No. 00-7620

IN THE
SUPREME COURT OF THE UNITED STATES

PHILIP R. WORKMAN,
Petitioner,

v.

RICKY J. BELL, Warden,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

Whether this Court possesses jurisdiction to review the first issue presented by petitioner, namely, whether it offends the Eighth and Fourteenth Amendments to apply the provisions of 28 U.S.C. § 2244 (b) to bar petitioner's second or successive habeas claims allegedly demonstrating his innocence.

II.

Whether a court of appeals may recall its mandate denying habeas relief upon a showing of fraud on the court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000), was filed on September 5, 2000, and appears as Appendix B to the petition for writ of certiorari.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §§ 1254(1), 1651(a) and U.S.Sup.Ct.R. 13.3. As more particularly discussed below,[1] respondent submits that the Court, by virtue of 28 U.S.C. § 2244(b)(3)(E), lacks jurisdiction to review the first issue presented by petitioner.

STATEMENT OF THE CASE

Evidence From Petitioner's Criminal Trial

On the evening of August 5, 1981, Philip Ray Workman ("petitioner"), robbed at gunpoint the Wendy's restaurant on Danny Thomas Boulevard in Memphis. A total of three Memphis police officers initially responded to the robbery -- Lieutenant Ronald Oliver and Officers Stoddard and Parker. (J.A., III. 1435-36, 1480) Stoddard and Oliver both responded to the north side of the restaurant, which is the side from which Workman exited. (J.A., III. 1436, 1478) Parker responded to the south side. After being confronted by Oliver at the restaurant exit, Workman fled across the parking lot. (J.A., III. 1478) Stoddard and Oliver caught up to Workman and wrestled with him across the Wendy's parking lot and into an adjacent parking lot. (J.A., III. 1479, 1482) There Workman removed a gun from his pants and shot Stoddard in the right arm, knocking him several

[1] *See* Argument, Sec. I, *infra.*

feet backwards to the ground. (J.A., III. 1479-80, 1482) While falling to the ground, Stoddard heard several more shots. (J.A., III. 1479) When Stoddard looked up, he saw Oliver down on the ground and Workman running away. (J.A., III. 1480, 1482)

Harold Davis, a computer operator from Tacoma, Washington, witnessed the shooting. While in the restaurant parking lot, Davis heard Oliver tell Workman to "hold it," and then saw the two men struggling. (J.A., III. 1411) He saw Stoddard come to Oliver's assistance and Workman struggling with the two officers. (J.A., III. 1411) Davis observed Workman shoot Stoddard and then, holding the gun at chest or stomach height, shoot Oliver. (J.A., III. 1411, 1412) As Oliver fell, he was firing at Workman. Workman fired back and fled. (J.A., III. 1411, 1412)

Parker, who had been checking the south side of the restaurant building, ran to the north side after hearing shots fired. (J.A., III. 1437-38) When he emerged on the north side, he saw Oliver falling to the ground. (J.A., III. 1438-39) Parker checked on Stoddard, who had been shot in the arm, and Oliver then noticed Workman running through the parking lot. (J.A., III. 1439) When Workman saw Parker, Workman fired a shot at him. (J.A., III. 1440, 1480, 1483) Parker attempted to return fire, but Workman spun away before Parker could shoot. (J.A., III. 1440) Workman then fled across the parking lot and into an adjacent wooded, residential area. (J.A., III. 1442) After radioing the police dispatcher regarding the situation, Parker pursued Workman. (J.A., III. 1443) Neither Stoddard nor Parker ever fired a shot. (J.A., III. 1458; T.R., XIV. 1122-23)[2]

Workman was apprehended in the same wooded area approximately an hour after the shooting. (J.A., III. 1447) He told officers that he had thrown his gun into the woods. (T.R., XII.

[2] "T.R." references are to the record of petitioner's criminal trial, a copy of which has been made a part of the record in this habeas case. *See* R. 16.

