0510960

No. 05-_____

In The Supreme Court Of The United States

SEDLEY ALLEY,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

MOTION TO PROCEED *INFORMA PAUPERIS*

EXECUTION DATE: May 17, 2006, 1:00 a.m.

Paul R. Bottei
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for Petitioner

CAPITAL CASE
EXECUTION DATE: 5/17/06 at 1:00 a.m.

Petitioner Sedley Alley respectfully moves this Court to grant him leave to proceed *in forma pauperis*. In support thereof, Mr. Alley shows:

1. A Tennessee jury convicted Mr. Alley of first-degree murder and sentenced him to death. State v. Alley, 776 S.W.2d 506 (Tenn. 1989).

2. Mr. Alley filed in the United States District Court for the Western District of Tennessee a habeas corpus petition. Pursuant to 21 U.S.C. § 848(q), the District Court appointed undersigned counsel to represent Mr. Alley in all appropriate proceedings respecting Mr. Alley's death sentence.

3. The District Court and the United States Court of Appeals for the Sixth Circuit have allowed Alley to proceed *in forma pauperis* in this action.

WHEREFORE, Sedley Alley respectfully requests that this Court:

1. Grant him leave to proceed *in forma pauperis*; and

2. Grant such other relief as this Court deems just.

Respectfully submitted,

Paul R. Bottei
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FAX (615)736-5265

Paul R Bottei

CERTIFICATE OF SERVICE

I certify that I have forwarded a copy of the foregoing petition for writ of certiorari to Joseph Whalen, Office of the Attorney General and Reporter, 425 Fifth Avenue North, Nashville, Tennessee 37243, this the 16 day of May, 2006.

Paul R Bottle

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In The Supreme Court Of The United States

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Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

1. In habeas corpus proceedings, do allegations of fraud, misconduct, and misrepresentation by the state's attorneys constitute a prohibited second or successive petition for writ of habeas corpus?

   See Gonzalez v. Crosby, 545 U.S. ____, ____ n. 5 (2005)(allegations of fraud do not constitute a second habeas petition).

2. When alleging a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) in a first habeas corpus petition, is a habeas corpus petitioner required to specifically identify particular items of withheld evidence of which the petitioner has no knowledge, where the state has continued to withhold such items while falsely representing that no such evidence has been withheld?

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TABLE OF AUTHORITIES

OPINIONS BELOW

The District Court order denying the motion for equitable relief is attached as Appendix 1. Alley v. Bell, No. 97-3159 (W.D.Tenn. Nov. 28, 2005). The District Court's order denying a motion to alter or amend is attached as Appendix 2. Alley v. Bell, No. 97-3159 (W.D.Tenn. Mar. 22, 2006). The Sixth Circuit Opinion affirming the District Court is attached as Appendix 3. Alley v. Bell, No. 05-6876 (6th Cir. May 9, 2006). The Sixth Circuit order on rehearing is attached as Appendix 4. Alley v. Bell, No. 05-6876 (6th Cir. May 15, 2006).

JURISDICTION

On May 9, 2006, the United States Court of Appeals for the Sixth Circuit affirmed the denial of equitable relief under Fed.R.Civ.P. 60(b) and Article III. Alley v. Bell, No. 05-6876 (6th Cir. May 9, 2006). Rehearing was denied on May 15, 2006. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III §2 of the United States Constitution provides that: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, on which shall be made, under their Authority . . . ."

Fed.R.Civ.P. 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated,

> or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .
>
> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . or to set aside a judgment for fraud upon the court.

STATEMENT OF THE CASE

In the evening of July 11, 1985, Suzanne Marie Collins was abducted as she was jogging at the Millington Naval Base near Memphis. Her body was found the next day in a park near the Naval Base. At trial, the prosecution asserted that Sedley Alley was the man who abducted and killed Ms. Collins around 11:00 p.m. The jury agreed, convicted Mr. Alley of first-degree murder, and sentenced him to death.

