IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STEPHEN MICHAEL WEST,	)	
	)	
Petitioner	)	**No. 10-6338**
	)	
v.	)	
	)	**DEATH PENALTY CASE**
RICKY BELL, Warden,	)	**EXECUTION SCHEDULED**
	)	**NOVEMBER 9, 2010**
Respondent	)	

APPLICATION FOR CERTIFICATE OF APPEALABILITY

Comes now Petitioner-Appellant, Stephen Michael West, through undersigned counsel of record, pursuant to 28 U.S.C. § 2253, and applies for a certificate of appealability ("COA")[1] to appeal the district court's denial of his Motion for Relief from Judgment filed pursuant to RULE 60(b)(6), FED.

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[1]Respondent has filed a motion to dismiss this appeal, arguing Mr. West has no right to appeal the district court's successor determination. The district court actually made dual determinations, that Mr. West's submission was a 60(b), and that it was in substance a successive petition. (R. 217). Further, when Mr. West asked for a COA in the district court, Respondent urged the court to not entertain his request due to a lack of jurisdiction. (R. 214, p. 3 of 6). The district court overruled Respondent's objection and ruled on the merits of Mr. West's COA request. (R. 217). This Application for Certificate of Appealability further demonstrates this Court's jurisdiction, and no specific reply to Respondent's motion to dismiss will be filed.

R. CIV. P. (R. 212).[2]

Introduction

The sentencing jury in this capital case never heard substantial evidence that Mr. West, born inside a mental hospital, was subject to horrific child abuse from the time he was a baby. Despite Mr. West's diligent efforts, no court has yet reviewed his claim of ineffective assistance of counsel at sentencing under the proper constitutional and statutory standards. The district court's misapprehension of the interplay between sections 2254(d) and (e) of AEDPA caused it to fail to consider:

- whether trial counsel was ineffective for failing to present evidence about Mr. West being born in a mental hospital and how this strongly suggests a genetic tendency to succumb to significant mental illness, a high likelihood of emotional deprivation in the critical bonding phase of his life,[3]
- whether trial counsel was ineffective for failing to present the testimony of Mr. West's sister, Debra West Harless, that West was

[2]Citations to "R.–" refer to docket entries in case number 3:01-cv-91 filed in the Eastern District of Tennessee.

[3]Affidavit of Dr. Keith Caruso, dated February 23, 2001 (R. 212-1); Medical Record from Community Hospital confirming West was born in a mental institute (R. 212-2). *See* page 85, n. 23, of the Court's Memorandum Opinion, R. 188.

physically abused as a child,[4]

- whether trial counsel was ineffective for failing to present the testimony of West's former wife, Karen West Bryant, about West describing to her the abuse he suffered,[5]
- whether trial counsel was ineffective for failing to present the testimony of his father, Vestor West, admitting that he severely abused Mr. West,[6]
- whether trial counsel was ineffective for failing to present testimony of Mr. West's manager at McDonald's that Ronnie Martin was hostile and aggressive while Mr. West was more passive,[7] and
- whether trial counsel was ineffective for failing to present proof that Mr. West suffered repeated childhood abuse which caused him to become very passive and submissive as an adult, suffering from

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[4]Affidavit of Debra West Harless, dated December 31, 1998 (R. 212-3). *See* page 85, n. 23 of the Court's Memorandum Opinion, R. 188.

[5]Affidavit of Karen West Bryant, dated December 18, 2001 (R. 212-4). *See* page 85, n. 23 of the Court's Memorandum Opinion, R. 188.

[6]Affidavit of Vestor West, dated December 31, 1998 (R. 212-5). *See* page 85, n. 23 of the Court's Memorandum Opinion, R. 188.