759) His gun was soon located beside a truck under which Workman had hidden while police were searching for him.(T.R., XII. 797-798) The gun, a .45 caliber semi-automatic Colt pistol, capable of carrying seven rounds (J.A., III. 1499D, 1499H), was found in a condition indicating that all its rounds had been fired. (T.R. , XII. 798-799) Oliver's service revolver was found by his feet with six spent shell casings in the cylinder. (T.R., XI. 722) An autopsy of Oliver revealed that he had died as the result of a single gunshot wound. (J.A., III. 1404) An entrance wound was found on the front left side of his chest, and an exit wound in the back, near his right shoulder blade. (J.A., III. 1399, 1401) The autopsy showed that Oliver had suffered internal gunshot wound injuries to his diaphragm, stomach, both lungs and heart. (J.A., III. 1400) The medical examiner, Dr. James Bell, testified that Oliver's wounds were consistent with his having been shot with a high-caliber bullet. (J.A., III. 1401)

During his own testimony, Workman stated that, after running from the officers, he fell on the parking lot. (J.A., III. 1513) He stated that, while trying to give up his gun, he was hit or grabbed and then "I guess I pulled the trigger" and "[t]he gun fired." (J.A., III. 1514-15) He stated that he then heard gunfire coming from his right, turned to it, and "I guess I shot again." (J.A., III. 1515) On cross-examination, Workman admitted, "I pulled the trigger, yes sir ... I had my hand around the gun and I guess it was pointed at the officers." (J.A., III. 1541)

After a trial by jury, petitioner was convicted in 1982 of the first degree felony murder of Oliver. At a separate sentencing hearing, the same jury sentenced Workman to death pursuant to Tenn. Code Ann. § 39-2-203(g)(1982), finding five statutory aggravating circumstances.[3]

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[3] 1) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered; 2) the murder was committed for the purpose of avoiding, interfering with, or

Post-Conviction Procedural History

Following the conclusion of two state post-conviction proceedings in 1986 and 1992, respectively, Workman filed a petition for the writ of habeas corpus in federal district court. (R. 1; J.A. I. 14)[4] The district court denied relief, awarding summary judgment to respondent on all claims and denying Workman's motion for summary judgment. (R. 94, J.A. III. 1293) Judgment was entered on November 14, 1996. (R. 96, J.A. I. 69)

The Court of Appeals for the Sixth Circuit affirmed the judgment of the district court on October 30, 1998. *Workman v. Bell*, 160 F.3d 276 (6th Cir. 1998), *republished at* 178 F.3d 759 (6th Cir. 1998). Workman filed a Petition for Rehearing and Suggestion for Rehearing En Banc on November 12, 1998. On May 10, 1999, Workman's petition was denied by the panel, with a portion of the Court's original opinion being deleted. Workman's petition for certiorari was denied by this Court on October 4, 1999, *Workman v. Bell,* 528 U.S. 913 (1999), and the Court of Appeals issued its mandate on October 12, 1999. Workman's petition for rehearing of the denial of certiorari was denied on November 29, 1999. *Workman v. Bell*, 528 U.S. 1040 (1999). The Tennessee Supreme

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preventing a lawful arrest or prosecution of the defendant; 3) the murder was committed while the defendant was engaged in committing or was fleeing after committing or attempting to commit, the offense of robbery; 4) the murder was committed by the defendant while he was in or during the escape from lawful custody or place of lawful confinement; and 5) the murder was committed against any law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer. Tenn. Code Ann. § 39-2-203(i)(3), (6), (7), (8), (9) (1982). The Court of Appeals previously determined that the jury improperly considered the felony murder aggravator but that this error was harmless. *Workman v. Bell*, 178 F.3d 759, 774 (6th Cir 1998), *cert. denied*, 528 U.S. 913 (1999).

[4] This was actually Workman's second-in-time petition. His first petition was filed November 18, 1987, and dismissed without prejudice on August 27, 1992.

Court set a new execution date of April 6, 2000.

On January 27, 2000, Workman filed an Application for Commutation to the Governor of the State of Tennessee. A hearing was scheduled on that application for March 9, 2000. On March 5, 2000, Workman filed a Motion to Reopen his habeas corpus case with the Court of Appeals. On March 8, 2000, Workman withdrew his Application for Commutation.[5] On March 24, 2000, Workman filed a Motion for Leave to File a Second Habeas Corpus Petition, Motion for Declaration That 28 U.S.C. § 2244 Does Not Apply to Specified Claims, and a Motion for Stay of Execution. On March 31, 2000, a panel of the Court of Appeals denied all of Workman's pending motions. On April 3, 2000, Workman filed petitions to rehear and suggestions for rehearing en banc. On April 4, 2000, the Court of Appeals granted Workman's petition to rehear en banc and stayed his execution "until further order of the Court."