I.
FRAUD, MISREPRESENTATION, AND MISCONDUCT IN THE INITIAL HABEAS CORPUS PROCEEDINGS

During initial federal habeas corpus proceedings, Sedley Alley alleged that, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), he had been denied a fair trial through the improper withholding of material exculpatory evidence. He alleged that the prosecution had withheld evidence which "otherwise would have entitled Sedley Alley to a new trial, in violation of the Fourteenth Amendment." Petition For Writ Of Habeas Corpus, ¶35. The District Court denied his claim.

As it turns out, and as Sedley Alley has alleged below, the state engaged in fraud, misconduct, and misrepresentation which led to the District Court's denial of the habeas petition. Specifically, the state (including the District Attorney's Office which both prosecuted Alley and defended the judgment in habeas proceedings) not only failed to comply with their ongoing duty to disclose exculpatory evidence, but affirmatively

represented to the District Court that all such exculpatory evidence had been disclosed. Specifically:

(1) In December 1985, the District Attorney represented to the trial court and to Sedley Alley that "The State of Tennessee will comply with the requirements of" Brady v. Maryland, 373 U.S. 83 (1963), Mooney v. Holohan, 294 U.S. 103 (1935) and Napue v. Illinois, 360 U.S. 264 (1959). R. 158, Second Amended Motion For Equitable Relief, Ex. 1.

(2) The document containing that assurance was likewise included as part of the record in the Tennessee Supreme Court on direct appeal. Id.

(3) In state post-conviction proceedings, relying on the representations made in that document, post-conviction counsel included that document as Exhibit 31 to the post-conviction proceedings.

(4) Then, in the habeas proceedings before Judge Donald, the District Attorney's Office continued to represent the state in its efforts to uphold Sedley Alley's conviction and death sentence: Assistant District Attorney General John Campbell entered a special appearance as counsel for the Respondent. R. 19 (Notice of Special Appointment of Assistant District Attorney General John W. Campbell). Mr. Campbell had represented the state throughout post-conviction proceedings in this case.

(5) The very day the Assistant District Attorney Campbell entered his appearance, Respondent's counsel filed as part of the record with Judge Donald the District Attorney's December 1985 representation concerning its alleged compliance with *Brady*. R. 20 (Notice of Filing Of Documents, Addendum 1: Tr. Technical

Record; Addendum 22, Post-Conviction Record; R. 158, Second Amended Motion For Equitable Relief, Ex. 1.

We now know that the District Attorney's representation to the federal court concerning its purported disclosure of exculpatory evidence was (and is) as a matter of fact, false. Indeed, it was not until after the conclusion of the habeas proceedings that Sedley Alley independently learned that the state had – contrary to its express assertions – actually withheld vital, exculpatory evidence demonstrating his innocence.

In 2004 and 2005, Sedley Alley learned for the first time that throughout the federal habeas proceedings, the state had in its possession evidence showing that the victim was killed at a time when Sedley Alley's whereabouts were clearly known by authorities: the victim was killed in a park at 3:30 a.m., when Sedley Alley was known to be elsewhere, at home. This withheld evidence categorically excludes Alley as having committed the crime. Alley is innocent.

The proof of the District Attorney's fraud and misrepresentation comes initially from two sources:

(1) A Shelby County Sheriff's Department Report from Sergeant Jim Houston (first discovered April 1, 2005) which recounts that Dr. James Bell (the medical examiner who examined the body at the scene) said that the victim "had been d[ea]d approximately six (6) hours when he saw the body and made the crime scene at 9:30 AM, 7-12-85." R. 158, Second Amended Motion For Equitable Relief, p. 26 & Ex. 2;[1] and

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[1] Sedley Alley first obtained this document in April 2005, and he amended his motion (continued...)

