY IRICK,	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE**
Petitioner.	**ORDER**

BEFORE: BATCHELDER, Chief Judge; SILER and GILMAN, Circuit Judges.

This case is before our court on a transfer from the district court under Fed. R. Civ. P. 60(b) because at the time of the transfer, our precedent required that it be treated as a second or successive federal habeas corpus petition under *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), which has since been overruled by *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (en banc), *vacated sub nom Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005). This motion's tangled procedural history has led to an extended delay in ruling on it. After Irick timely filed the Rule 60(b) motion in his original habeas case, the district court properly transferred it under the then-applicable law. Irick then filed a motion for a second or successive federal habeas petition in support of his transferred Rule 60(b) motion. At that time Irick's appeal of his original habeas case (No. 01-5638) was already before us. Due to pending dispositive decisions in other cases, we held both this motion and the original appeal in abeyance on July 1, 2002. We removed the original appeal from abeyance on April 3, 2006 and issued a final judgment on May 12, 2009. During that time, *In re Abdur'Rahman*

was also decided. No. 02-6547/6548 (6th Cir. filed Jan. 18, 2008). With those two obstacles removed, we can now rouse this motion from its long slumber and decide it.

Because *McQueen* is no longer applicable, *see Gonzales v. Crosby*, 545 U.S. 524 (2005), the district court is no longer required to transfer the Rule 60(b) motion to this court and may proceed to rule on that motion in the first instance.

Therefore, the motion for leave to file a second or successive habeas corpus petition is removed from abeyance, the motion is denied as unnecessary, and this case is remanded to the district court to rule on Irick's Rule 60(b) motion.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

No. 01-5638

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JAN 30 2008

LEONARD GREEN, Clerk

BILLY R. IRICK,

Petitioner-Appellant,

v.

RICKY BELL, Warden,
Riverbend Maximum Security Institution,

Respondent-Appellee.

ORDER

Before: SILER, BATCHELDER, and GILMAN, Circuit Judges.

Billy R. Irick, a Tennessee death-row prisoner represented by counsel, appeals a district court order dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The court denied a certificate of appealability ("COA") on all claims. Irick applies for a COA, *see* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1)-(2), moves for appointment of counsel, and requests leave to proceed *in forma pauperis*.

A jury convicted Irick of felony murder and two counts of aggravated rape. In the sentencing phase, four aggravating circumstances were found: (a) the victim was less than twelve years old, while the defendant was over seventeen; (b) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; (c) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution; and (d) the murder was committed while the defendant was engaged in the felony of rape. Irick was given consecutive sentences of death and forty years. His efforts to obtain relief on direct appeal and in state post-

conviction were unsuccessful, although the state courts in post-conviction did hold the rape-murder aggravator invalid. Nonetheless, they found the error harmless beyond a reasonable doubt.

In 1999, Irick filed a federal habeas corpus petition raising 19 claims: (A) the State illegally suppressed exculpatory material and mitigating evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (B) there was insufficient evidence to support his conviction for first-degree murder and to impose the death penalty; (C) the trial court erred in not suppressing two of Irick's statements; (D) Irick's rights were violated in that he was prohibited from offering evidence that the victim's stepfather gave deceptive answers in his polygraph test; (E) the trial court denied Irick his right to compulsory process; (F) the trial court improperly allowed Dr. Wilson to testify as an expert; (G) the trial court erred in allowing the jury to review highly prejudicial and inflammatory photographs of the victim; (H) all four of the aggravating circumstances in this case were unconstitutional; (I) Tennessee's then-applicable capital statute was unconstitutional; (J) the unavailability of adequate funds for expert witnesses and investigators denied Irick's trial and post-conviction counsel the ability to fully develop all claims for relief; (K) the length of time Irick has spent under sentence of death renders that sentence cruel and unusual; (L) executing Irick would be unconstitutional because he may be mentally retarded or incompetent; (M) Irick was denied an impartial jury when the trial court improperly excused veniremembers because of their attitudes toward death-penalty issues, while improperly rehabilitating other veniremembers with biases against the defendant; (N) Irick was denied an impartial jury because the veniremembers were not called into the jury box by random selection; (O) the jurors were improperly instructed; (P) the prosecutor engaged in misconduct during penalty-phase closing arguments; (Q) convicting Irick of both felony murder and aggravated rape subjects him to double jeopardy; (R) Irick was denied the effective assistance of counsel at trial, on direct appeal, and in state post-conviction proceedings; and (S) the cumulative effect of the foregoing errors produced a fundamentally unfair trial. Granting the warden summary judgment, the district court dismissed the petition and later denied Irick's motion to alter or amend the judgment. The court also denied a COA. Irick appeals and requests a COA on all claims raised below and on certain other federal habeas issues.

A COA shall issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court dismissed the habeas petition on the merits, the applicant must show that "reasonable jurists could debate whether" it "should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted). If the district court dismissed the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) whether the petition states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling. *Id.* at 484.

Upon consideration, we grant a COA on Claim P (prosecutorial misconduct). We also grant a COA on Item (*l*) of Claim A (*Brady* violation), but only to the extent it indicates that Irick was "drunk and talking crazy" the night of the murder. No other claims or parts of claims are certified for appeal because, as to them, Irick has failed to make a substantial showing of the denial of a constitutional right.

Accordingly, Irick's application for a certificate of appealability is granted in part and denied in part. Irick's motions for appointment of counsel and to proceed *in forma pauperis* are granted. The Clerk's Office is directed to issue a briefing schedule as to the following grounds for relief as certified by this court:

> A) whether the State's failure to turn over Item (*l*), to the extent it indicates that Irick was "drunk and talking crazy" the night of the murder, was in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and
>
> P) whether the prosecutor engaged in misconduct during penalty-phase closing arguments.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

IN UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

BILLY RAY IRICK,

Petitioner-Appellant

v.

RICKY BELL, WARDEN

Respondent-Appellee

No. 1:5638

PETITIONER'S REPLY TO WARDEN RICKY BELL'S RESPONSE TO APPLICATION FOR CERTIFICATE OF APPEALABILITY

I. INTRODUCTION

Billy Ray Irick, a Tennessee death row prisoner, represented by counsel, appeals an order from the Eastern District of Tennessee dismissing his petition for writ of *habeas corpus* filed under 28 U.S.C. §2254 and responds to the State of Tennessee's recently filed response to petitioner's Certificate of Appealability. This Court's order filed April 3, 2006 sets out a brief procedural history of this case; therefore, the same will not be repeated here.

Since the original Application for Certificate of Appealability was filed on May 22, 2001, several highly relevant decisions have been rendered by this Court, as well as the Supreme Courts of the United States and the State of Tennessee. These decisions include but are not limited to House v. Bell, -U.S.-, 126 S. Ct. 2064, -L.Ed.2d- (June 26, 2006); Bell v. Cone, 543 U.S. 447, 125 S.Ct. 847, 160 L.Ed.2d

881 (Jan. 24, 2005); Gonzalez v. Crosby, -U.S.-, 1255 S.Ct. 2641, 162 L.Ed2d 480 (June 23, 2005) and Van Tran v. State, 66 S.W.3d 790 (Tenn. Dec. 4, 2001). In light of these important decisions, as well as the filing of the State's response, petitioner makes the following reply.

Nature of Case - A Miscarriage of Justice

This case is worthy of the Court's attention not only for the many constitutional errors affecting the petitioner's trial but for the ultimate consequence of those errors, namely, the conviction and sentence to death of Billy Ray Irick who was - in light of new and persuasive evidence - insane at the time of the offense and therefore *not guilty* at the time of the offense, or at least not guilty of the death penalty. This extended introduction emphasizes the extraordinary newly discovered evidence and its proper impact on the case while also referencing some of the more important facts previously known about petitioner's mental health. Facts supporting a finding of a miscarriage of justice also include the state's refusal to provide funds to hire investigators and experts resulting in a less than full and fair opportunity to be heard. Additionally, the state withheld critical information which might have led to a more thorough investigation of the case and which greatly strengthens petitioner's claim of actual innocence.

In the context of this habeas petition, the newly discovered evidence serves three important and distinct purposes. First, the evidence serves as proof of "actual innocence" or "innocence of the death penalty" thereby providing a "gateway" to allegedly defaulted claims and avoiding any procedural bars on the basis of a finding of a miscarriage of justice. Second, the evidence serves as a stand-alone claim of actual innocence. Third, the newly discovered evidence serves as factual predicates for separate constitutional claims (e.g., ineffective assistance of counsel) discussed later in the pleading.

The impending miscarriage of justice of executing petitioner deservedly demands society's closest scrutiny and upon proper reflection by this Court, the ordering of an evidentiary hearing to examine the issues raised in his *habeas corpus* petition. The issues presented undermine any residual confidence in the state proceedings and require the setting aside of petitioner's verdict and sentence.

Tennessee's Insanity Defense: 1986

At the time of petitioner's trial in 1986, Tennessee followed the Model Penal Code's Section 4.01 (1962) regarding the insanity defense as adopted by the Tennessee Supreme Court in Graham v. State, 547 S.W.2d 531 (Tenn. 1977). Section 4.01 read as follows:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity *either* to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article the terms "mental disease or defect" do not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(Emphasis supplied.) Id. at 543.

In pre-1995 cases, insanity was a general defense to murder charges; once the defendant raised the issue of insanity, the state had the burden of proving his sanity *beyond a reasonable doubt.* See State v. Holder, 15 SW3d 905 (Tenn.Crim.App. 1999). If evidence adduced by *either* the defendant or the state raised a reasonable doubt as to the defendant's sanity, the burden of proof shifted to the state. Graham, 547 SW2d at 544. Sanity was therefore "an element of the crime" State v. Clayton, 656 S.W.2d 344, 346 (Tenn. 1983); Stacy v. Love, 679 F.2d 1209, 1213 (6th Cir.) cert. denied, 459 U.S. 1009, 103 S.Ct. 364, 74 L.Ed.2d 400 (1982), and insanity at the time of the offense was and is an absolute defense. State v. Sparks, 891 S.W.2d 607 (Tenn. 1995).[1] In applying this standard and burden of proof, the Tennessee Supreme Court found in Sparks that the defendant met Tennessee's definition of insane stating

[1]While Tennessee's insanity defense was first promulgated in 1989 (T.C.A. §39-11-501) , this statutory enactment did not bring about any substantive changes in Tennessee's common law on the subject. However, in 1995 Tennessee revised the statute making the insanity defense an "affirmative defense" and requiring *the defendant* to prove "by clear and convincing evidence" that at the time of the offense the defendant had a "severe mental disease or defect" and was "unable to appreciate the nature or wrongfulness of his or her acts."

"... even though the record contains evidence of acts and statements of the defendant which are consistent with sanity, they are not inconsistent with insanity." (Cites omitted.) Id. at 617.

Synopsis of Mental Competency Evidence Presented at Trial

Petitioner was a long-time friend of the victim's mother and stepfather, Kathy and Kenneth Jeffers, and had lived with the family for a couple of years, on and off, often babysitting and caring for the couple's five children while the parents were at work. Kathy and Kenneth Jeffers separated due to marital difficulties prior to April 15, 1985, during which time petitioner and Mr. Jeffers lived with Mr. Jeffers' parents, Ramsey and Linda Jeffers. On April 15, 1985, the Jeffers' 7 year old minor daughter, Paula Dyer, was raped and suffocated to death. Petitioner was arrested the next day and charged with the offenses. On November 1, 1986, the petitioner was convicted and sentenced to death in the Criminal Court of Knox County, Tennessee.

Prior to trial, petitioner's attorneys withdrew a previously filed notice to use the insanity defense. During sentencing, defense counsel called Nina Braswell, a social worker with Mental Health Center of Knoxville, who had last treated the petitioner when he was probably in the second grade, some 20 years prior to the trial. The petitioner, who was in the first grade at the time of the referral to the Mental Health Center of Knoxville, was reported to be overly aggressive, difficult to

discipline and unmanageable. He mistreated animals and had numerous other behavioral problems. Petitioner was treated on an outpatient basis for approximately 9 months; however, principally because of a lack of parental support, the petitioner made little or no progress.

Exhibits introduced during the sentencing phase noted that Dr. Kenneth B. Carpenter, a psychiatrist and Director of the mental health center, had evaluated the petitioner in April of 1965, forming the following diagnostic impression: "Adjustment reaction of childhood versus organic brain damage versus childhood schizophrenia." Subsequently, Dr. John A. Edwards conducted several tests, including an IQ test, where petitioner scored 107 on a Stanford-Benet test and 84 on the Wechsler Intelligence Scale for Children. Dr. Edwards' diagnostic impression was "psychoneuroses, anxiety reaction, severe, with possible mild organic brain damage." Dr. Edwards' findings were also introduced through exhibits.