[7]Affidavit of Patty Rutherford, dated February 11, 2002 (R. 212-6). *See* page 85, n. 23 of the Court's Memorandum Opinion, R. 188.

post-traumatic stress disorder.[8]

The district court held 28 U.S.C. § 2254(e)(2) barred consideration of these claims. *See* R. 188, p. 85, n. 23. We now know, however, that AEDPA requires a reviewing court first to consider whether the state court ruling was an unreasonable application of federal law pursuant to 28 U.S.C. § 2254(d). If it is unreasonable, the federal court is free to engage in plenary review on the merits. *Detrick v. Ryan*, 2010 WL 3274500 *18 (9th Cir. Aug. 20, 2010).[9]

Soon after this principle of law was clarified, West filed a Motion for Relief from Judgment, pursuant to FED. R. CIV. P. 60(b)(6), alleging that this recent clarification of the law qualified as an extraordinary circumstance warranting reopening of the district court's judgment. (R. 212). The district court found Mr. West failed to allege an extraordinary

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[8]Report of Claudia R. Coleman, Ph.D., dated November 7, 2001(R. 212-7); Report of Richard G. Dudley, Jr., M.D. dated February 22, 2002 (R. 212-8). *See* page 85, n.23 of the Court's Memorandum Opinion, R. 188. Affidavit of Pablo Stewart, M.D. dated December 13, 2002 (R.212-9), which was attached to Petitioner's Fourth Motion to Expand the Record filed December 19, 2002 (R. 166), granted August 21, 2003 (R. 181). Dr. Stewart's affidavit was presented to the district court. *See* Motion to Expand, *supra*, and Order granting same, *supra*. His affidavit was not specifically discussed in the district court's Memorandum dismissing Mr. West's petition. Implicit in the Court's Memorandum Opinion is the holding that this evidence was likewise barred by 2254(e)(2). *See* R. 188, p. 85-88.

[9]*See infra* at pp. 18-19 for further discussion of how *Detrick* and other recent case law clarify this point of law.

circumstance, that his filing was not timely, and that the law-of-the-case doctrine barred relief. (R. 216, pp. 9-13 of 13).[10] Mr. West filed a request for COA, R. 218, which the district court denied, stating no reasonable jurist would have concluded the Motion for Relief should have been granted. (R. 221). Mr. West now comes before this Court seeking a Certificate of Appealability so that he may appeal the district court's denial of his Motion for Relief from Judgment.

Issues Presented

1. Whether Mr. West presented extraordinary circumstances warranting relief under RULE 60(b)(6) where:

   a. No reviewing court has ever reviewed compelling evidence of the severe abuse Mr. West endured as a child and how that affected his personality,

   b. Mr. West will be put to death, despite the fact that this unreviewed evidence demonstrates a sentence of less than death is warranted,

   c. It is now apparent that the district court misapprehended the

[10]The District Court also treated Mr. West's Motion for Relief from Judgment as a Successor Petition and transferred it to this Court for initial consideration. (R.217). This Court assigned the transfer order case number 10-6333. Concurrently with this Application, Mr. West has filed a motion to retransfer that portion of the case back to the district court for initial review.

interplay between 28 U.S.C. §§2254(d) and (e)(2) and erroneously refused to consider several claims of ineffective assistance of counsel, and

d. Where he filed his motion within months of when federal circuit case law clarified the interplay between 2254(d) and 2254(e)(2).

2. Whether the law-of-the-case doctrine bars consideration of Mr. West's motion.

Procedural History and Statement of the Case

In 1990, Mr. West filed a petition for post-conviction relief in state court, arguing his trial attorneys were ineffective for failing to investigate and present evidence of the tragic circumstances of his childhood. The state court denied relief, holding he had not established by a preponderance of the evidence that his trial would have been different if the jury had heard the mitigating evidence. *West v. State*, 1998 WL 309090, at * 8-9 (Tenn. Crim. App. 1998), *perm. app. granted on unrelated issue*, 19 S.W.3d 753 (Tenn. 2000). The preponderance of the evidence standard is exactly the same standard condemned in *Williams (Terry) v. Taylor*, 529 U.S. 362, 405-06 (2000) for being "contrary to" *Strickland*.

Mr. West next filed a timely habeas petition, alleging, in part, that trial

counsel was ineffective at sentencing for failing to present the above enumerated evidence. *See* Amended Petition (R. 111), Claim III, p. 39-56 and numerous attachments. Specifically, he alleged in his habeas petition:

> The state court denied Mr. West relief with respect to his ineffective assistance of counsel claim and, citing *Lockhart v. Fretwell*, 506 U.S. 364 (1993), concluded that Mr. West had not demonstrated how he was prejudiced by counsel's deficient performance. ... The [state] court's citation and application of the erroneous prejudice standard of *Lockhart v. Fretwell*, 506 U.S. 364 (1993) mandates relief because this was contrary to or an unreasonable application of *Strickland*.