Decision of the Court Below

An equally divided en banc Court of Appeals rejected petitioner's motion to reopen and dissolved the previously-entered stay of execution. *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000). Two separate opinions were issued with the en banc court's order. In an opinion authored by Judge Siler (hereafter, Siler opinion), seven members of the fourteen-member en banc court voted to deny petitioner's motion to reopen. *Workman v. Bell, supra*, 227 F.3d at 338-42. In that opinion, the judges likened petitioner's motion to reopen to a motion to recall the mandate and pointed out that such a motion would generally be barred from their consideration as a successive petition under 28 U.S.C. § 2244. While acknowledging that *Calderon v. Thompson*, 523 U.S. 538, 557 (1998), had

[5] Response of Respondent-Appellee to Petitioner's Motion to Reopen, App. E.

left open the question of whether the limited issue of fraud may nonetheless be raised by such a motion, the Siler opinion nevertheless concluded that § 2244(b) did not preclude the court's consideration of the motion to reopen. *Id.* at 339, 341.

On the merits of the motion, and applying the standard for fraud on the court set out in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), the Siler opinion determined that there had been no fraud on the court. The judges found that petitioner's allegation that evidence — an autopsy x-ray of Lt. Oliver's body — had been withheld by the county medical examiner's office could not constitute a fraud on the court because it did not involve actions by an officer of the court, *id.* at 341; they further determined that the evidence itself was immaterial. *Id.* at 339-40, 341. The x-ray, the opinion concluded, "adds nothing to the evidence in this case" because it proves nothing that had not been previously known and considered. *Id.* at 339-40. With respect to petitioner's proffer of an alleged recantation of Harold Davis' trial testimony,[6] the judges observed that such an allegation, even if it amounted to a fraud on the court, would only be fraud on the *state* court — not the *federal* court. *Id.* at 341.

In an opinion authored by Judge Merritt (hereafter, Merritt opinion), the remaining seven members of the en banc court voiced their desire to reverse the panel's denial of petitioner's motion to reopen and to remand the matter to the district court. *Id.* at 332-38.[7] Construing petitioner's

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[6] While petitioner raised this evidence before the en banc court, he had not based his motion to reopen upon it. *See* petitioner's March 6, 2000, Motion to Reopen. Instead, petitioner had cited this evidence in support of his motion to file a second habeas petition. *See* petitioner's March 24, 2000, Motion for Leave to File Second Habeas Petition.

[7] Although petitioner had filed a number of motions before the three-judge panel, this opinion, which appeared first immediately following the en banc court's order, explicitly stated that "the one we undertake to review today is Workman's request to reopen" his first habeas petition.

motion to reopen as a motion to recall the mandate, the Merritt opinion likewise addressed whether the provisions of 28 U.S.C. § 2244(b) precluded their consideration of the motion. *Id.* at 333-34. Noting that this Court, in its decision in *Calderon,* had distinguished cases of fraud on the court, the Merritt opinion also concluded that such cases are excepted from the statutory restrictions against successive petitions. *Workman v. Bell, supra*, 227 F.3d at 335.

The Merritt opinion then considered whether petitioner had alleged facts sufficient to warrant an evidentiary hearing on his allegations of fraud on the court. Likewise applying the elements of fraud on the court set out in *Demjanjuk*, the opinion concluded that he had. With respect to the alleged withholding of the x-ray evidence, the judges expressed the view that a material issue of fact had been created as to whether this constituted a fraud on the court. The Merritt opinion also addressed petitioner's allegations regarding Davis' recantation and concluded that these allegations created a material issue of fact warranting a full evidentiary hearing. *Id.* at 336.

Having decided that a hearing was warranted, the Merritt opinion further addressed the scope of such a hearing. The opinion stated that, on remand, the district court should also consider petitioner's new evidence relative to other claims of constitutional error, independent of the fraud allegation. *Id.* at 336-37. In that vein, the opinion went on to assess whether petitioner's evidence satisfied the requirements of 28 U.S.C. § 2244(b). *Id.* at 337-38.[8]

Workman v. Bell, supra, 227 F.3d at 333.

[8] In response to this section of the opinion, the Siler opinion points out that such claims of constitutional error were the subject of the second habeas petition that had already been rejected by the panel. *See Workman v. Bell*, *supra,* 227 F.3d at 341. In this respect, the Siler opinion observed: "Although the [Merritt] opinion states ... '[W]e are not reviewing an application for permission to file a second petition or a panel's decision to permit or deny such a request,' that is exactly what it is doing." *Id.*

On October 5, 2000, the Tennessee Supreme Court set January 31, 2001, as petitioner's new execution date.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE FIRST ISSUE PRESENTED BY PETITIONER.