Ms. Braswell further testified that in the summer or fall of 1966, the petitioner's mother became increasingly disturbed mentally and was placed on medication. As a consequence of petitioner's declining performance at the Mental Health Center, petitioner was hospitalized in Eastern State Psychiatric Hospital (whose name was later changed to Lakeshore Psychiatric Hospital) on October 24, 1966, in an effort to remove him from the volatile and unhealthy home situation and

to better treat him.[2] Ms. Braswell testified that she again began to work with the petitioner individually twice a week and that the parents remained uninvolved. In March of 1967, petitioner was sent to the Church of God Home for Children, an orphanage in Sevierville, Tennessee, and after July 1967, Ms. Braswell had no further contact with the petitioner.[3] It should also be noted that petitioner's trial counsel consulted with a psychiatrist, Dr. Diana McCoy, and a neuropsychologist, Dr. Scariano, prior to trial, but elected not to use these witnesses because, to their understanding, these witnesses would have likely testified that petitioner was a sociopath, a diagnosis that they believed would be detrimental to their client's interests.

During the sentencing phase of the trial, the State presented Dr. Tennyson, a psychiatrist employed at the Helen Ross-McNabb Center in Knoxville, Tennessee,

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[2]A psychological report dated December 1, 1966 from Eastern State stated the following history: "The patient was first referred to the Knoxville Mental Health Center in May of 1965 because of his unmanageable behavior at school. He had been tested by a school psychologist earlier in the year and found to be functioning at the high end of the normal range of intelligence (Binet IQ of 107), but when seen at the Center, he attained a WISCIQ of 84, placing him in the dull normal range. This drop in functioning was attributed largely to a very high level of anxiety and a very low frustration tolerance. Projective tests administered at that time indicated that the patient had a strong need for structure, and that he felt threatened by *his own impulses* as well as by forces in his environment. The diagnoses given at that time Psychoneuroses, Anxiety Reaction, severe, with possible mild organic brain damage. The patient's mother was also found to be in need of treatment and an attempt was made at the Center to help her also. The patient's father has been described as a passive person who does not take a great deal of interest in his family, and who is able to provide only a small income. This boy was seen in therapy at the Mental Health Center for about six months and did not respond, so it was recommended that he be admitted to Eastern State for more intensive care." (Emphasis supplied.)

[3]Not unexpectedly, the physicians did not speak in one accord regarding the mental status of the petitioner. The District Court notes on page 17 of its Memorandum and Order that in August of 1967 a previous diagnosis was "changed to situational reaction of childhood."

who performed a competency evaluation on the petitioner. Before testing the petitioner, Dr. Tennyson did not have access to petitioner's prior records and spent a mere hour evaluating him.[4] Dr. Tennyson testified that in his opinion, that while petitioner suffered from a psychiatric personality disorder, he was nevertheless competent to stand trial and competent when he committed the crime. Nevertheless, in response to the trial court's question of whether petitioner's disorder translated into an unwillingness or an *inability* to take into consideration the rights of others in his actions, Dr. Tennyson replied as follows:

> That's the problem with the personality disorders right there is that we are not able, in any scientific way - using any measures that can hold up - to decide whether or not these kind of personality traits are due to an *inability* or an unwillingness. There is no way to know. There are very strong theories for both sides, but it makes no difference with regard to treatment. We make these diagnoses so that we can treat, so we can plan treatment. No one knows, as far as I'm concerned. (Emphasis supplied).

Synopsis of Mental Competency Evidence During Post-Conviction Process

During his post-conviction hearing, petitioner did not cooperate with his counsel in supporting or even exploring an insanity defense. He testified that when his post-conviction attorneys raised the issue of insanity, he told them "flat out" that he would not plead to insanity. Though several motions for funds to hire experts had

[4]However, the District Court noted that Dr. Dye, a psychologist who also examined petitioner, had access to petitioner's prior records and had concurred in Dr. Tennyson's diagnosis.

been denied, post-conviction counsel nevertheless obtained the services of Dr. Pamela Auble, a psychologist who met with the petitioner and performed a series of tests. Though familiar with differing opinions as to petitioner's diagnoses, she testified that brain damage could not be ruled out. Dr. Auble further testified[5] that when petitioner was 8 years old, he was placed in the Eastern State/Lakeshore Psychiatric Hospital for a year, beginning October of 1966. Subsequently, he was placed with the orphanage in Sevierville, Tennessee, where he spent the next five years. During these five years, his parents *never* visited him at the children's home. During one of his vacations home, in 1972, the petitioner, at the age of 13, reportedly took an axe to the television set, clubbed the flowers in a flower bed, and cut up the pajamas of his younger sister, Susan, leaving a razor in her bed. He set fires in wastebaskets and stole matches. In July of 1972, while he was still only 13 years old, he broke a window in the children's home and climbed in to a girl's bedroom. After being removed from the girl's bedroom, a knife was found in the bed. Subsequently, he was returned to Eastern State where he remained for several more months before inexplicably being released back to his family.[6] Dr. Auble testified that petitioner

[5]The following summary of testimony is taken in large part in large part directly from the District court's summation beginning on page 18 of its memorandum and order.

[6]Petitioner's medical records also contained the following note: "Miss Edna Shults @ Children's Home in Sevierville, TN. Called RE: Billy Ray Irick who has been there since 8/7/67 This child was ref. there from hr McNC and has been doing very well until vacation time @ home with his parents. One night he cut his sister's pajamas /c a razor blade and denied it at first, then adm. to the act. He has previously set fire to wastebaskets etc. & denied but

was suffering from a serious mixed personality disorder with strong paranoid features and possibly schizotypal or schizoid features.

Synopsis of Mental Competency Evidence Determined During habeas corpus Case

Subsequent to their appointment, current counsel became aware, through the efforts of their investigators, of newly discovered evidence which persuasively demonstrates that Irick was insane at the time of the defense and therefore not guilty by reason of insanity, or at least not guilty of the death penalty. The sources of this information included the father, mother and sister of the victim's stepfather, Kenneth Jeffers, all of whom shared a house with the petitioner in the days leading up to April 15, 1985. Needless to say, their sympathies lie not with the petitioner but with the victim, and therefore, their testimony should be considered extremely reliable.[7] Their affidavits depict the petitioner as out of touch with reality and incapable of acting logically or in conformity with the law. Below are brief excerpts from those affidavits. The first affidavit is from Linda Jeffers, the mother of Kenneth Jeffers. The affidavit, in part, states:

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later confirmed that he did this. Last night one of the little girl's room [sic] in the girls dorm was screaming and the boy was in the room with her and they thought @ first it was a sexual act but later found a butcher knife in her bed clothing. Dr. Carpenter was called & recommended immediate adm. to ESPH. Dr. Webster confirmed adm. for this boy. Ruth F. West."

[7]The petitioner never mentioned these events to present counsel. This information only came to light from conversations with the three members of the Jeffers family.

> On and for several weeks previous to April 15, 1985, my son, Kenneth, and his friend, Billy Ray Irick, resided continuously at our Virginia Avenue residence. I was acquainted with Billy Ray Irick previous to April 15, 1985 as he had lived with Kenneth, Kathy and the children at their former residence in Clinton, Tennessee...
>
> On and for several weeks previous to April 15, 1985, while Billy Ray Irick resided at our residence, I observed his behavior and language as follows: A) Billy Ray Irick's personal hygiene was atrocious. He had horrible body odor, he rarely took a bath and did not clean his clothes or his room where he slept... B) He repeatedly told me that he talked every day to the devil and that the devil and/or "voices" told him what to do. C) Billy Ray Irick repeatedly told him his "voices" would tell him to kill people. As evidence of such, I personally observed the following: C-1) I personally observed that Billy Ray Irick walked through our apartment and mumbled to himself. When I asked him what he was saying or to whom he was talking too (sic) he would answer by stating that he was listening and talking to his "voices." C-2) Some time immediately before April 15, 1985, I observed that Billy Ray Irick chased a young girl down Virginia Avenue holding a machete, screaming that he was going to kill the child... When Billy returned to our apartment, I asked him what he was doing and why he chased the girl with a machete? To the best of my recall, he told me that he chased the child with a machete because he wanted to kill her because "I don't like her looks." C-3) I distinctly recall that on several occasions, when I was in the company of Billy Ray Irick at our apartment, he would mumble to himself that he wanted to kill people. He would make these comments about total strangers that happened to walk past our apartment.

The next affidavit comes from Ramsey Jeffers, husband of Linda Jeffers and the father of Kenneth Jeffers. In addition to corroborating the information found in his wife's affidavit, Mr. Jeffers also stated:

> Some time immediately before April 15, 1985, some time at or before midnight, I stopped Billy Ray Irick in our apartment hallway as he

> walked mumbling to himself and towards my son's bedroom with a long bladed machete in his hand. I asked him what he was doing to which he said, "I'm gonna kill Kenny." I was able to take the machete away from him and stopped him from hurting my son."

The third Jeffers affidavit is from Cathy Jeffers (not to be confused with the victim's mother Kathy), the sister of Kenneth Jeffers. Among other observations, Cathy Jeffers stated as follows:

> 3) To the best of my recall, in and prior to April of 1985, I was married to Steven Miller and we resided in Knoxville, Tennessee. I had been to my parents' apartment approximately three (3) to four (4) times in April of 1985 when Kenneth and Billy Ray Irick temporarily resided with them. I distinctly observed the behavior and language of Billy Ray Irick as follows... B) Billy Ray Irick continuously mumbled to himself. I remember asking Mr. Irick what he was saying or to whom he was talking too (sic). I distinctly remember that Billy Ray Irick told me that he was listening and talking to "a voice." He continued by commenting in a stern voice/firm conviction that "the only person that tells me what to do is the voice."... C) I had slept at my parents' apartment one evening in April, 1985, when Billy Ray Irick woke at night, walked and mumbled through the apartment and woke me up to warn me that the police were in the apartment and that they were there to kill us with chainsaws...

Other newly discovered evidence came from Barbara Holcomb, a house mother at the orphanage, who stated that petitioner was the most disturbed child she had ever seen and from an early age was already "sexually acting out." This "acting out" included cutting the crotches out of little girl's underwear at the orphanage and breaking into one of the girl's bedrooms with a knife as discussed above. Inez

Prigmore, a neighbor of the Irick family and interviewed for the first time by investigators appointed in petitioner's habeas case, stated that petitioner's father was an excessive drinker and was extraordinarily abusive towards his children. Ms Prigmore stated in her affidavit filed with the District Court that she saw petitioner's father strike to the ground his pregnant daughter and hit petitioner in the head with a board. She observed petitioner's family members, including petitioner, with bruises over their bodies from his mistreatment. Ms. Prigmore actually witnessed petitioner, at age seventeen, being ordered to leave the family home.

When one considers the meaning of the newly discovered evidence, along with existing mental competency evidence, any reasonable juror would have reasonable doubts about petitioner's sanity at the time of the offense. A resolving picture of insanity comes into clear focus when one considers, for instance, the Brady evidence unlawfully withheld from the trial attorneys. One such document was a letter from the victim's mother, Kathy Jeffers, to the District Attorney's office, which clearly indicates in one of its paragraphs that petitioner's actions were profoundly in contradiction to his obvious love for the victim and her other children.

> Why without some provocation from someone would Bill want to do this when just two months earlier he risked his own life to save two of my children from a burning house...

Other evidence withheld in violation of Brady demonstrates that Irick was also inebriated at the time. A Knoxville Police Department report found in the District Attorney's file included descriptions of a "drunken" Irick left to care for the children, beer cans littering the victim's home's back porch, and statements of the victim's siblings indicating that Irick was drinking heavily that night. In addition to the police report described, in part, above, the prosecution also failed to provide the defense with a handwritten note prepared apparently by someone in the District Attorney's office from a conversation with petitioner's mother, Nancy Irick, indicating that the petitioner drank out of the commode.

The most disturbing of the Brady violations however may the be withholding of a statement from Kathy Jeffers given to law enforcement describing the night of April 15, 1985, which stated, in part:

> Q The room where that you left Paula at...and so, you went to work at Hagaman's, and then the next time you saw your husband, where was that at?
>
> A He came in, I was getting ready to go to the phone. The girl I work with, Donna, was there with me. I was going to call and see if he was at the other truck stop and tell him to go home, that Bill was *drunk and talking crazy*...
>
> Q Yeah, but Bill was intoxicated when you left?
>
> A He wasn't drunk drunk, but he was well on his way.

Q Yeah. And so you told your husband when he come in-what did he tell you when he come in the truck stop?...

A And he started talking about Margaret (?), and I interrupted him, and I asked him to please go to the house and stay with the kids, that Bill was *drinking and talking crazy*. ...

Q Have you ever had any feelings that maybe Bill might be abusing one of the kids?

A No. He loved, he loved the kids. He took up for them, all of them. If anybody said anything to them, he was one of the first ones there...he was one of the first ones there to defend them.

(Emphasis supplied.)