Amended Petition, p. 55 (R. 111).

He also alleged, "[t]rial counsel failed to conduct a reasonable investigation of Mr. West's social history and failed to present mitigating evidence, through expert and lay witness testimony and records, at the trial." (*Id.* p.42). West then argued the evidence presented in post-conviction as well as the several affidavits detailed above in footnotes 1-7, *infra*, demonstrated he was prejudiced by counsel's deficient performance at sentencing. (*Id.*, p.42-56).

Respondent filed multiple pleadings urging the district court not to consider the affidavits. *See, e.g.*, Response to Petitioner's Motion to Expand the Record, R. 119, p. 6-7; Motion for Summary Judgment, R. 125, p.162.

The district court addressed Mr. West's ineffective assistance of counsel at sentencing claim using a two-step analysis. The district court first considered whether the previously mentioned evidence could be considered pursuant to 28 U.S.C. § 2254(e)(2)(*See*, p. 83-88 of the Court's Memorandum Opinion, R. 188). Accepting Respondent's argument, the district court ruled it would not do so. *(Id.*, p. 88). The court reasoned that considering this evidence "would skew the determination to be made under AEDPA's standard of review because, logically, the state court could not have applied the law to facts that were not before it." (*Id).*

Next the district court reviewed the reasonableness of the state court opinion under 28 U.S.C. § 2254(d)(1):

> The state post-conviction court and the appellate court decision that counsel was not ineffective for failing to investigate and present mitigating evidence during the sentencing hearing was based on a reasonable determination of the facts in light of the evidence presented in the state court proceeding, and that the decision was not contrary to *Strickland*. The decision reached by those courts does not reflect an unreasonable determination of the facts in light of the evidence presented in those state court proceedings nor is the decision contrary to *Strickland.*

Court's Memorandum Opinion, p. 93 (R. 188).

Mr. West appealed to this court, which held that the state court rulings were an unreasonable application of federal law: "Clearly, the Criminal

Court for Union County stated the wrong standard for proving prejudice in a claim of ineffective assistance ... West is correct that his situation satisfies requirements of 28 U.S.C. §§ 2254[d] ... [W]e must deny West's petition for a grant of habeas corpus even though the state court decision was an unreasonable application of clearly established federal law." *West v. Bell*, 550 F.3d 542, 553-54 (6th Cir. 2009). This Court was deeply divided over whether West had established prejudice. Two judges found he had not established prejudice and voted to deny relief. *Id.* at 550. One judge would have held Mr. West established he was prejudiced, as contemplated in *Strickland v. Washington*, 466 U.S. 668 (1984), and would have ordered a new sentencing hearing. *West*, 550 F.3d at 568.

Mr. West timely sought a writ of certiorari from the United States Supreme Court, which was denied on March 1, 2010. (R. 209).

On June 14, 2010, the United States Supreme Court granted certiorari to address whether "Resolution of the 2254(d)(1) 'reasonableness' question should precede any presentation of evidence in federal court.'" *Cullen v. Pinholster*, No. 09-1088, 130 S.Ct. 3410; *see Petitioner's Brief, 2010 WL 3183845 p. 21-42 (U.S. Aug. 9, 2010)*.

On August 20, 2010, the Ninth Circuit Court of Appeals held that

"when a state court adjudication is based on an antecedent unreasonable determination of fact, the requirement set forth in 2254(d) is satisfied and we may proceed to consider the petitioner's claim *de novo*." *Detrick v. Ryan*, 2010 WL 3274500 *18 (9th Cir. Aug. 20, 2010).

On October 4, 2010, the United States Supreme Court denied review in *Thompson v. Bell*, 580 F.3d 423 (6th Cir 2009), a case in which this Court held that an antecedent unreasonable determination of fact may open the door to *de novo* review.