(2) Dr. Bell's handwritten notes, which confirm that the victim died at 3:30 a.m. on July 12, 1985, and no earlier than 1:30 a.m. that day. See R. 158, Second Amended Motion For Equitable Relief, p. 26 & Exs. 3-4.[2]

Ultimately, the Houston report and Dr. Bell's notes are critical, because, having had Sedley Alley under surveillance, the authorities knew where Sedley Alley was from 1:27 a.m. and afterwards – Sedley Alley was at home. See Second Amended Motion For Relief, p. 26-27 & Ex. 5 (Naval Investigative Service Radio Log showing Alley's whereabouts from 12:10 a.m. onward). Sergeant Houston's report and Dr. Bell's withheld notes establish that Sedley Alley did not commit the murder for which he was convicted. These documents are also critical because they completely disprove that the state's theory at trial, *viz.*, that Sedley Alley supposedly abducted and killed the victim around 11:00 p.m. on July 11. See Appendix 5, Timeline of Events of July 11-12, 1985.

The significance of the withheld time of death evidence is confirmed by additional evidence, including proof that: (1) The person identified as the abductor was 5'8" with a dark complexion, dark hair, and no noted facial hair, while Sedley Alley was 6'4" with a light complexion, long reddish-brown hair, a mustache and beard (R. 158, Second Amended Motion For Equitable Relief, p. 28 & & Exs. 4, 7, 8, 9, 10, 11); (2) Unlike Sedley Alley, the victim's boyfriend closely fits the description of the abductor (Id., p. 28 & Exs. 4 & 7);(3) The boyfriend drove a station wagon, the type of vehicle described by witnesses to the

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[1](...continued)
for equitable relief to include this matter on June 16, 2005.

[2] Sedley Alley first obtained these documents in January, 2004, and he amended his motion for equitable relief to include such matters on May, 2004.

abduction (Id., p. 28 & Exs. 4, 10, 11); (4) The tire tracks at the abduction scene are not from Sedley Alley's car (Id., p. 29 & Exs. 12, 13,14); and (5) Shoe prints at the scene didn't match Alley's shoes either. Id., p. 29 & Exs. 15 & 16.

Not only was Sedley Alley denied Dr. Bell's opinion and his vital notes throughout initial federal proceedings, he also was not provided information about the victim's boyfriend, which was in the possession of authorities. The boyfriend (John Borup) was interviewed by an Naval Investigative Service investigator, but the investigator only wrote that Borup had no significant information. The investigator, however, clearly knew that Borup would have fit the description of the abductor, and would have learned from Borup that Borup was, in fact, with the victim the night of her death.[3] We also know independently that Borup would have had a motive – the victim was to leave the next day to be with her fiancee in California.[4] None of this critical exculpatory information, however, was disclosed to Sedley Alley before the conclusion of his initial habeas proceedings – despite the District Attorney's representation that all such evidence had been disclosed.[5]

II.
SEDLEY ALLEY'S MOTION FOR EQUITABLE RELIEF FROM JUDGMENT BASED ON FRAUD, MISREPRESENTATION, AND MISCONDUCT OF THE DISTRICT ATTORNEY

Because it now appears that, throughout the federal proceedings, the District

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[3] R. 158, Second Amended Motion For Equitable Relief, p. 29 & Ex. 4 (Borup admits to being with victim before she was killed).

[4] R. 158, Second Amended Motion For Equitable Relief, pp. 29-30 & Ex. 4 ¶¶ 4, 6, 7.

[5] In addition, Sedley Alley alleged that he was denied exculpatory evidence from prosecution expert Craig Lahren which showed that hairs found at the crime scene were not Sedley Alley's. R. 158, Second Amended Motion For Equitable Relief, pp. 30-31 & Exs. 17 & 18.

Attorney had falsely represented its compliance with *Brady* to both Alley and the Court, Sedley Alley filed in the United States District Court a motion for relief from judgment, alleging that he had been the victim of fraud, misrepresentation, and/or misconduct, and that he was therefore entitled to equitable relief from judgment under Fed.R.Civ.P. 60(b), Rule 60(b)'s savings clause, and/or directly under Article III. R. 158, Second Amended Motion For Equitable Relief.