Finally, despite the district court's denial of a request for funds to hire mental health experts, habeas counsel obtained the cooperation of Dr. William Blackerby, a clinical neuropsychologist, and Dr. Kenneth Knickerson, a clinical forensic psychologist. Based on their review of petitioner's medical records submitted in this case, along with the newly discovered evidence described above, these two experts disagreed profoundly with conclusions of Dr. Tennyson, the government expert who testified at petitioner's trial. In his affidavit filed with the court, Dr. Blackerby states, in part:

> Based on my review of the above materials and information, my opinion is that Billy Ray Irick, at the time of Paula Jeffers' [Dyer's] murder, suffered at the very least from a dissociative order, and probably was schizophrenic or intermittently psychotic. The dissociation experienced by persons such as Billy Ray Irick are involuntary and are brought on by

anxiety and stress, especially with combined with drug or alcohol abuse. During the periods of dissociation, the affected person experiences a separation of his conscious mind from his actions thereby loosening, if not extinguishing, conscious control of his actions; he is also amnestic afterwards for the dissociated period....It is my opinion that Mr. Irick's mental condition is and was far worse than a personality disorder and that it manifested itself, as described above, in dissociative behavior resulting in uncontrollable acts. The probability of brain damage is great and was suggested in several previous evaluations. My preliminary diagnosis differs from previous diagnoses in part because medical science's understanding of dissociative disorders has increased significantly since Dr. Pam Auble's examination in 1991. It is also my understanding that earlier examiners did not have the benefit of the observations of Barbara Holcomb, Inez Prigmore, and Ramsey and Linda Jeffers, which I found to be informative.[8]

II. APPLICABLE *HABEAS CORPUS* LAW

AEDPA would have impermissible retroactive effect as to this case.

As stated in his application, petitioner submits that the amendments to Title 25, Chapter 153 (AEDPA) are inapplicable because their application would have an impermissible retroactive effect and that his petition should be judged by pre-AEDPA law. Petitioner adopts and relies upon the arguments made in his application and other previous pleadings filed before this court in regard to this issue and will not repeat those arguments here.

[8]Dr. Kenneth Knickerson concurred with Dr. Blackerby's diagnosis and other conclusions.

Tennessee's statute of limitations for post-conviction proceedings is not a proper basis for procedural default.

The State has argued, and the District court so ruled, that many of petitioner's claims cannot be reached in this proceeding because the claims have been procedurally defaulted for failure to raise the claims in previous state proceedings. Putting aside temporarily the substantive issue of whether petitioner did in fact fail to raise these issues, petitioner submits that the State's applicable statute of limitations (currently codified at T.C.A. §40-30-102) is not a proper basis for a procedural default in a *habeas corpus* proceeding for at least two reasons. The first is that Tennessee courts have made the application of the statute of limitations depend on antecedent rulings of federal law. See, e.g., Sands v. State, 903 S.W.2d 297 (Tenn. 1995) and Burford v. State, 854 S.W.2d 204 (Tenn. 1992). Even after Tennessee's Post-Conviction Act was amended in 1995, the Tennessee Supreme Court stated in 1998, in dismissing a *fourth* post-conviction petition on procedural grounds, "[b]y this ruling, we do not intend to foreclose relief allowable under the due process clauses of the state and federal constitutions." Cazes v. State, 980 S.W.2d 364, 365 n.3 (Tenn. 1998). Pursuant to Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), this court should refuse to find Tennessee's statute of limitations to be sufficiently "independent" to bar petitioner's habeas claim.

The second reason is that a state procedural rule will not bar federal relief if the state rule is not "strictly or regularly followed" by the courts of the state. Hathorne v. Lavorn, 457 U.S. 255, 262-63, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). In applying Tennessee's statute of limitations to post-conviction petitions, the Tennessee Supreme Court has made exceptions and allowed "untimely" claims. In fact, Tennessee's Supreme Court has held that, at least under some circumstances, there must be a "voluntary or knowing waiver" of a fundamental procedural right. Sawyers v. State, 814 S.W.2d 725, 729 (Tenn. 1991). In Sawyers, the Tennessee Supreme Court held that the conviction of a petitioner who discovered eight years after his conviction that he was actually a juvenile, not an adult, at the time of the crime was prejudicial error requiring remand. In that case, the court found that the post-conviction statute did not contemplate barring claims when there had not been a voluntary or knowing waiver of the fundamental procedural right. The court stated:

> Consequently, where the error is raised at the first opportunity and there is no suggestion of bad faith on the petitioner's part, it would be patently unfair to conclude that the issue has been "waived," as that term is contemplated by the post-conviction statutes, principally T.C.A. §40-30-112(b). Moreover, under these facts, there has been no voluntary or knowing waiver of what we hold to be a fundamental procedural right. We thus reject the waiver imputed to the petitioner by the trial court's decision. Id. at 729.

In its response, the State cites the case of Hutchison v. Bell, 303 F.3d 720 6th Cir. 2002, a case decided since the filing of petitioner's application, for the holding that Tennessee's post-conviction statute of limitations constitutes an adequate procedural bar. However, in light of recent state court opinions, petitioner respectfully denies that Hutchison should be controlling on this matter. In Hutchison, the court stated, "[a]lthough Tennessee courts will often permit the hearing of an untimely claim, the decision is confined by the due process standards delineated in Burford and its progeny." Id. at 738. The court further stated, "[t]hus, as with the Virginia rule, Burford provides an exception to the statute of limitations when the denial of the hearing itself would violate the petitioner's constitutional due process rights. Unlike Ake, the decision to apply the Burford exception does not depend upon the state court's determination of the merits of the petitioner's constitutional challenge to his conviction or sentence." Id. at 740-741.

Nevertheless, the Hutchinson analysis and holding appear to be at odds with the Tennessee Supreme Court's pronouncement of state law in Van Tran v. State, 66 S.W.3d 790 (Tenn. Dec. 4, 2001). In Van Tran, the petitioner sought to reopen his post-conviction case arguing that he was mentally retarded and therefore *statutorily* ineligible for the death penalty under T.C.A. §39-13-203 which had been enacted subsequent to his earlier post-conviction petition. Though Van Tran did not raise a

constitutional issue in his motion to reopen either before the trial or appellate courts, the Supreme Court *sua sponte* recognized the issue as "critical and overriding" and requested the parties to brief the constitutional aspects of the issue. Id. at 799.

Prior to deciding whether Van Tran had a constitutional right not to be executed based on his mental retardation, the court first had to decide whether Van Tran should be allowed even to present his argument, given the fact that he had never raised the constitutional issue until prompted to do so by the Tennessee Supreme Court. In other words, had not petitioner waived the issue? A vehement dissent argued that Van Tran had, in fact, waived the issue. In response, the majority stated in part:

> The dissent's arguments are misplaced. A motion to reopen, by definition, is based on a new legal issue or new scientific evidence of actual innocence that serves as a new basis to "reopen" the earlier post-conviction proceedings. Tenn. Code Ann. §40-30-217(A) (1997) having identified that the unique but narrow circumstances of this case raise serious constitutional implications of first impression, a majority of this court has decided to address these critical issues. [Footnote omitted]. As noted, the state has raised none of the procedural objections argued by the dissent and the parties have neither briefed nor argued them. As this court has very recently said, "'[T]he importance of correctly resolving constitutional issues suggests that constitutional issues should rarely be foreclosed by procedural technicalities.'" [Cite omitted]. Id. at 799.

The court then went on to hold that under both state and federal constitutions, Van Tran had a right not to be executed if found to be mentally retarded. The Supreme Court's criterion in determining whether to apply the right retroactively was whether "the new rule materially enhances the integrity and reliability of the fact finding process of the trial." Id. at 811. In conclusion, the court stated that its decision to reopen the case, despite the statute of limitations and an apparent "waiver" of the issue, and to apply its holding retroactively was a matter of "fundamental fairness." Id.

The dissent lashed out at the majority for having "*excused the waiver* addressed the substantive issue and created a 'final appellate ruling establishing a constitutional right.'" Id. at 817. (Emphasis supplied.) The dissent was particularly disturbed that Van Tran had never raised the constitutional issue until the petitioner filed his permission to appeal to the Tennessee Supreme Court. In dissent, Justice Barker stated:

> The majority holds that the considerations of "fundamental fairness" dictate that the petitioner have a meaningful opportunity to raise his *substantive* constitutional claim. Declining to be bound by what it feels are the "technical" mandates of the Post-Conviction Procedure Act and Supreme Court Rule 28 governing waiver of issues, the majority has given the petitioner an evidentiary hearing, even though the petitioner has never been statutorily entitled to receive this hearing in the first instance. Nevertheless, the majority grants the petitioner an evidentiary

> hearing so as to provide him "due process of law." I disagree because in my view the petitioner has already been afforded due process of law...

(Emphasis supplied.) Id. at 823.

Therefore, based on the Van Tran decision, it appears clear that the Tennessee Supreme Court's approach includes a case by case analysis to ensure that fundamental fairness is assured and that the fact finding process retains its integrity and reliability, especially in the context of the death penalty. In that context, the Supreme Court reiterated that the death penalty was "qualitatively different from any other sentence and this 'qualitative difference' between death and other penalties calls for a greater degree of reliance when the death sentence is imposed." Id. at 807, cites omitted. Laudably, the Tennessee Supreme Court has on occasion allowed "fundamental fairness" as applied to both procedural and *substantive* claims to trump the state's statute of limitations. In this instance, the federal courts may also properly reach petitioner's claims.

Petitioner was denied a full and fair opportunity to be heard under Tennessee's post-conviction process.

As with previous arguments raised in Section II, this issue concerns the proper application and effect of AEDPA and is less a substantive constitutional claim (though due process and the Sixth Amendment are implicated) than an issue of statutory construction. This claim asserts that §2254(b)(1)(B)(i) and (ii) of AEDPA

require the granting of this application because of the absence and/or ineffectiveness of state "corrective processes." Tennessee's post-conviction process, at least as it was applied in this case, was absent or ineffective in that among other failings, it disallowed all investigative funds at the trial level except for $300.00 to compile statistics regarding Knox County's use of the death penalty while disallowing any funds for investigative or expert services (including mental health experts) during the post-conviction process. Had the trial or post-conviction processes provided previous counsel with sufficient funds, then it is likely that the factual circumstances which now would compel a reasonable juror to have a reasonable doubt concerning Irick's guilt/sanity would have come to light. In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), which was decided well before petitioner's post-conviction hearing, the Supreme Court held that defendants are constitutionally guaranteed competent psychiatric assistance.

Despite the lack of funding, post-conviction counsel obtained the services of Dr. Pamela Auble, whose testimony, in part, has been previously discussed in this pleading. Nevertheless, the state trial court categorically refused to consider her testimony since her evaluation had been conducted after the petitioner had been convicted of the crime. (The state court did not explain how such an evaluation could have otherwise been conducted.) See, State v. Irick, 973 S.W.2d 643, 648 (Tenn.

Crim. App. 1998). Though recounting her testimony in its opinion, the post-conviction appellate court did not characterize or otherwise indicate whether or how Dr. Auble's testimony was considered or whether the trial court had properly refused to consider it. Certainly petitioner was denied a full and fair hearing on his mental health claims before the post conviction courts - the very claim that now constitutes a claim of actual innocence.

AEDPA and previous law require the granting of a writ of *habeas corpus* in those incidences were there was an absence of or ineffectiveness of state "corrective processes" which denied the petitioner a full and fair opportunity to be heard. This is only proper because as the Supreme Court has stated: "In capital proceedings generally, this court has demanded that fact finding procedures aspire to a heightened standard of reliability. This special concern is a natural consequence of a knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." Ford v. Wainwright, 477 U.S. 399, 411, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

With the failures documented and/or related above, petitioner respectfully submits that the standard of reliability in state processes fell far short of that required statutorily or constitutionally. Furthermore, as with so many issues in this case, this claim should also be viewed in light of petitioner's overall claim of miscarriage of

justice. The constitutional rights implicated by these failures would include the petitioner's Sixth Amendment right as well as his due process rights under federal and state constitutions.

The standard for determining what constitutes a fundamental miscarriage of justice is suspect in light of Williams v. Taylor.

Petitioner adopts and relies on his pleadings previously filed with this court to address this issue, including but not limited to his Application.

III. CONSTITUTIONAL CLAIMS

Brady Claims.

Post-conviction counsel found and alleged that numerous material documents were never disclosed to Irick's trial counsel. The post-conviction state courts held that the materials were either not withheld and/or were not material, and therefore denied all Brady claims. The District court upheld the state court determination and further found that many of the Brady claims had been procedurally defaulted. The most important of the Brady items is discussed below. Petitioner contends that the claims were not defaulted and that the state court decisions were contrary to, or an unreasonable application of federal law as determined by the Supreme Court. Especially when reviewed in connection with the newly discovered evidence, denial of relief in these Brady issues would constitute a miscarriage of justice.

1. Petitioner "risked his own life to save two of my children."

The State failed to disclose a letter written by the victim's mother, Kathy Jeffers, and subsequently found in the District Attorney's office. This letter consisted of a series of questions, one of which asked:

> Why without some provocation from someone would Bill want to do this when just two months earlier he risked his own life to save two of my children from a burning house?

When the claim was presented to the Tennessee Court of Criminal Appeals, the court stated that "[a]t the evidentiary hearing, the petitioner presented no evidence as to when the state received either the letter purportedly written by Ms. Jeffers or the DHS records. The letter was undated and unsigned. We cannot, therefore, undeniably conclude that the state withheld this evidence." While not finding this claim to have been procedurally defaulted, the District court nevertheless held that the State court ruling was not contrary to or an unreasonable application of Federal law and denied the claim. Petitioner respectfully disagrees because the trial court unconstitutionally shifted the burden of proof to the defendant to prove when the State received the letter (and DHS records) when United States Supreme Court precedent has held that in such circumstances the burden of proof was on the government. "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his

adversary." See, Campbell v. United States, 365 U.S. 85, 96, 81 S.Ct. 421, 5 L.Ed.2d 428 (1961) regarding the production of a report under the Jencks Act. Furthermore, Kathy Jeffers submitted an affidavit to the district court which stated that she had delivered the letter and briefly discussed its contents with either Assistant District Attorney Dake or Jennings two to four weeks before the trial.