On October 15, 2010, Mr. West filed a Motion for Relief from Judgment,(R. 212) alleging that the clarification of the interaction between 28 U.S.C. §§ 2254 (d) and (e)(2) qualified as an extraordinary circumstance warranting reopening of his habeas case. (R. 212).

On October 27, 2010, the district court entered an order denying the 60(b) motion and also transferring the case to this Court for authorization to file a successor petition. (R. 216, 217).

On October 29, 2010, the district court denied Mr. West's COA. (R. 221). Mr. West now comes before this Court seeking COA.

Standard of Review

To obtain a certificate of appealability ("COA"), a habeas petitioner

must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner "need not show that he should prevail on the merits." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Instead, the Supreme Court instructs:

> [t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claim. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

A claim denied by the district court on its merits warrants issuance of a COA when it presents a "question of some substance." Questions of some substance include those (a) that are "debatable among jurists of reason;" (b) "that a court could resolve in a different manner;" (c) that are "adequate to deserve encouragement to proceed further;" or (d) that are not "squarely foreclosed by statute, rule or authoritative court decision, or ... [that are not] lacking any factual basis in the record." *Barefoot*, 463 U.S. at

893 n.4, 894; *see also Slack v. McDaniel*, 529 U.S. 473 (2000).

A claim denied on procedural grounds "without reaching the prisoner's underlying constitutional claim," warrants a COA when:

> jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 478.

In particular, where a district court denies a RULE 60(b) motion, a certificate of appealability is proper where the district court abuses its discretion in denying the 60(b) motion. *Kellogg v. Strack*, 269 F.3d 100, 103-04 (2d Cir. 2001). An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard. *Romstadt v. Allstate Ins. Co.,* 59 F.3d 608, 615 (6th Cir. 1995).

As is shown within, Mr. West meets the above-cited standards for a certificate of appealability to include the issues discussed below.

Argument

1. Mr. West presents extraordinary circumstances warranting relief under FED. R. CIV. P. RULE 60(b)(6) where:

a. No reviewing court has ever reviewed compelling evidence of the severe abuse Mr. West endured as a child and how that affected his development;

b. Mr. West will be put to death, despite the fact that this unreviewed evidence demonstrates a sentence of less than death is warranted;

c. It is now apparent that the district court misapprehended the interplay between 28 U.S.C. §§ 2254(d) and (e)(2) and erroneously refused to consider several claims of ineffective assistance of counsel;

d. Where he diligently filed his motion within months of when federal circuit court case law clarified the interplay between 2254(d) and 2254(e)(2).

No reviewing court has ever reviewed compelling evidence of the severe abuse Mr. West endured as a child and how that affected his development. Shortly before his birth, Stephen West's mother tried to kill herself by gas inhalation. (R. 212-7, p. 5 of 10). Consequently, Stephen was born in a psychiatric hospital. (R. 212-1, p. 9 of 12). Beyond doubt, Stephen came into this world with a genetic predisposition to mental illness. In addition, because his mother was severely mentally ill, she lacked the capacity to care for him. As an infant, Stephen suffered from emotional

deprivation and was deprived of the opportunity for maternal bonding. Stephen's mother relentlessly abused him. An aunt further described a time when she sought medical attention for Stephen:

> I came down. Patty came out to get some food for Steve and she [Steve's mother] started swearing at them and she ran in there and just slung Steve up against the wall; grabbed him by his feet. There was blood and he started throwing up. And she said, "I feel like killing the little bastard." She walked out. I cleaned them up and took them to the hospital. His nose was bleeding and his mouth was bleeding.