Petitioner contends that this Court should grant certiorari to review whether the federal constitution prohibits applying the provisions of 28 U.S.C. § 2244(b) to bar his successive habeas claims allegedly demonstrating his innocence. In the first place, the issue is not presented by this case, because petitioner's premise is flawed. As discussed in detail in respondent's accompanying Brief in Opposition to the Petition for Writ of Habeas Corpus, petitioner's allegations of innocence are wholly without merit.

In any event, this Court lacks jurisdiction to review this issue. Petitioner first raised the issue in the Court of Appeals as part of his application for permission to file a second habeas petition.[9] Pursuant to 28 U.S.C. § 2244(b)(3)(B), a panel of the Court of Appeals denied that application. This denial is not appealable and "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E); *see Felker v. Turpin*, 518 U.S. 651, 661, 665 (1996)(certiorari petition to review denial of successive habeas application dismissed for want of jurisdiction); *see also Stewart v. Villareal*, 523 U.S. 637, 641-2 (1998)(if court of appeals had applied statutory provisions to decide successive habeas application, court would be without jurisdiction to consider certiorari petition).

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[9] *See* Petitioner's Motion for Leave to File Second Habeas Corpus Petition, pp. 12-13.

In addition to the jurisdictional bar to such review under § 2244(b)(3)(E), the issue is not properly before the Court. On rehearing en banc, citing the provisions of § 2244(b)(3)(E), as well as its own precedent,[10] the en banc Court of Appeals recognized that the subject of a second or successive petition cannot be considered en banc and expressly disavowed any intent to review the panel's decision denying petitioner's application. *Workman v. Bell, supra*, 227 F.3d at 333-34, 341-42. Accordingly, petitioner's reliance on a statement taken from the Merritt opinion to support his request for certiorari review is misplaced; this statement is mere dictum. The question of whether petitioner's evidence satisfies the statutory requirements for filing a second habeas petition had already been decided by the panel and was not before the en banc court.[11] The en banc court simply did not decide the issue that petitioner now asks this Court to review; consequently, it should not now be the subject of certiorari review. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) (Court ordinarily will not decide questions not passed on below).

Even if this Court determines that the issue is properly subject to certiorari review, such review is unwarranted because the issue is patently without merit. Petitioner contends that it would violate the Eighth and Fourteenth Amendments to apply the restrictions under 28 U.S.C. § 2244(b) to bar habeas claims that demonstrate a prisoner's innocence. This argument, though, ignores the fact that, for successive habeas claims that could not have been brought previously, § 2244(b) codifies the "actual innocence" exception that has long been a part of habeas corpus jurisprudence.

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[10] *See In re King,* 190 F.3d 479 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 1538 (2000).

[11] For the same reason, statements appearing in a footnote of the Merritt opinion regarding the constitutionality of precluding the court from addressing petitioner's claims, *see Workman v. Bell, supra*, 227 F.3d at 337 n. 4, and in the Siler opinion in response thereto, *see id.* at 342, are also dicta and cannot provide the basis for certiorari review.

28 U.S.C. § 2244(b)(2)(B)(ii). *See McClesky v. Zant*, 499 U.S. 467, 494 (1991). As this Court made clear in *Felker v. Turpin*, 518 U.S. 651, 664 (1996), while Congress may not foreclose the availability of habeas relief under the federal constitution, restricting the scope of such relief is well within its power.[12] Here, petitioner has merely been required to make a sufficient showing of his alleged innocence, as well as a threshold showing of both the merits and previous unavailability of such claims, before being allowed to proceed. That he has been unable to make the requisite showing does not give rise to a constitutional deprivation.

Finally, petitioner's intimation of a conflict between the decision below and other circuits on this issue provides no justification for certiorari review. The circuit court cases cited by petitioner are inapposite and therefore establish no such conflict.[13] Moreover, because the court below did not reach this question, the Sixth Circuit's decision cannot be said to conflict with the decision of any other circuit that has addressed this issue.

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[12] In further response to petitioner's assertion that he has been deprived of a federal forum for his claims, respondent notes the pendency of his Petition for Writ of Habeas Corpus before this Court, which presents these very claims.

[13] The cases cited by petitioner relate either to the application of the AEDPA's statute of limitations, *see Lucidore v. New York State Division of Parole*, 209 F.3d 107 (2d Cir. 2000), *cert. denied*, 121 S.Ct. 175 (2000); *Miller v. Marr*, 141 F.3d 967 (10th Cir. 1998), *cert. denied*, 525 U.S. 891 (1998); or to the relatively unique situation of a federal prisoner's successive post-conviction petition under § 2255 based on neither new evidence nor a new rule of constitutional law, but on this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995). *See Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997).