Kathy Jeffers' question quoted above strongly indicates, from the perspective of the victim's own mother, that only a horrendous aberration in the mind of the petitioner could explain the rape and murder of her daughter. When this evidence is considered in light of the newly discovered evidence averring petitioner's insanity, the overall consequence of the letter is that there is more than a "reasonable probability of a different result" in petitioner's trial had the evidence been available to the jury.

2. Petitioner had "been observed taking good care of the children."

The State failed to disclose a Department of Human Services letter dated March 23, 1984 (over a year before the offense) which, in part, explained that the petitioner lived in the Jeffers home, "appeared stable," and had "been observed taking good care of the children during a surprise home visit while Mr. and Mrs. Jeffers were working." While not finding the claim to be procedurally defaulted, the District court nevertheless held that the state court ruling was not contrary to or an unreasonable

application of federal law. As with the previous claim, the state appellate court shifted the burden of proof to the petitioner to demonstrate when the state had reviewed the records. For the same reasons as stated above, petitioner submits that the state ruling was contrary to or an unreasonable application of federal law, as determined by the Supreme Court. Furthermore, the petitioner submits that this information that was withheld was in fact material and when viewed in light of all the other evidence, demonstrates that the petitioner loved and cared for these children and that his acts were a gross aberration that could only be explained by a psychological breakdown rendering the petitioner insane at the time of the offense.

3. Report/photographs of victim's home with beer cans.

The State failed to disclose law enforcement report/photographs of the victim's home which, among other things, depicted/described numerous beer cans within and outside the home. While the District Court did not find this claim to have been defaulted, nevertheless, the court held that the State court ruling was not contrary to or an unreasonable application of federal law in finding the photographs immaterial under applicable Brady law. For the reasons stated in the previous two subsections, petitioner states that the photographs of the beer cans lent strong credibility and corroboration of Irick's intoxicated state and that the state determination was contrary to or an unreasonable application of federal law. See, Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The state of Irick's mind is of course of central concern to the finding of guilt and/or a death penalty sentence, especially in

light of the newly discovered evidence already discussed. Intoxication in conjunction with a severely disturbed mental state would demonstrate petitioner's insanity at the time of the offense and, therefore, petitioner is entitled to relief on this issue. See also, Affidavit of William Blackerby, *supra.*)

4. "Drunken Irick" left to care for children.

Also included with the District Attorney's file was a Knoxville Police Department report which stated that a "drunken Irick" was left to care for the children on the evening of the offense. The report also contained descriptions of numerous beer cans. It was the District Court's finding that this claim was procedurally defaulted because the petitioner failed to present this item "to the highest Tennessee court." Since the court ruling, however, the Tennessee Supreme Court has enacted Rule 39 which states:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearsing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Supreme 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. An automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated §39-13-206, a claim presented to the Court of Criminal Appeals shall be considered

exhausted even when such claim is not renewed in the Supreme Court on automatic review. [Adopted June 28, 2001.]

Petitioner submits that Rule 39 clarifies Tennessee law in regard to exhaustion and removes the procedural default from the claim. Furthermore, courts have previously found that a claim is exhausted when "incidents left out differ only in number, not in kind." Miller v. Estelle, 677 F.2d 1080, 1083-1084 (5th Cir. 1982). Petitioner's intoxication is the subject of several non-defaulted claims and, therefore, this specific claim should not be defaulted. The case cited by the state, Baldwin v. Reese, 541 U.S. 27, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) does not contradict this position since the Baldwin case concerned a petitioner who failed to raise a particular class or type of claim to the State courts and was therefore precluded in his *habeas corpus* claim. However, petitioner has raised non-defaulted Brady claims regarding intoxication throughout the proceeding; therefore, this claim should not be held defaulted. The claim is material for the same reasons as Item 3.

5. Petitioner was "drunk and talking crazy."

One of the more egregious failures on the part of the state was its refusal or failure to provide defense counsel with a statement recorded by law enforcement of the victim's mother, Kathy Jeffers. In the statement, Ms. Jeffers stated, in part, that on the evening of the offense, the petitioner was "drunk and talking crazy." Petitioner

has previously set out in greater detail, some of the more relevant questions and answers found within Ms. Jeffers' statement. Those will not be repeated here. Nevertheless, Ms. Jeffers' statement is strong evidence not only of the petitioner's intoxication but, from Ms. Jeffers' point of view (a person who had known and lived with the petitioner over a period of years), that petitioner was talking "crazy" just prior to the offense. Ms. Jeffers testified at trial that she was so disturbed by the petitioner's behavior that throughout the evening she was extremely anxious and telephoned her husband to check on Irick and her children.

While not finding the claim to be defaulted, the district court found that the state court's finding of immateriality was not reversible under AEDPA. The victim's mother's statement that petitioner was "drunk and talking crazy" is undoubtedly material for its mentally exculpatory nature, especially when considered in light of Dr. Blackerby's diagnosis which lists intoxication as an important factor in petitioner's mental incapacity. Proper disclosure of this information might have also led to more fruitful investigations by trial counsel. Therefore, the state ruling was contrary to or an unreasonable application of Kyles v. Whitley.

6. Petitioner drinking from the toilet.

The State failed to disclose a handwritten note from the District Attorney's file which indicates that the petitioner's mother had stated, among other things, that

petitioner had drank from the toilet. Though the District Court held this claim to be procedurally defaulted for failing to present it to the Tennessee Supreme Court, petitioner respectfully argues that Rule 39, discussed under No. 4, excuses that alleged omission. Furthermore, the materiality of this bizarre behavior is clear, especially when viewed in conjunction with all the other evidence concerning Irick's instability and insanity at the time of the offense. Drinking from the toilet is strong evidence of an underlying mental disability and when combined with the newly discovered evidence would likely lead to a "different result."

Insufficient Evidence Claim: Actual Innocence

Under this heading, the petitioner has previously raised two categories of evidence, namely, evidence tending to show (1) that some person other than the petitioner committed the crime based on questions raised by Assistant District Attorney David Drake regarding the government's own interpretation of lab data on bloodstains, and (2) that petitioner was insane/incompetent at the time of the offense and therefore, not guilty by reason of insanity. The petitioner will only address the second claim regarding his mental status at the time of the offense.

As previously provided above, defense counsel, with the help of appointed investigators, discovered previously uninterviewed witnesses who told via their affidavits of the horrific time period just before the offense. These eyewitnesses

described seeing Billy Ray Irick acting in a frenetically violent and uncontrolled manner. Specific events included his stalking of his best friend with a machete, the chasing of an unknown girl down a public street in Knoxville, threatening her with a machete, and the ongoing "hearing" of voices that told him what to do.

While the State declares categorically that the case of Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993) stands for the proposition that a freestanding innocence claim is not cognizable pursuant to a writ of *habeas corpus*, petitioner respectfully disagrees. Relying in part on the 9th Circuit's decision in Caro v. Calderon, 162 F.3d 1157 (9th. Cir. 1998), the petitioner submits that the Supreme Court majority assumed and/or held that the execution of an innocent person would in fact violate our Constitution. Herrera, 506 U.S. at 417, 419 and 430-37. In that the Jefferses' affidavits persuasively demonstrate that petitioner was innocent by reason of insanity under Tennessee law, petitioner submits that he has a cognizable freestanding claim of actual innocence. While Herrera's "actual innocence" claims may be judged by a different standard than Schlup's "actual innocence" claims, see Caro, 162 F.3d at *3, petitioner has met the burden and would respectfully direct the court's attention to the earlier factual and legal discussion regarding miscarriage of justice for the relevant facts and legal authorities.

The district court refused to find a miscarriage of justice with regard to the new evidence. In reaching its conclusion, however, the court never analyzed the content or possible effect of the Jefferses' affidavits. Instead, the court only considered the old mental health evidence and focused its analysis on the affidavit of Dr. William Blackerby.[9] Though the court had refused to appoint a psychiatric expert on behalf of the petitioner, the court nevertheless found Dr. Blackerby's proffered testimony to be unconvincing, stating, "[h]owever, a diagnosis made by a mental health expert who has observed, interviewed and tested a patient carries more weight with this court than a diagnosis of a reviewing expert who never met the patient." The court never considered what effect the new evidence would have had on the previous experts who testified at the petitioner's trial, especially in light of the fact that the government's own psychiatrist was unable to state whether the petitioner was capable of controlling his own actions.

The Supreme Court recently reviewed the miscarriage of justice issue with regard to another Tennessee case. In the case of Bell v. Thompson, 125 S.Ct. 2825 (2005), the court found that the petitioner had in fact stated a basis for miscarriage of justice, allowing for the granting of the application to appeal. Petitioner believes that

[9]William Blackerby was a psychiatrist who was hired with the defense counsel's own money at a reduced rate. Dr. Blackerby reviewed the available medical records as well as the affidavits described herein, in forming his opinion. Dr. Blackerby practiced in Chattanooga, Tennessee, while the petitioner has been held in the state's Riverbend facility located in Nashville, Tennessee.

the Supreme Court analysis and summation of the miscarriage of justice issue bears repeating here:

> In an effort to "balance the societal interest in finality, commonity and conservation of scarce judicial resources with individual interest in justice that arises in the extraordinary case," Schlup, 513 U.S. at 324, 115 S.Ct. 851, the court has recognized a miscarriage of justice exception. "'[i]n appropriate cases,'" the court has said, "the principles of commonality and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration'" Carrier, *supra* at 495, 106 S.Ct. 2639 (quoting Engle, *supra* at 135, 102 S.Ct. 1558)....For purposes of this case, several features of the Schlup standard bear emphasis. First, although "[t]o be credible," a gateway claim requires "new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial," Id., at 324, 115 S.Ct. 851, the habeas court's analysis is not limited to such evidence....In addition, because the district court held an evidentiary hearing in this case, and because the state does not challenge the court's decision to do so, we have no occasion to elaborate on Schlup's observation that when considering an actual innocence claim in the context of a request for an evidentiary hearing, the district court need not "test the new evidence by a standard appropriate for deciding a motion for summary judgment, " but rather may "consider how the timing of the submission and the likely credibility of the affiant's bear on the probable reliability of that evidence." 513 U.S., at 331-332, 115 S.Ct. 851...Schlup makes plain that the habeas court must consider "' all the evidence,'" old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." See, Id. at 327-328, 115 S.Ct. 851 [further cites omitted.]...The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurists. Ibid.

Id. at 2076-2077. "A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt - or to remove the double negative, that more likely than not, any reasonable juror would have reasonable doubt." Id at 2077. In light of the new and reliable evidence presented in his *habeas corpus* petition, petitioner states that any reasonable juror would have reasonable doubt about his guilt.

Aggravating Circumstances: Felony murder

As to this aggravating circumstance, petitioner has argued that it fails to constitutionally narrow the class of individuals eligible for the death penalty. During the post-conviction process, the Tennessee appellate court agreed, citing both the Eighth Amendment and Article I, §16 of the Tennessee Constitution as bases for its holding. Nevertheless, the Court of Appeals ruled the error harmless.

The District Court found that the petitioner had procedurally defaulted his claim by allegedly failing to challenge the State's harmless error analysis of the felony murder aggravator on federal constitutional grounds when he pled his claim before Tennessee's Supreme Court.[10] Petitioner respectfully disagrees with the District Court's finding and would direct this court to the petitioner's application for permission to appeal (addendum no. 16, p. 26) where petitioner raised as authority for

[10]The District Courts found that the petitioner only cited to the state case of State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) in its state post-conviction pleadings.

his position Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (2980) in addition to Middlebrooks.

Furthermore, the Tennessee Supreme Court in Middlebrooks based its decision, in part, on the Eighth Amendment to the U.S. Constitution, stating, "...we conclude that Tenn. Code Ann. §39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, §16 of the Tennessee Constitution where the death penalty is imposed for felony murder." Id. at 345. Where petitioner has cited a case employing a federal constitutional analysis in a like factual situation, there is no default of the issue. Franklin v. Rose, 811 F.2d at 322, 326 (6th Cir. 1987).

While apparently the Supreme Court has not ruled that duplicative aggravating factors are unconstitutional, (see, Jones v. U.S., 527 U.S. 373, 398, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999)), nevertheless, the significance of the felony murder aggravator was that the Tennessee Supreme Court did, in fact, find the aggravator to be unconstitutional in petitioner's case. In light of the newly discovered facts referenced above, and with the court's review of all the facts and circumstances of this case for a miscarriage of justice, the absence of one of the four aggravators is

highly material in determining whether any reasonable juror would find a reasonable doubt as to petitioner's guilt.