(R.67, Add.26, pp. 382-383.) As Ruby explained: "She was always hitting him. He had bruises on him; pinching him; sling him back in that room if he came out." (*Id*. p. 383.) An aunt recalled Stephen's mother throwing him against the wall, resulting in her taking him to the hospital. (R. 212-7, p. 4 of 10). As a very young child, Stephen was often confined to room, hiding on a urine-soaked mattress. (R. 212-7, p. 4 of 10). His older sisters recall that Stephen was so scared of his mother that he would flinch and start crying if his mother raised her arm toward him in any manner. (R. 212-7, p. 4 of 10). Stephen's aunt recalls his parents beat, kicked, and punched him. (R. 212-9, p. 7 of 17). Stephen's alcoholic father hit him with a belt, an electric cord, sticks, and a broom handle. (R. 212-9, p . 8 of 17). With no parental support or encouragement, Stephen dropped out of school in junior

high. (R. 212-8, p. 5 of 15). He began consuming alcohol as a way to self-medicate for significant depression. *(Id).* Despite suffering innumerable acts of cruelty as a child, Stephen West reached adulthood, served three years in the Army, received an honorable discharge, fell in love, became married, and fathered a child. (R. 212-8, p. 6 of 15). The abuse Mr. West suffered as a child caused him to become very passive and submissive as an adult, suffering from post-traumatic stress disorder. (R. 212-7, p. 9 of 10; R. 212-8, p. 14 of 5).

The jury who sentenced Mr. West to death did not hear this evidence; tragically, defense counsel offered the sentencing jury no insight into the horrible circumstances of Mr. West's childhood. Defense counsel was hired by Mr. West's mother, the same mother who slammed him against the wall, leaving him with crossed eyes requiring several operations. She did not want defense counsel to offer proof of the abuse she inflicted on West; so he did not. (R. 212-5, ¶ 5).

Because the sentencing jury did not hear this evidence, and because no reviewing court has ever reviewed it, this Court has lost assurance that the sentence was imposed in a manner that comports with the Eighth and Sixth Amendments to the United States Constitution.

If the RULE 60(b) motion is not granted, Mr. West stands to lose his life without a full merits review of whether death is the appropriate punishment. Indeed, the courts have recognized in capital habeas cases that the petitioner's right to life carries substantial – if not controlling – weight when a court exercises its equitable powers. *See e.g., Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001)(using equitable powers to allow consideration of petition because "[i]n a capital case such as this, the consequences of error are terminal. ... We will therefore exercise leniency under the facts of this capital case."); *Calderon v. United States District Court*, 128 F.3d 1283, 1288 n. 4 (9th Cir. 1997)("'[O]ccasional' injustices . . . are decidedly not an acceptable cost of doing business in death penalty cases."). This Court recently affirmed this principle in *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009)(*cert. denied*, Oct. 4, 2010). Mr. Thompson filed a RULE 60 Motion for Relief alleging Tennessee clarified its law concerning exhaustion and that the district court erred in failing to consider certain allegations of ineffective assistance of counsel at sentencing. This Court held Thompson was entitled to relief, even though his Motion was filed years after the clarification in law. *Thompson*, 580 F.3d at 444. This Court held the "irreversible finality of [an inmate's] execution, as well as serious

concerns about ineffective assistance" are entitled to controlling weight. *Id.*

It is now apparent that the district court misapprehended the interplay between 28 U.S.C. §§ 2254(d) and (e)(2) and erroneously refused to consider several claims of ineffective assistance of counsel, finding them unexhausted. The error undermining the integrity of the district court's judgment is that it did not first determine the reasonableness of the state court decision under 28 U.S.C. § 2254(d). The fact that this was not the first step of the court's analysis precluded proper review on the merits of the prejudice component of the *Strickland* claim. This is the type of extraordinary error that supports a RULE 60(b) motion. The state court's decision in this case was an unreasonable application of federal law because it applied an incorrect standard. *West v. Bell*, 550 F.3d at 553-54. Thus, having met 2254(d), the merits – including all evidence presented to this Court – should have been reviewed and considered. Such a review should have been conducted *de novo* precisely because 2254(d) was met.

It is fair to say that Mr. West has established the state court unreasonably applied federal law by imposing an unconstitutionally high burden of proof on his *Strickland* claim. This court has so held. *West*, 550 F.3d at 553. What makes this case extraordinary, however, is that

intervening case law now demonstrates that where a petitioner establishes an unreasonable application of the federal law by the state court, and where the federal court then engages in *de novo* review, the federal court may consider the new evidence Mr. West offered as part of his habeas petition.