II. NO REASON EXISTS TO REVIEW THE SECOND ISSUE PRESENTED BY PETITIONER.

Petitioner also contends that certiorari should be granted to decide whether a court of appeals possesses the authority to recall its mandate in a habeas corpus case based upon a showing of fraud on the court and to resolve an alleged conflict between the two opinions below concerning the standard to be applied in deciding such claims. Respondent submits that certiorari review is not warranted on this issue for a number of reasons.

First, the entire en banc Court of Appeals agreed that it possessed such authority, and that it would therefore entertain petitioner's motion to reopen. Specifically, all fourteen judges agreed that, precisely because the motion alleged a fraud on the court, the restrictions against successive habeas petitions, *see* 28 U.S.C. § 2244(b), did not preclude them from acting on the motion. *Workman v. Bell*, *supra*, 227 F.3d at 335, 341, *citing Calderon v. Thompson, supra*, 523 U.S. at 557. For purposes of this case, respondent does not contend otherwise. Accordingly, the issue is not presented by the decision of the court below.

Second, petitioner's allegation of a conflict between the Siler opinion and the Merritt opinion regarding the legal standard governing claims of fraud on the court provides no basis for certiorari review. A conflict within a circuit court is *not* grounds for certiorari review. U.S.Sup.Ct.R. 10(a). *See* 23 *Moore's Federal Practice*, § 510.21[2] (3d ed. 1997)(Rule 10(a) contemplates a conflict between two or more courts of appeals and not conflicting decisions within a circuit). "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957)(per curiam).

Third, there is no conflict between the two opinions of the court below on this point. Both the Siler and the Merritt opinions utilized the *same* standard — that which the Sixth Circuit itself

had established previously in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied*, 513 U.S. 914 (1994). *See Workman v. Bell, supra,* 227 F.3d at 336, 341. The two opinions simply reached different conclusions as to whether petitioner's allegations satisfied that standard.[14] Petitioner's mere disagreement with one of those conclusions affords no basis for certiorari review. *See* U.S.Sup.Ct.R. 10 (petitions alleging misapplication of a properly stated rule of law are rarely granted). Nor does petitioner make any claim that the legal standard employed by all fourteen members of the en banc court conflicts with relevant decisions of this Court. *See* U.S.Sup.Ct.R. 10(c). Indeed, the standard established in *Demjanjuk* is fully consistent with prior decisions of this Court.[15] Accordingly, there is no reason to grant review on this issue.

III. THE DECISION BY THE COURT OF APPEALS NOT TO RECALL ITS MANDATE SHOULD NOT BE SUBJECT TO CERTIORARI REVIEW

Respondent submits that this case is not appropriate for certiorari review for a final reason. The entire en banc Court of Appeals effectively treated petitioner's motion to reopen his first habeas petition as a motion to recall its mandate denying habeas relief to petitioner. *See Workman v. Bell, supra*, 227 F.3d at 332-33, 338-39. Federal courts of appeal "are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." *Calderon v. Thompson, supra*, 523 U.S. at 550, *citing Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers). This power, though, is one of last resort, to be exercised only in

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[14] The seven members of the court who voted to deny relief to petitioner included the three members of the original panel upon whom the fraud was alleged to have been perpetrated.

[15] In *Demjanjuk*, the Sixth Circuit relied directly upon this Court's prior decisions involving cases of fraud on the court. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Hazel-Atlass Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944).

extraordinary circumstances. It is otherwise "to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson, supra*, 523 U.S. at 550.

Here, however, the Court of Appeals declined to exercise this extraordinary power, consistent with the sparing nature of its use. If the affirmative exercise by a court of appeals to recall its own mandate is subject to review only for abuse of discretion, *see Hawaii Housing Authority v. Midkiff, supra*, 463 U.S. at 1324 (Court not prepared to say that circuit court abused its power in recalling its mandate), the converse would seem necessarily to follow: a decision by a court of appeals not to recall the mandate is *not* subject to review. In any event, having eschewed use of its inherent, discretionary authority to recall the mandate, the court below certainly cannot be regarded as having abused such authority, nor can it be said to have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Supreme Court's supervisory power." U.S.Sup.Ct.R. 10(a). There is, quite simply, no compelling reason for this Court to grant certiorari review in this case. *See* U.S.Sup.Ct.R. 10.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded to counsel for the petitioner by mailing same, postage prepaid, to Christopher M. Minton, Office of the Post-Conviction Defender, 530 Church Street, Suite 600, Nashville, Tennessee 37243 on this the ____ day of January, 2001.

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