Inadequate Funding

The District Court found that petitioner's claim that he was unconstitutionally denied funds for investigators at the trial level and experts' services during the post-conviction proceedings is not cognizable. However, as stated earlier, §2254(b)(1)(B)(i)(ii) and the case of Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) provide that where there is an absence of effective state processes, an applicant should be provided a hearing. By depriving counsel of needed experts and investigators, the State was not capable of reliably finding the relevant facts in contravention of petitioner's due process rights under the federal constitution. As previously argued, the Supreme Court in Ford v. Wainwright, *supra*, stated that death penalty cases demand that "fact finding procedures aspire to a heightened standard of reliability." 477 U.S. at 411. The Supreme Court has also found the appointment of mental health experts is a constitutional imperative. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). See also Townsend, 372 U.S. at 212, 218 and Coleman v. Zandt, 708 F.2d 541, 548 (11th Cir. 1983).

The proof of the ineffectiveness of the State process can be seen in the fact that highly relevant information concerning the petitioner was never discovered until the federal *habeas corpus* process where defense counsel were finally able to retain investigators. Therefore, petitioner respectfully submits that his claim is cognizable under said standard and highly relevant in determining whether a hearing should be granted for a lack of effective state procedures and/or there has been a miscarriage of justice.

Unconstitutional Prosecutorial Argument

Petitioner's rights under the Eighth and Fourteenth Amendments were violated when the prosecutor, despite a motion *in limine* and petitioner's objections during the trial, used inflammatory and improper arguments before the jury in the penalty phase. In particular, a long impassioned argument based on deterrence was heard over the objection of petitioner's trial counsel. During the same argument, the prosecutor also expressed his own personal beliefs. The following are brief excerpts from the prosecutor's argument:

> Mr. Dake: ...you know what his crime is. What punishment meets it? Is that not the highest form of crime - the rape and murder of a child? And, if it is the highest form of crime, doesn't it demand the highest form of punishment? But that is not the only question that we look to, in deciding a sentence or a judgment in a criminal case. We, also, look at that defendant, not only to see if the punishment matches the crime, but to determine to what extent are we willing to risk that he will do it,

again? How many more people will we risk to Billy Ray Irick under any circumstances?

Mr. Miller: May it please the court, I object. May we approach the bench?

The Court: Yes, sir.

(Whereupon a bench conference was held off the record in the presence of the jury but out of the hearing of the jury.)

Mr. Dake: Know this, ladies and gentlemen, if you give out the death sentence and it is carried out, you will never bear any risk from Billy Ray Irick. Not one other 7 year old child will ever be at risk of him - not one. No matter what else happens....some of you may believe that punishment is a deterrence. Some of you may not. I don't know. I personally believe that it is. I will tell you why, and this is not an original thought. But I have heard this comment made, and I guess it all depends on how you are turned [sic] - how you look at the world. Someone said that the death penalty is - sort of like a lighthouse. You don't know how many ships have been saved by its beacon. You can't count that. You only know the ones that disregard its warning. Those, you count. Those are the Billy Ray Iricks.

In addition, the prosecutor made an improper implication that the petitioner had been involved in previous acts though there was no basis for that statement within the evidentiary record. The following is the relevant excerpt:

Mr. Dake: And he takes it out on a 7 year old child. We knew that about Billy Ray Irick before Ms. Lunn or Dr. Dennison ever hit that witness stand. What we didn't know is he has been doing it for a long time.

Mr. Miller Objection, your Honor.

Petitioner respectfully submits that the State court's failure to find that the Assistant District Attorney's conduct constituted flagrant conduct warranting a plain error reversal is contrary to or an unreasonable application of Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Similarly, the state made an unreasonable determination of the facts in that a fair reading of the testimony would require a finding that the prosecutor's comments about previous similar acts was referring to similar sexual acts or rape.

Ineffective Assistance of Counsel

In violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, petitioner was denied the effective assistance of counsel. In particular, trial counsel failed to interview critical witnesses, including but not limited to Ramsey, Linda and Cathy Jeffers, who provided affidavits in this case, and other sources of information which would substantiate an insanity defense. The three Jefferses had all shared a house with the petitioner in the weeks just before the offense. The house was located within blocks, and a relatively short walk, from the crime scene. Counsel failed to meet the constitutional standard for assistance of counsel when they failed to make a reasonable investigation that included the three people who knew the most about petitioner in the weeks just before the offense. A legally sufficient investigation

would have also included interviews with Barbara Holcomb, his house mother at the orphanage, and Inez Prigmore, a longtime neighbor of the family.

In denying relief, the District Court found that the petitioner skipped the intermediate level of state court review regarding this issue resulting in a procedural default. In response, petitioner respectfully directs the court's attention to Rule 39 of the Tennessee Supreme Court excusing any such procedural default, the miscarriage of justice exception, as well as the case of Meeks v. Bergen, 749 F.2d 322, 325 (6th Cir. 1984) which holds that submitting the issue to the state supreme court avoids a procedural default.

Furthermore, this and previous pleadings before this court have recited the many startling facts that were discovered during petitioner's *habeas corpus* proceeding. These newly discovered facts support a finding that a miscarriage of justice has occurred in this case, thus providing a "gateway" through which petitioner's Sixth Amendment rights to counsel can be heard.

SPEARS, MOORE, REBMAN & WILLIAMS
By: Carl E. Shiles, Jr.
Carl E. Shiles, Jr., BPR #011678
Attorneys for Petitioner
P. O. Box 1749
Chattanooga, TN 37401-1749
(423) 756-7000

By: Howell Clements
Howell G. Clements, BPR# 001574
1010 Market Street, Suite 404
Chattanooga, TN 37402
(423) 757-5003

CERTIFICATE OF SERVICE ON FOLLOWING PAGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this pleading has been served on counsel for all parties at interest in this cause by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

Jennifer Smith
State of Tennessee
Criminal Justice Division
Cordell Hull Building, 2nd Floor
426 Fifth Avenue North
Nashville, TN 37243

This 20th day of July, 2006.

SPEARS, MOORE, REBMAN & WILLIAMS

By: M. Dillon

CES/mtd
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Nos. 01-5638/02-5105

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLY RAY IRICK,

Petitioner-Appellant,

v.

RICKY BELL, Warden

Respondent-Appellee.

In re: BILLY RAY IRICK,

Movant.

ORDER

FILED
APR - 3 2006
LEONARD GREEN, Clerk

Before: SILER, BATCHELDER, and GILMAN, Circuit Judges.

Billy Ray Irick, a Tennessee death-row prisoner represented by counsel, appeals a district court order dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. He applies for a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1) and Fed. R. App. P. 22(b). Citing Tenn. Sup. Ct. R. 39, he has also filed a notice of supplemental authority, a motion requesting permission to supplement the COA application, and a motion for an order authorizing the district court to consider a second or successive habeas corpus petition. *See* 28 U.S.C. § 2244(b)(3)(A). The warden opposes this court's authorizing a second or successive petition.

Irick was convicted of one count of felony murder and two counts of aggravated rape, sentenced to death for the former, and given two forty-year sentences for the latter. In 1999, he filed his federal habeas corpus petition, which was dismissed in March 2001. He now appeals in No. 01-5638.

After Irick filed his appeal, Tenn. Sup. Ct. R. 39 went into effect. The rule not only applied retroactively, it also (Irick contends) lifted the procedural bars the district court had found applicable to several of his habeas claims. *See Adams v. Holland*, 330 F.3d 398, 401-05 (6th Cir. 2003). Citing Rule 39, Irick filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) in the district court and a notice of additional authority in his appeal.

The district court transferred the Rule 60(b) motion here because then-controlling caselaw held that such a motion had to be treated as a second or successive habeas corpus petition, which cannot be filed in the district court without prior authorization from the court of appeals. 28 U.S.C. § 2244(b)(3). When a petitioner tries to file an unauthorized second or successive petition, it must be transferred to the court of appeals pursuant to 28 U.S.C. § 1631. *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

The transferred Rule 60(b) motion was docketed here under No. 02-5105. Both that case and Irick's appeal were placed in abeyance more than once, most recently pending resolution of *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (en banc), *vacated sub nom. Bell v. Abdur'Rahman*, 125 S. Ct. 2991 (2005).

Upon consideration, we remove the appeal (No. 01-5638) from abeyance and grant the Warden sixty days from the filing of this order to respond to Irick's COA application and its supplements. Irick shall have fifteen days to reply after service of the Warden's response. The transferred case (No. 02-5105) will remain in abeyance pending this court's resolution on remand of *Abdur'Rahman*. *See In re Abdur'Rahman*, 425 F.3d 328 (6th Cir. 2005) (en banc).

Accordingly, the Warden is ordered to respond to Irick's COA application in appeal No. 01-5638 within sixty days of the entry date of this order.

ENTERED BY ORDER OF THE COURT

Clerk

IN UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

BILLY RAY IRICK,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	No. 2-5105
	)	
RICKY BELL, WARDEN	)	
	)	
Respondent-Appellee	)	

MOTION TO AUTHORIZE FILING OF SECOND PETITION OR IN THE ALTERNATIVE MOTION TO SUPPLEMENT CERTIFICATE OF APPEAL ABILITY TO REFLECT STATE'S WAIVER OR REPEAL OF ALLEGED INDEPENDENT AND ADEQUATE STATE PROCEDURAL RULE UPON WHICH PETITIONER'S CLAIMS WERE FOUND TO BE DEFAULTED PURSUANT TO TENNESSEE SUPREME COURT RULE 39 ADOPTED JUNE 28, 2001 MADE RETROACTIVE TO JULY 1, 1967

I. Introduction

Petitioner moved the United States District Court for the Eastern District of Tennessee (Knoxville) pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from its Memorandum and Order filed on March 30, 2001 and its subsequent order filed on April 23, 2001 dismissing his Petition for Writ of Habeas Corpus. The grounds for the Petitioner's Rule 60(b) Motion was the adoption of Tennessee Supreme Court Rule 39 which retroactively amended Tennessee law regarding the exhaustion of remedies in state criminal and post-conviction proceedings. Since Rule 39 was only

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

adopted on June 28, 2001 some three months after the District Court's Memorandum and Order, the Petitioner first raised the issue in his Rule 60 Motion filed in the District Court and the Notice of Supplemental Authority filed in this Court.

Rule 39 provides that when a claim has been presented to the Tennessee Court of Criminal Appeals or the Tennessee Supreme Court and relief has been denied, the litigant is deemed to have exhausted all available State remedies for that claim. This Rule was made retroactive to all criminal convictions or post-conviction relief matters from and after July 1, 1967. The Rule in its entirety, states as follows:

> In all appeals 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. Upon automatic review of Cases by the Supreme Court pursuant to Tennessee Code annotated §39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Rule 39 is highly relevant to Petitioner's Petition for Writ of Habeas Corpus in that five or more of his claims were dismissed by the District Court on the basis, in whole or in part, that they were procedurally defaulted for failure to plead the claim before the State appellate or Supreme Court. During the state and criminal and post-conviction proceedings, the state had not raised and the state courts had not held that any of

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

Petitioner's claims were defaulted. All findings of procedural default originated in the Federal District Court.

II. Petitioner's Rule 60(b) Motion Should Be Authorized As A Second Petition

The Antiterrorism and Effective Death Penalty Act of 1996 (or "AEDPA") provides for second or successive petitions in 28 USC§2244. New claims must meet certain requirements outlined there. 28 USC§2244(b)(2) states:

> A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application, shall be dismissed unless -
>
> (A) The applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral reviewed by the Supreme Court, that was previously unavailable; or
>
> (B)(i) The factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) The facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

The obvious intent of these statutory requirements is to limit second petitions to extraordinary circumstances that arise subsequent to the filing of the first petition and that are out of the control of Petitioner or his counsel. The adoption of Rule 39 meets these requirements. It was adopted subsequent to the dismissal of Petitioner's first petition and was certainly beyond Petitioner's control. While Petitioner does not rely upon a new U.S. Supreme Court rule of constitutional law made retroactive to cases on

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

collateral review, he does rely upon a new Tennessee Supreme Court rule that was previously unavailable and that was made retroactive to Petitioner's case.

The effect of Rule 39 is to remove the alleged independent and adequate state procedural rule that served as the basis for the District Court's dismissal of five of Petitioner's claims under the doctrine of procedural default. The procedural default doctrine (along with the exhaustion doctrine) ensures that the state's interest in correcting its own mistakes is respected in all federal habeas cases. Coleman v. Thompson, 501 U.S. 722, 732, 111 S.Ct. 2546, 2555, 115 L.Ed.2d 640 (1991). Rule 39 makes clear that Tennessee's interest in correcting any mistakes is satisfied by raising the claim before either the Court of Appeals or the Supreme Court and that the Petitioner exhausts his state remedies when this is done. While this development (the adoption of Rule 39) does not meet the strict letter of 28 USC §2244(b)(2), Rule 39 otherwise meets the relevant objectives of the statute. It is retroactive, was previously unavailable, and was not under Petitioner's control. To dismiss Petitioner's Motion as a successive Petition would be to favor form over substance since Petitioner's Rule 60(b) Motion meets the substance of 28 USC §2244(b)(2)(A). Therefore, the Petitioner would respectfully move this Court to accept his Rule 60(b) Motion as a second petition.