The Ninth Circuit has also very recently applied this reasoning, explaining "because we do not know what the state court would have decided had it applied the law to the correct facts, there is no actual decision to which we can defer. Continuing to apply AEDPA deference even after concluding that the state court had unreasonably determined the facts to which it applied the law would therefore require us to assess the reasonableness of a decision that the state court never actually reached." *Detrick v. Ryan*, 2010 WL 3274500 , at *18-19 (9th Cir. Aug. 20, 2010). The court concluded "when a state court adjudication is based on an antecedent unreasonable determination of fact, the requirement set forth in § 2254(d) is satisfied and we may proceed to consider the petitioner's claim *de novo*. *Id.* at *18

In *Thompson v. Bell*, this Court found the state court had unreasonably applied Supreme Court precedent concerning the condemned inmate's right to be competent for execution. 580 F.3d 423 (6th Cir. 2009),

cert. denied, Oct. 4, 2010. Upon finding Section 2254(d)(1) had been met, this Court remanded for an evidentiary hearing. The court stated:

> When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires. Accordingly, this Court will remand the action to the district court to conduct Thompson's incompetency hearing and decide the merits of his incompetency claim *do novo*.

Thompson, 580 F.3d at 436-37.

The United States Supreme Court is poised to address this exact issue. In *Cullen v. Pinholster*, No. 09-1088, the Supreme Court of the United States granted certiorari to address whether "Resolution of the *§* 2254(d)(1) 'reasonableness' question should precede any presentation of evidence in federal court." *See* order granting cert. on June 14, 2010, 130 S.Ct. 3410. *See* Petitioner's Brief, 2010 WL 3183845, p. 21-42 (U.S. Aug. 9, 2010).

Mr. West's Rule 60(b) motion is consistent with Supreme Court precedent. RULE 60(b)(6) provides that "the court may relieve a party ... from a final judgment, order, or proceeding for ... any other reason justifying relief from the operation of the judgment." A proper RULE 60(b) attacks the

integrity of the decision-making in the federal habeas proceedings. When there is an important mistake in the decision-making process, "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005).

The Supreme Court in *Gonzalez* specified that a RULE 60(b) motion may "assert[] that a previous ruling which precluded a merits determination was in error–for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Gonzalez,* 545 U.S. at 532, n. 4. The Court noted that a RULE 60(b) motion based upon subpart (6),("any other reason justifying relief"), should demonstrate "extraordinary" circumstances. *Id.* at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 200-01 (1950) (comparing petitioner's deliberate choice not to pursue his adjudicated claims to avoid the cost of sacrificing his home with extraordinary circumstances in *Klapprott v. United States*, 335 U.S. 601 (1949), where outside forces caused petitioner's claims to be defaulted)). Sixth Circuit case law affirms that a fundamental misapprehension of law may qualify as an extraordinary circumstance. In *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985), this Court held that a change in law may be an extraordinary circumstance if the state of law is

clarified while the case is on appeal and if the plaintiff has been diligent in pursuing the issue. In the habeas context, this Court recently found a change in the state of law qualified as an extraordinary circumstance. *Thompson v. Bell*, *supra* at p. 443 (holding promulgation of TENN. S. Ct. R. 39 qualified as an extraordinary circumstance warranting reopening of the habeas petition). In Mr. West's case, this Court erroneously failed to review his claim under 2254(d) prior to determining whether to consider the remaining evidence. This failure to do so qualifies as a defect in the proceedings which erroneously barred this Court from considering persuasive evidence in support of his ineffective assistance at sentencing claim. The legally unjustified failure to address the merits of West's claim strikes at the heart of the habeas proceedings. Due process lies in "the right to notice and an opportunity to be heard [which] must be granted at a meaningful time and in a meaningful manner." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (internal quotation marks omitted) *citing Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

Beyond question, West has been diligent. After this Court initially declined to consider the evidence, West filed a RULE 59 motion again asserting the propriety of considering this evidence. FED.R.CIV.P. 59(e), (R.