III. Tennessee Supreme Court Rule 39 Waives or Repeals the Alleged Independent and Adequate State Procedural Rule that Served as a Basis for the Procedural Default of Five of Petitioner's Claims

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

In its Memorandum and Opinion, the District Court found that five of Petitioner's claims had been procedurally defaulted for failure either to plead the claim before the Tennessee Supreme Court (claims regarding court instructions on the aggravating circumstance of felony murder, flight and no prejudice or sympathy) or the Tennessee Court of Appeals (claims regarding failure of trial counsel to investigate and present factual evidence of innocence or involvement of third parties and mental health factors, and failure of trial counsel to present mental health defense). The procedural default doctrine is a judicially declared practice[1] and was not codified by AEDPA. Before a claim can be dismissed on the basis of a procedural default, it must be shown that the state procedural rule is both "adequate" and "independent" to support the dismissal. Coleman v. Thompson, 501 U.S. at 725. Furthermore, it is the state that has the burden of demonstrating that a procedural default has occurred. Gordon v. Nagle, 2 F.3d 385, 388 n.4 (11th Cir., 1993).

As mentioned above, none of the State court judgments relied upon a finding of procedural default in their rulings. The application of the doctrine of procedural default and the related doctrine of exhaustion are grounded in concerns of comity and federalism. Coleman v. Thompson, 501 U.S. at 730-731. These doctrines have been enforced because "... in a federal system, the state should have the first opportunity to address and correct

[1]See United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

alleged violations of state prisoner's's federal rights." Coleman v. Thompson, 501 U.S. at 731. Furthermore, the Supreme Court has recognized the "inseparability of the exhaustion rule and the procedural-default doctrine" finding that" [i]n the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground ensures that the State's interest in correcting their own mistakes is respected in all federal habeas cases." Edwards v. Carpenter, 529 U.S. 446, 452-53, 120 S.Ct. 1587, 1592, 146 L.Ed.2d 518 (2000), quoting Coleman v. Thompson, 501 U.S. at 732.

While AEDPA never addresses the issue of procedural default, it does have an exhaustion requirement. 28 U.S.C. §2254(b) and (c) states:

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available state corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000--FACSIMILE (423) 756-4801

> (3) A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (C) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

Subsection (b)(3) clearly provides that the exhaustion requirement is non-jurisdictional and may be waived by the State. This is consistent with prior law as determined by the United States Supreme Court. See Castille v. Peoples, 489 U.S. 346, 349-50, 109 S.Ct. 1056, 1059, 103 L.Ed2d 380 (1989); Granberry 481 U.S. 129, 131, 107 S.Ct. 1671, 1674, 95LEd2d 119 (1987); Strickland v. Washington, 466 U.S. 668, 684, 1045 S.Ct. 2052, 80 L.Ed2d 674 (1984). The exhaustion rule is grounded in "comity concerns", and its purpose is to afford the state a full and fair opportunity to address and resolve federal claims on their merits. Rose v. Lundy, 455 U.S. 509, 518, 102 S.Ct. 1198, 71L.Ed2d 379 (1982). The purpose of the exhaustion rule is to provide state courts "an opportunity" to rule - consistent with our federal system.

> The exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference with the federal judiciary... Under standards established by the [Supreme] Court, a state prisoner may initiate a federal habeas petition "[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated..." It follows of course, that once a federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. Vasquez v. Hillery, 474 U.S. 254, 257, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (quoting Picard v. Connor, 404 U.S. 270, 275-76, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

Since the object of the exhaustion rule is to provide the states a full and fair opportunity to rule in federal claims, the federal courts should give effect to Tennessee Supreme Court 39. Rule 39 clearly expresses the State's position that it has had "an opportunity" to rule on the federal issues when the claim has been presented in either the State Court of Appeals or Supreme Court. Consistent with the principle of comity, the federal court should respect Rule 39 and find petitioner's claims to be exhausted.

> It is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist. Ex parte Hawk, 321 U.S. 114, 117, 64 S.Ct. 448, 450, 88 L.Ed. 572 (1944).

In the case of O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) the Supreme Court held that in order to satisfy the habeas corpus exhaustion requirement, the prisoner's was required to present his claims to the state Supreme Court for discretionary review. However, the issue before this Court differs from the circumstances under which O'Sullivan was decided. In that case, there was no rule similar to Rule 39 or any other indication that the state deemed the defendant's claims exhausted. The rule of exhaustion "reduces friction between the state and federal court systems by avoiding the unseem[liness] of a federal district court's overturning a state court conviction without the state courts having an opportunity to correct the constitutional violation in the first instance." Rose v. Lundy, 455 U.S. 509, 515-516, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

In this case, the State has expressly waived the exhaustion requirement when the Tennessee Supreme Court adopted Rule 39. While the issue of exhaustion has been deemed a matter of federal law in several cases,[2] nevertheless, exhaustion can be waived, and in this instance, has been waived by the State[3]. In this case, there is no "unseemliness" of the State Court being deprived of an opportunity to rule. The State of Tennessee views petitioner's claims as completely exhausted.

Even if the State has not waived the exhaustion requirement, the doctrine of procedural default cannot apply where state law does not clearly support the existence of the alleged procedural requirement. Ulster County Court v. Allen, 442 U.S. 140, 150-51, 995 Ct. 2213, 60 LEd2d 777 (1979). In this case, Tennessee has waived or otherwise repealed the procedural requirement upon which the District Court found five (5) of petitioner's claims to be procedurally defaulted.

V. Conclusion

For the reasons stated herein, petitioner respectfully requests that his Rule 60 motion be reviewed by this Court as a second petition. In the alternative, petitioner would request that his motion be allowed to supplement his Application for Appealability

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

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[2] See for example, Manning v. Alexander, 912 Fd.2d 878 (6th Cir., 1990) and Jennison v. Goldsmith, 940 Fd. 2d 1308 (11th Cir., 1991).

[3] However, The Tennessee Attorney General's Office denies Rule 39 has this result.

already before this Court and that this Court would find that the State has waived any procedural rule upon which the petitioner allegedly defaulted.

Respectfully submitted,

SPEARS, MOORE, REBMAN & WILLIAMS

By: Howell Clements

Howell G. Clements BPR#0011574
Carl E. Shiles, Jr.(BPR #011678)
Attorneys for Petitioner
801 Broad Street, Sixth Floor
P. O. Box 1749
Chattanooga, TN 37401-1749
423/756-7000

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this pleading has been served on counsel for all parties at interest in this cause by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

Jennifer L. Smith
Assistant Attorney General
State of Tennessee
Criminal Justice Division
Cordell Hull Building, 2nd Floor
426 Fifth Avenue North
Nashville, TN 37243

This 20 day of Feb, 2002.

SPEARS, MOORE, REBMAN & WILLIAMS

By: Thull Clark

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LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000---FACSIMILE (423) 756-4801

IN UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

BILLY RAY IRICK,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	No. 2-5105
	)	
RICKY BELL, WARDEN	)	
	)	
Respondent-Appellee	)	

ATTACHMENT A

Supplemental Responses to Question Number 13(5) and 16B. of Federal Form

The following grounds for relief were stated in Billy Ray Irick's Petition for Writ of Habeas Corpus. These grounds are described in general terms and are greatly simplified.

Question No. 13(5)

1. The state illegally suppressed material exculpatory and mitigating evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

2. There was insufficient evidence to find Petitioner guilty of first degree murder or aggravated rape.

3. The state court made constitutional evidencery errors including:

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000–FACSIMILE (423) 756-4801

a. Failing to suppress two statements made by Eric which were illegally obtained and were not, under the totality of circumstances, voluntarily given.

b. The trial court prohibited the Petitioner from offering evidence regarding "deceptive" answers provided by the father of the victim during a polygraph examination.

c. Petitioner was denied his constitutional right to compulsory process when the trial court refused to order the Knox County District Attorney General to appear to be questioned regarding whether the death penalty was being applied in a discriminatory fashion as to Petitioner.

d. The trial court improperly allowed Dr. Wilson to testify as an expert in the field of forensic pathology when his field of competence was in clinical and anatomical pathology.

e. Petitioner's constitutional rights were violated when the jury was permitted to review prejudicial photographs of the victim.

4. Petitioner's constitutional rights were violated when the trial court utilized four aggravating circumstances all of which were unconstitutional.

5. Tennessee's death penalty statute, former Tennessee Code Annotated §39-2-203, was unconstitutional.

6. The application of the death penalty to Petitioner was unconstitutional in that both trial and post conviction counsel were denied the ability to fully develop all claims for relief due to the unavailability of funds for expert witnesses and investigators.

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INCORPORATED
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7. The death penalty constitutes cruel and unusual punishment as a result of the length of time Petitioner has been incarcerated under the sentence of death following the offense for which he was convicted.

8. The execution of the Petitioner would violate his constitutional rights because, upon information and belief, Petitioner may be "mentally retarded" or may be incompetent to be executed.

9. Petitioner was denied his constitutional rights to be tried by an impartial jury in that the Court improperly excluded jurors based upon their attitudes towards the death penalty, the defendant, the crime, possible defenses, and aggravating and mitigating circumstances.

10. The Petitioner was denied his constitutional rights to be tried by an impartial jury in that the jurors were not called from within the venire by a random selection process.

11. The trial court utilized unconstitutional jury charges.

12. The Petitioner was denied his constitutional rights as a result of the prosecutor's inflammatory and improper argument before the jury in the penalty phase.

13. The Petitioner's constitutional rights were violated because he was wrongly convicted of both felony murder and aggravated rape in violation of due process and the double jeopardy clause of the 5th Amendment.

14. Petitioner was denied the effective assistance of counsel at his trial, his direct appeal to the Supreme Court of Tennessee and his post conviction proceedings.

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
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15. Constitutional errors, when considered cumulatively, were sufficient to produce a fundamentally unfair trial.

Question No. 16B

Rule 39 of the Tennessee Supreme Court was enacted by the State Supreme Court on June 28, 2001. This rule and summary states a claim presented to the Court of Criminal Appeals is considered exhausted even if not renewed in the State Supreme Court. This rule applies to all appeals from criminal convictions or post conviction relief from and after July 1, 1967.

Respectfully submitted,

SPEARS, MOORE, REBMAN & WILLIAMS

By: _____

Howell G. Clements BPR#0011574
Carl E. Shiles, Jr.(BPR #011678)
Attorneys for Petitioner
801 Broad Street, Sixth Floor
P. O. Box 1749
Chattanooga, TN 37401-1749
423/756-7000

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000–FACSIMILE (423) 756-4801

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this pleading has been served on counsel for all parties at interest in this cause by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

Jennifer L. Smith
Assistant Attorney General
State of Tennessee
Criminal Justice Division
Cordell Hull Building, 2nd Floor
426 Fifth Avenue North
Nashville, TN 37243

This 20 day of Feb, 2002.

SPEARS, MOORE, REBMAN & WILLIAMS

By: _____

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SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000–FACSIMILE (423) 756-4801

MOTION UNDER 28 U.S.C. § 2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER SECOND OR SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. § 2254 OR § 2255

DEATH PENALTY CASE

United States Court of Appeals for the Sixth Circuit

Name of Movant	Prisoner No.	Case Number (leave blank)
BILLY RAY IRICK	113945	2-5105

Place of Confinement (List complete mailing address): Riverbend Maximum Security Institution (R.M.S.I.)
Unit 2 D-211
7475 Cockrill Bend Blvd., Nashville, TN 37209-1048

IN RE: BILLY RAY IRICK, MOVANT

1. Name and location of court which entered the judgment of conviction from which relief is sought: Criminal Court of Knox County, Tennessee (Division I), Knoxville, Tennessee

2. Parties' Names: State of Tennessee vs. Billy Ray Irick

3. Docket Number: 24527 4. Date of judgment of conviction: 11/01/86

5. Length of sentence: death (no execution date at this time)

6. Nature of offense(s) involved (all counts): 1st degree murder and two (2) counts of aggravated rape

7. What was your plea? (Check one) ☒ Not Guilty ☐ Guilty ☐ Nolo Contendere

8. If you pleaded not guilty, what kind of trial did you have? Check one) ☒ Jury ☐ Judge only

9. Did you testify at your trial? (Check one) ☐ Yes ☒ No

10. Did you appeal from the judgment of conviction (Check one) ☒ Yes ☐ No

11. If you did appeal, what was the

Name of court appealed to: Tennessee Supreme Court

Parties' names on appeal: State of Tennessee vs. Billy Ray Irick

Docket number of appeal: S. Ct. No. 180 Date of decision: 11/7/88

PATTY ELDER

Result of appeal: Trial court and jury verdict affirmed.

12. Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, applications for relief, or other motions regarding this judgment in any federal court? ☒ Yes ☐ No

13. If you answered "yes" to question 12, answer the following questions:

A. FIRST PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? U.S. Eastern District of Tenn (Knoxville)

(2) What were the parties' names? Billy Ray Irick vs. Ricky Bell, Warden

(3) What was the docket number of the case? 3:98-CV-666

(4) What relief did you seek? Writ of Habeas Corpus

(5) What grounds for relief did you state in your petition, application, or motion? See "Attachment A"

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☐ Yes ☒ No

(7) What was the result?
☐ Relief granted ☒ Relief denied on the merits
☐ Relief denied for failure to exhaust ☐ Relief denied for procedural default
☐ Relief denied as premature
☐ Case transferred to Court of Appeals as request to file second/successive § 2254/2255 application for relief

(8) Date of court's decision: 3/30/01; 4/23/01

[NOTE: You must attach copies of all prior orders granting or denying relief under § 2254 or § 2255, even if you believe that you do not need this court's permission to file your current application.]

B. SECOND PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion? U.S. Eastern Dist. of Tenn. (Knoxville)

(2) What were the parties' names? Billy Ray Irick vs. Ricky Bell, Warden

(3) What was the docket number of the case? 3:98-CV-666

(4) What relief did you seek? Relief from judgment (those portions finding procedural default)

(5) What grounds for relief did you state in your petition, application, or motion? New Tennessee Supreme Court Rule 39 which retroactively amends, state law regarding the exhaustion of and/or supercedes available state remedies and thereby amends the corresponding federal law regarding exhaustion and procedural default

(6) Did the court hold an evidentiary hearing on your petition, application or motion? ☐ Yes ☒ No

(7) What was the result? ☐ Relief granted ☐ Relief denied on the merits
☐ Relief denied for failure to exhaust ☐ Relief denied for procedural default
☐ Relief denied as premature
☒ Case transferred to Court of Appeals as request to file second/successive § 2254/2255 application for relief

(8) Date of court's decision: 1/25/02 (regarding Petitioner's Motion for Relief from Judgment)

[NOTE: You must attach copies of all prior orders granting or denying relief under § 2254 or § 2255, even if you believe that you do not need this court's permission to file your current application.]

C. THIRD AND SUBSEQUENT PETITIONS, APPLICATIONS, OR MOTIONS
For any third or subsequent petition, application, or motion, attach a separate page providing the information required in items (1) through (8) above for first and second petitions, applications, or motions.

D. PRIOR APPELLATE REVIEW(S)
Did you appeal any order regarding your petitions, applications, or motions to a federal court of appeals having jurisdiction over your case? If so, list the docket numbers and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals.

First petition, application, or motion	☒ Yes	Appeal No. 1:5638	Date _____	☐ No
Second petition, application, or motion	☐ Yes	Appeal No. _____	Date _____	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No. _____	Date _____	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No. _____	Date _____	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No. _____	Date _____	☐ No
Subsequent petitions, applications or motions	☐ Yes	Appeal No. _____	Date _____	☐ No

If you did not appeal from the denial of relief on any of your prior petitions, applications, or motions, state which denials you did not appeal and explain why you did not.

*1:5638 - Application for Certificate of Appealability filed 5/22/01 - no action taken by Court

14. Did you present any of the claims in this application in any previous petition, application, or motion for relief under 28 U.S.C. § 2254 or § 2255? (Check one) ☐ Yes ☒ No

15. If your answer to question 14 is "yes," give the docket number(s) and court(s) in which such claims were raised and state the basis on which relief was denied.

16. If your answer to question 14 is "No," answer the following questions:

A. State the claims which you did not present in any previous petition, application, or motion for relief under 28 U.S.C. § 2254 or § 2255: The effect of new Tennessee Supreme Court Rule 39.

B. State the reasons explaining why you did not present the above claims in any previous petition, application or motion for relief under 28 U.S.C. § 2254 or § 2255:* Rule 39 was not enacted until approximately 3 months after denial of petition. See Attachment A.

*NOTE: This Court will grant you authority to file in the district court only if you show that you could not have presented your present claims in your previous § 2254 or § 2255 application because . . .

A. (For § 2255 motions only) the claims involve "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [you] guilty"; or,

B. (For § 2254 petitions only) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [you] guilty of the offense"; or,

C. (For both § 2254 and § 2255 applicants) the claims involve "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court [of the United States], that was previously unavailable."

Movant prays that the United States Court of Appeals for the Sixth Circuit issue an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254 or 2255.

Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct.

Executed on Feb 20, 2002
[date]

Movant's Signature

PROOF OF SERVICE

A copy of this motion and all attachments must be sent to the state attorney general (§ 2254 cases) or the United States Attorney for the United States judicial district in which you were convicted (§ 2255 cases).

I certify that on February 20, 2002 [date] I mailed a copy of this motion and all attachments

to Jennifer L. Smith at the following address:

Office of the Attorney General, State of Tennessee, P.O. Box 20207
Nashville, TN 37202

Movant's Signature

IN UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

BILLY RAY IRICK,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	No. 1:5638
	)	
RICKY BELL, WARDEN	)	
	)	
Respondent-Appellee	)	

NOTICE OF SUPPLEMENTAL AUTHORITY

Comes now Petitioner, Billy Ray Irick, through undersigned counsel and gives notice of the following supplemental authority:

Tennessee Supreme Court Rule 39. Exhaustion of Remedies - - In all appeals 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

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, §§ 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review. [Effective June 28, 2001.]

This authority is submitted in support of Billy Ray Irick's contention that the claims presented to this Court are properly exhausted.

Respectfully submitted,

SPEARS, MOORE, REBMAN & WILLIAMS

By: _____

Howell G. Clements BPR#0011574
Carl E. Shiles, Jr.(BPR #011678)
Attorneys for Petitioner
801 Broad Street, Sixth Floor
P. O. Box 1749
Chattanooga, TN 37401-1749
423/756-7000

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this pleading has been served on counsel for all parties at interest in this cause by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

Glen R. Pruden
State of Tennessee
Criminal Justice Division
Cordell Hull Building, 2nd Floor
426 Fifth Avenue North
Nashville, TN 37243

This 20 day of November, 2001.

SPEARS, MOORE, REBMAN & WILLIAMS

By: Cindy Larkin

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LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

IN UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

BILLY RAY IRICK,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	No. 1:5638
	)	
RICKY BELL, WARDEN	)	
	)	
Respondent-Appellee	)	

MOTION TO HOLD APPEAL IN ABEYANCE PENDING APPELLANT'S CONTEMPORANEOUS RULE 60(b) MOTION IN THE DISTRICT COURT

Comes Billy Ray Irick, by and through his attorneys, and respectfully moves the Sixth Circuit Court of Appeals pursuant to Rule 27 of the Rules of Appellate Procedure to hold in abeyance this Court's consideration of his Application for Certificate of Appealability to allow the District Court an opportunity to rule on his Rule 60 motion. Defendant asserts that its Rule 60(b) motion is timely despite its filing during the pendency of the appeal. See First National Bank of Salem, Ohio v. Hirsch, 535 F.2d 343 (6th Cir. 1976); Flynt v. Brownfield, 726 F. Supp. 1106 (S.D. Ohio 1989). Furthermore, this Court may hold an appeal in abeyance pending

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
(423) 756-7000—FACSIMILE (423) 756-4801

resolution of a matter currently before another court. See Eubanks v. Wilkinson, 1989 WL 147107, slip op., p. 1 (6th Cir. 1991) (unpublished) (Attachment A).

As a basis for this motion, defendant would state that he has recently moved the District Court for relief pursuant to Fed.R.Civ.Pro. 60(b) from the orders which were the subject of his Application for Certificate of Appealability (Exhibit B). Defendant seeks this relief based on a new Tennessee Supreme Court Rule 39 which changes the law upon which the District Court relied in whole or in part to dismiss at least five of his claims.

In its orders, the District Court dismissed these five claims based on findings that the Petitioner had procedurally defaulted these claims by failing to raise them before the Tennessee Court of Appeals or Supreme Court in earlier state proceedings. These claims included: (1) felony murder aggravating circumstance; (2) flight instruction; (3) prejudice and sympathy instructions; (4) failure of trial counsel to investigate and present evidence; and (5) failure of trial counsel to present mental health defense. However, Rule 39 provides that when a claim has been presented to the Tennessee Court of Criminal Appeals or the Tennessee Supreme Court, and relief has been denied, the litigant is deemed to have exhausted all available state remedies for that claim. This rule has been made retroactive to criminal convictions or post-

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
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(423) 756-7000—FACSIMILE (423) 756-4801

conviction relief matters from and after July 1, 1967. Pursuant to Rule 39, defendant is entitled to relief from the District Court's orders.

Based on this development which occurred subsequent to the Court's Order of April 23, 2001, defendant respectfully requests that the Sixth Circuit delay its decision regarding his Application for Certificate of Appealability to give the District Court an opportunity to rule on his motion. In the alternative, defendant would request that the same arguments found in defendant's motion and memorandum of law now currently before the District Court be incorporated and/or otherwise considered by the Sixth Circuit in his application for certificate of appealability, (See Notice of Supplemental Authority filed contemporaneously with this motion.)

Respectfully submitted,

SPEARS, MOORE, REBMAN & WILLIAMS

By: Howell G. Clements by Dane Shiles

Howell G. Clements BPR#0011574
Carl E. Shiles, Jr.(BPR #011678)
Attorneys for Petitioner
801 Broad Street, Sixth Floor
P. O. Box 1749
Chattanooga, TN 37401-1749
423/756-7000

LAW OFFICES
SPEARS, MOORE, REBMAN & WILLIAMS
INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
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The undersigned hereby certifies that a true and correct copy of this pleading has been served on counsel for all parties at interest in this cause by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

Glen R. Pruden
State of Tennessee
Criminal Justice Division
Cordell Hull Building, 2nd Floor
426 Fifth Avenue North
Nashville, TN 37243

This 20 day of November, 2001.

SPEARS, MOORE, REBMAN & WILLIAMS

By: Cindy Laskin

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INCORPORATED
801 BROAD STREET, SIXTH FLOOR
P. O. BOX 1749
CHATTANOOGA, TENNESSEE 37401-1749
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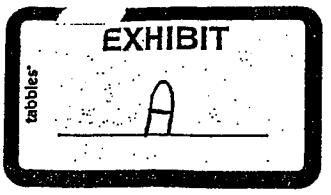

891 F.2d 290 (Table)
Unpublished Disposition

(Cite as: 891 F.2d 290, 1989 WL 147107 (6th Cir.(Ky.)))

H

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Samuel G. EUBANKS, M.D., et al., Plaintiffs-Appellees,
v.
Wallace WILKINSON, et al., Defendants,
John and Jane Doe, Pseudonym, et al., Intervening Defendants-Appellants.

No. 89-5353.

Dec. 6, 1989.

W.D.Ky.

APPEAL DISMISSED.

On Appeal from the United States District Court for the Western District of Kentucky.

Before MERRITT and WELLFORD, Circuit Judges, and ROBERT E. DeMASCIO, [FN*] U.S. District Judge.

PER CURIAM:

**1 We have heretofore indicated by an order following oral argument in this case that we will hold in abeyance further consideration of the *merits* of the case until the Supreme Court decides issues in other pending cases before that Court which may bear upon our decision. We now determine that the appeal of intervening defendants, fourteen parents of minor children of childbearing age (John and Jane Doe, et al), should be dismissed.

The district court struck down certain provisions of the informed consent statute in controversy, particularly the criminal sanctions against doctors such as plaintiffs because of a "vagueness" which rendered it unconstitutional. Judge Allen stated:

... we should also note that the section of the statute which makes it a crime for the attending physician to perform the abortion unless he has received the consent of both parents "if available" is clearly unconstitutional because of its vagueness. A criminal statute that "fails to give a person of ordinary intelligence fir notice that his contemplated conduct is forbidden by the statute or is so indefinite that it encourages arbitrary and erratic arrest and convictions is void for vagueness." See *Colautti v. Franklin,* 439 U.S. 379, 390 (1979). This is "especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti, supra,* at 391.

Here, the physician has no reasonable guide to determining what is meant by the phrase "if available." If the parents are divorced and living in the same community as the minor, are they available within the meaning of the statute? If the parents are divorced and living in separate cities, is the non-custodial parent available? If a parent is in some form of institution, is he or she available? To subject a doctor to criminal liability that turns on the meaning of a phrase that contains as many possibilities as does the phrase "if available" would place an undue burden upon the physician to determine whether the conduct was criminal.

(August 23, 1988 Memorandum Opinion)

In that same opinion the court indicated "we are convinced that the burden imposed by the two-parent consent requirement cannot be justified constitutionally, except where the young woman reports that she lives at home with both parents. If the young woman lives with one parent or guardian, the consent of the adult may be required."

The judgment entered by the district court incorporated the latter holding but did not specifically strike the criminal sanctions section of the law. Enforcement of the law was enjoined temporarily, and the requirement of notarization of consent forms was permanently enjoined. Plaintiffs within thirty days appealed from this "final

judgment." [FN1]

On February 22, 1989 the district court entered a "memorandum and order," which included the following:

The Court has noted that its August 23, 1988 judgment did not explicitly enjoin enforcement of the portion of the statutory scheme that would have made a physician criminally liable for performing an abortion without the required consents. The accompanying memorandum clearly stated the Court's ruling that the statutory provision was void for vagueness, and the subsequent memorandum opinion concerning stay pending appeal also referred to the Court's having barred enforcement of that provision. The parties have proceeded with an apparently clear understanding that the provision is not to be enforced. It is clear that omission of specific reference to this matter in the order was mere oversight, and did not constitute a ruling contrary to that announced in the opinion.

**2 Intervening defendants filed a notice of appeal on March 22, 1989 from the February 22, 1989 order. Plaintiffs have since moved to dismiss this appeal because it is asserted to be untimely and because intervening defendants have no standing to challenge the district court's striking of the criminal sanction.

While it is true that timely filing of a notice of appeal is both mandatory and jurisdictional, *United States v. Robinson,* 361 U.S. 220, 224 (1960), and it seems evident that the district court on February 22, 1989, merely clarified what it clearly intended to do on August 23, 1988, we choose to dismiss intervening defendants' appeal on the standing issue rather than untimeliness.

"A private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.,* 410 U.S. 614, 619 1973.

See also Leeke v. Timmerman, 454 U.S. 83 (1981). Adopting the above rationale, the Supreme Court held in a somewhat similar factual setting in *Diamond v. Charles,* 476 U.S. 54, 56:

The State of Illinois has chosen to absent itself from this appeal, despite the fact that its statute is at stake. Because a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense, we dismiss the appeal for want of jurisdiction.

The Commonwealth has not appealed from either of the district court orders in this case. Defendant intervenors seek to restore the criminal sanctions in the statute. We conclude that they have no standing to do this. As in *Diamond v. Charles,* we dismiss the appeal of intervening defendants for want of standing and conclude that we lack jurisdiction to consider that aspect of this case.

Plaintiffs argue that Dr. Diamond was intervening as a doctor who might benefit by the statute (as a pediatrician), as a guardian ad litem for "unborn fetuses," and as "father of a daughter of childbearing years." *Diamond,* at 58, 67. They maintain that in the latter category they have made a showing that Dr. Diamond did not make. *Id.* at 67. We find the principles that are expressed in *Diamond* in the case of criminal sanctions to be applicable here, compelling the conclusion that intervening defendants, as private citizens, have no standing in the absence of an appeal by the Commonwealth of Kentucky. *See* 70 L.Ed. 941; *Princeton University v. Schmid,* 455 U.S. 100 (1982).

We accordingly DISMISS the appeal of the intervening defendants.

FN* The Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan, sitting by designation.

FN1 The district court's 8/23/88 judgment specifically indicated that it was "a final and appealable order."

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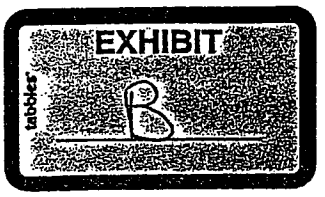

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

BILLY R. IRICK Petitioner vs. RICKY BELL, WARDEN, Riverbend Maximum Security Institution Respondent	)	Case No. 3:98-cv-666 Judge Collier/Powers

PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

Comes the Petitioner, by his attorneys, and respectfully moves this Court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from this Court's Memorandum and Order filed on March 30, 2001 and the Order filed on April 23, 2001. As grounds therefore, Petitioner would state that Tennessee law regarding exhaustion of remedies and procedural default has been amended retroactively in Tennessee Supreme Court Rule 39 and that the adoption of Rule 39 has a direct impact on portions of this Court's orders referenced above, including claims concerning the (1) felony murder aggravating circumstance; (2) flight instruction; (3) prejudice or sympathy instructions; (4) failure of trial counsel to investigate and present evidence; and (5) failure of trial counsel to present mental health defense.

Rule 39 of the Rules of the Supreme Court of the State of Tennessee adopted June 28, 2001 provides that when a claim has been presented to the Court of Criminal Appeals or the Supreme Court and the relief has been denied, the litigant is deemed to have exhausted all available state remedies for that claim. This rule

was made retroactive to all criminal convictions or post-conviction relief matters from and after July 1, 1967. In several instances, this Court relied upon what had been previous Tennessee law to hold that several claims were procedurally defaulted for having not been raised on the Court of Appeals or the Tennessee Supreme Court level. Based on Supreme Court Rule 39, Petitioner now seeks relief from those orders. In support of said motion, Petitioner is filing a Memorandum of Law.

Respectfully submitted,

SPEARS, MOORE, REBMAN & WILLIAMS

By: _____
Howell G. Clements, BPR#0011574
Carl E. Shiles, Jr., BPR#011678
Attorneys for Petitioner
801 Broad Street, 6th Floor
P. O. Box 1749
Chattanooga, TN 37401-1749
423/756-7000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this pleading has been served on counsel for all parties at interest in this cause by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

Glen R. Pruden
State of Tennessee
Criminal Justice Division
Cordell Hull Building, 2nd Floor
426 Fifth Avenue North
Nashville, TN 37243

This 20 day of November, 2001.

SPEARS, MOORE, REBMAN & WILLIAMS

By: _____

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BILLY RAY IRICK
Petitioner

vs.

RICKY BELL, WARDEN
Respondent

On Petition for Writ of Certiorari
from the United States Court of Appeals
for the Sixth Circuit

SPEARS, MOORE, REBMAN & WILLIAMS

By: _____
C. Eugene Shiles, Jr. (BPR 011678)
801 Broad Street, Sixth Floor
P. O. Box 1749
Chattanooga, Tennessee 37401-1749
(423) 756-7000

By: _____
Howell G. Clements, BPR# 001574
1010 Market Street, Suite 404
Chattanooga, TN 37402
(423) 757-5003

Counsel for Petitioner Irick

CAPITAL CASE

QUESTIONS PRESENTED

I. Under 28 U.S.C. § 1254, does this court have jurisdiction to review a court of appeals' order granting in part and denying in part a certificate of appealability, and if so, are there any prerequisites to seeking review on certiorari?

II. What is the proper standard governing in issuance of a certificate of appealability or a writ of *certiorari* in this case?

III. Whether petitioner has made a sufficient showing for an evidentiary hearing on his claim of innocence of the underlying offense and/or the death penalty based on evidence from the victim's family that he was behaving irrationally, hearing and talking to "voices," and acting violently towards others, including loved ones, for no rational reason just before the victim's death.

IV. Whether the lower courts erred in finding certain claims procedurally barred when they failed to fully review the adequacy and independence of the asserted state rule and other criteria affecting Tennessee's procedural default doctrine.

V. Whether petitioner should be allowed to present evidence of his intoxication and its effect on his underling mental condition when the prosecution withheld evidence thereof in violation of Brady.

VI. Whether petitioner should be allowed to present evidence of ineffective assistance of counsel when reliable evidence has been discovered that petitioner was incapable of appreciating and/or controlling his actions and such evidence was never presented in his trial.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254: "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..."

28 U.S.C. §2244(b)(2): A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application, shall be dismissed unless -

(A) The applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral reviewed by the Supreme Court, that was previously unavailable; or

(B)(i) The factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) The facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2253 (a): "In a *habeas corpus* proceeding ... the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held..."

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(A) the final order in a *habeas corpus* proceeding in which the detention complained of arises out of process issued by a State courts ...

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. §2254 (d): "An application for writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Tenn. Code. Ann. §40-30-102(b)(2) (1995): (b)No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless: (2) The claim in the petition is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted...

Tennessee Supreme Court Rule 39: In all appeals 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. Upon automatic review of Cases by the Supreme Court pursuant to Tennessee Code annotated §39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

U.S. Const. Amend. XIV: "No state shall ... deprive any person of life, liberty, or property, without due process of law ...."

evidence, we have only succeeded in judging and sentencing a caricature of the real defendant when new evidence clearly and convincingly shows he was innocent by reason of insanity or otherwise ineligible for the death penalty under Tennessee law.

Tennessee's statute of limitations applicable to post-conviction proceedings is not a proper basis for procedural default.

(i) Tennessee's statute is neither adequate nor independent.

Petitioner contends that the relevant Tennessee statute of limitations applicable to post-conviction proceedings (T.C.A. §40-30-102 (1989) and/or T.C.A. §40-30-201 (1995)) is not a proper basis for procedural default in general or in this *habeas* claim, in particular. Before a claim can be dismissed on the basis of a procedural default, it must be shown that the state procedural rule is both "adequate" and "independent" to support the dismissal. Coleman v. Thompson, 501 U.S. at 725. Petitioner asserts that the state has made the application of its statute of limitations depend on antecedent rulings of federal law. See e.g., Sands v. State, 903 S.W.2d 297 (Tenn. 1995) and Buford v. State, 854 S.W.2d 204 (Tenn. 1992). The Supreme Court has held that "when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the Court's holding is not independent of federal law, and our jurisdiction is not precluded." Ake v. Oklahoma, 470 U.S. 68, 75 (1985). Even after Tennessee's Post Conviction Act was amended in 1995 to

enumerate certain limited circumstances in which the statute of limitations for post-conviction proceedings would be inapplicable, the Tennessee Supreme Court stated in 1998, in dismissing a fourth post-conviction petition on procedural grounds, "[b]y this ruling, we do not intend to foreclose relief allowable under the due process clauses of the state and federal constitutions." Cazes v. State, 980 S.W.2d 364, 365 n.3 (Tenn. 1998). Clearly, Tennessee's statute of limitations still depends on federal constitutional rulings - thereby allowing federal jurisdiction.

(ii) Tennessee's statute is not "strictly or regularly followed."

In a similar vein, a state procedural rule will not bar federal relief if the state rule is not "strictly or regularly followed" by the courts of the state. Hawthorne v. Lovorn, 457 U.S.255, 262-63 (1982). In applying Tennessee's statute of limitations to post-conviction petitions, the Tennessee Supreme Court has made exceptions and allowed "untimely" claims. In fact, Tennessee's Supreme Court has held that, at least under some circumstances, there must be a "voluntary or knowing waiver" of a fundamental procedural right. Sawyers v. State, 814 S.W.2d 725, 729 (Tenn. 1991).

(iii) Irick was denied a full and fair opportunity to be heard under Tennessee's post-conviction process.

In order to qualify for the more deferential standard of review of §2254(d)(1) of AEDPA, the state court determinations must be the product of a fair adjudicative

process, having addressed the legal merits of the petitioner's claim and resulting in an explanatory decision. Neal v. Gramley, 99 F.3d 841, 843 (7th Cir.1996). In the Gramley case, the Court stated that § 2254(d)(1) applies "provided [that the state court] determination was made after the petitioner had a full and fair opportunity to litigate the issue." Id. at 843. In the absence of a "full and fair" hearing, the federal court must hold an evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 312, 313 (1963).

Petitioner asserts that in his state court proceedings he did not receive a full and fair evidentiary hearing in that the state court refused to provide the funds or necessary resources for trial or post-conviction counsel to obtain investigators to thoroughly investigate the factual circumstances of the case. The state court's refusal to provide said funds may be explained by Tennessee's rule that the sufficiency of evidence is *not* reviewable in post-conviction relief cases. Johnson v. State, 733 S.W.2d 525 (1987) and Parton v. State, 483, S.W.2d 753 (1972), cert. denied, 409 U.S. 871 (1972). Therefore, neither the prior nor the current Tennessee Post-Conviction Act allows for petitioners to litigate actual innocence (except for new "scientific evidence"[5]) thereby

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[5]Tenn. Code. Ann. §40-30-102(b)(2) (1995). (b)No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless:

(2) The claim in the petition is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted...

depriving petitioners a full and fair opportunity to litigate the essential question of a criminal prosecution.

The lack of the necessary funds to investigate his case and the state ruled against hearing collateral sufficiency of evidence claims prevented the petitioner from receiving a full and fair evidentiary hearing and requires that he be provided an evidentiary hearing. Townsend, 372 U.S. at 312-13.

(iv) Tennessee Supreme Court Rule 39

Tennessee Supreme Court Rule 39 provides that when a claim has been presented to the Tennessee Court of Criminal Appeals or the Tennessee Supreme Court and relief has been denied, the litigant is deemed to have exhausted all available state remedies for that claim. This Rule was made retroactive to all criminal convictions or post-conviction relief matters from and after July 1, 1967. The Rule in its entirety, states as follows:

> In all appeals 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. Upon automatic review of Cases by the Supreme Court pursuant to Tennessee Code annotated §39-13-206, a claim presented to the Court

of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Rule 39 is highly relevant to petitioner's petition for writ of *habeas corpus* in that five or more of his claims were dismissed by the district court on the basis, in whole or in part, that they were procedurally defaulted for failure to plead the claim before the state appellate or Supreme Court. During the state and criminal and post-conviction proceedings, the state had not raised, and the state courts had not held that any of petitioner's claims were defaulted. All findings of procedural default originated in the federal district courts.

Since the object of the exhaustion rule is to provide the states a full and fair opportunity to rule in federal claims, the federal courts should give effect to Tennessee Supreme Court 39. Rule 39 clearly expresses the State's position that it has had "an opportunity" to rule on the federal issues when the claim has been presented in either the state Court of Appeals or Supreme Court. Consistent with the principle of comity, federal courts should respect Rule 39 and find petitioner's claims which were raised before at least one of the higher state courts, to be exhausted. Therefore, the petitioner respectfully moves this court to find that Rule 39, independently or in connection with other precedents eliminate the prospect of a procedural default in his case where petitioner has raised an issue before one of the state appellate courts.