191). West also vigorously argued the relevance of this evidence on appeal to this Court. *See, e.g.*, *West v. Bell*, 550 F.3d at 550-51 (erroneously finding that the district court did not abuse its discretion in failing to grant the Motion to Expand, when, in fact, those motions were granted), (*See* R. 145, 181). Only after this Court denied relief, did case law emerge explaining that when the petitioner satisfies 28 U.S.C. § 2254(d)(1) and is entitled to *de novo* review, the district court may receive the newly proffered evidence. "When a prisoner has shown reasonable diligence in seeking relief based on a change in procedural law, and when that prisoner can show that there is probable merit to his underlying claims, it would be well in keeping with a district court's discretion under RULE 60(b)(6) for that court to reopen the habeas judgment and give the prisoner the one fair shot at habeas review that Congress intended that he have." *Gonzales,* 545 U.S. at 542.

This claim qualifies for a COA. The district court's denial of the Motion for Relief from Judgment is debatable among jurists. This very court has held that a clarification in the law may qualify as an extraordinary circumstance. *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009). *See also Gonzalez v. Crosby*, 545 U.S. 524 (2005). Furthermore, the United States

Supreme Court is poised to address and clarify the interplay between §§ 2254(d) and (e)(2). *Pinholster v. Ayers*, 590 F.3d 651 (9th Cir. 2009), *cert. granted*, sub nom, *Cullen v. Pinholster*, 130 S.Ct. 3410, 78 USLW 3728 (U.S. June 14, 2010)(No. 09-1088). The claim is one of substance. *Slack v. McDaniel*, 529 U.S. 473 (2000). It merits this Court's review. A COA should issue.

2. Mr. West also seeks COA on whether the law-of-the-case-doctrine bars consideration of his Motion for Relief from Judgment.

The district court held it was bound by this Court's resolution of Mr. West's ineffective assistance claims. (R. 216, p. 12 of 13). The law-of-the-case doctrine provides that a prior ruling on an issue generally cannot be revisited in subsequent litigation. *United Sates v. Haynes*, 468 F.3d 422, 426 (6th Cir 2006). However, there are exceptions to this doctrine which are present here. First, the law-of-the-case doctrine is not applicable "where a subsequent contrary view of the law is decided by the controlling authority." *Id*. As discussed previously at pp. 18-21, federal law on the interplay between §§ 2254(d) and (e)(2) has recently been clarified; and this clarification would change the outcome in Mr. West's case. Another exception to the law-of-the-case doctrine is "where a decision is clearly erroneous and would work a manifest injustice." *Haynes*, at 426. As

explained *infra*, the district court and this Court's failure to consider all of the evidence relevant to Mr. West's claim of ineffective assistance at sentencing will work a manifest injustice and result in a death sentence carried out in violation of the Eighth and Sixth Amendments to the United States Constitution.

A COA is warranted if reasonable jurists could conclude Mr. West's Motion for Relief from Judgment is not barred by the law-of-the-case doctrine. Certainly reasonable jurists did not conclude Mr. Thompson's 60(b) motion was barred by the law of the case. *See* generally *Thompson*, 580 F.3d at 442-444. Further, in *Mitchell v. Rees*, 261 Fed Appx 825, 828 (6th Cir. 2008), this Court specifically held that the law-of-the-case doctrine did not bar a habeas 60(b) alleging a change in the law as the extraordinary circumstance. Certainly Mr. West's argument is substantive enough to merit further encouragement. The same result is dictated here. A COA should issue.

CONCLUSION

Because RULE 60(b) is quintessentially a vehicle for the exercise of equity, a district court must properly consider the equities involved when assessing a motion for relief from judgment. Because Mr. West stands to lose his life absent remedy from this Court, and given the intervening events described in this motion, his case is one of the rare cases which "cries out for the exercise of that 'equitable power to do justice." *National Credit Union Administration Board v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) (granting relief from judgment).

Therefore when exercising its inherent, equitable powers over its own judgment, this Court may confidently act in accordance with these principles and in harmony with the interests and purpose of RULE 60(b), *Gonzalez v. Crosby*, *supra*.

PRAYER FOR RELIEF

West respectfully requests this Court grant COA on his two issues and enter a briefing schedule.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, the foregoing Application for Certificate of Appealability was filed electronically. Notice electronically mailed by the Court's electronic filing system to all parties indicated on the electronic filing receipt. Notice delivered by other means to all other parties via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

s/Stephen Ferrell