In seeking equitable relief from judgment under Fed.R.Civ.P. 60(b) and Article III, Sedley Alley maintained that he was denied a full and fair adjudication of his *Brady* claims (Petition ¶35). He is therefore entitled to relief from judgment: Exculpatory evidence was withheld throughout the course of federal habeas proceedings where counsel for the District Attorney's Office (which represented Respondent in federal habeas proceedings) had assured Sedley Alley that all exculpatory evidence had been disclosed, and counsel for Respondent filed with the United States District Court a document specifically making that representation to the federal court.

Initially, the District Court granted a stay of execution, which the state appealed. On rehearing, the Sixth Circuit remanded the case to have the District Court address, in the first instance, Sedley Alley's motion for equitable relief. Alley v. Bell, 405 F.3d 371 (6th Cir. 2005)(en banc).

In remanding to the District Court, Judges Cole, Martin, Daughtrey, Moore, and Clay made clear that Sedley Alley's allegations were not a second or successive habeas corpus petition because his allegations were sufficient to "allege fraud" under Fed.R.Civ.P. 60(b). Alley v. Bell, 405 F.3d at 372 (Cole, J., concurring). As Judge Cole explained, Alley's allegations of fraud "whether true or not" had "nothing to do with his state court

proceedings." As Judge Cole explained: "State attorneys certainly could have willfully or recklessly withheld evidence from the federal habeas court," and therefore "resolution of Alley's Rule 60(b) motion would be irrelevant to the constitutionality of his state trial, since success on the motion would merely serve to reopen his original habeas proceeding without determining facts that would require a finding that his state trial was unconstitutional." Id. at 372-373. As Judges Cole, Martin, Daughtrey, Moore, and Clay concluded:

> Thus, this claim is not effectively a second or successive [habeas] petition challenging the validity of his state trial – to the contrary, Alley's allegations of fraud relate *only* to the validity of the federal habeas proceeding. *See Abdur'Rahman*, 392 F.3d at 181. Accordingly, under our precedent in *Abdur'Rahman*, Alley's motion is properly viewed as a Rule 60(b) motion unaffected by AEDPA, and the district court has jurisdiction to consider it.

Alley v. Bell, 405 F.3d at 373 (Cole, J., concurring).

On remand, Sedley Alley specifically sought discovery to determine whether state attorneys had willfully or recklessly withheld evidence during the federal habeas proceedings. See R. 167 (Motion For Discovery). Without ever addressing the question of discovery, the District Court denied relief. R. 169, District Court Opinion, pp. 10-13 (Exhibit 1). Notwithstanding Judge Cole's careful analysis, the District Court on remand held that Sedley Alley's allegations of fraud, misconduct, and misrepresentation constituted a second or successive petition for habeas relief. Id. The District Court reached this conclusion based on its belief that Sedley Alley could not establish fraud as it related to the District Court's decision to deny habeas relief, *because even though Sedley Alley had alleged that the prosecution withheld exculpatory evidence which was material to his conviction* (Petition ¶35), *he had not specifically alleged in his initial habeas petition that the prosecution withheld evidence about the time of death or John Borup.* See R. 169, District Court

Opinion, p. 12 (Exhibit 1).

Sedley Alley respectfully objected to that conclusion, noting that it was *because of misconduct and fraud* that he could not have pleaded his claim with the specificity which the District Court now, in retrospect, demanded. R. 170, Motion To Alter Or Amend. Indeed, his whole point was that his habeas proceedings were tainted by the withholding of evidence throughout the course of federal proceedings: It is unfair to conclude that a party cannot get away with fraud if a party pleaded a claim and then was the victim of fraud, but can get away with the same type of misbehavior if the party is able to mislead his or her opponent at the pleading stage. See R. 170 (Motion To Alter Of Amend Judgment). Again the District Court denied relief, and found that by "seek[ing] refuge" in Judge Cole's opinion, Sedley Alley was relying on an opinion which was incorrect. R. 176, pp. 6, 7-9 (Order on Motion To Alter Or Amend)(Exhibit 2).

On appeal, the Sixth Circuit panel adopted the District Court's reasoning. Exhibit 3, pp. 3-4. Because Sedley Alley had not specifically alleged the withholding of the evidence which he did not know was withheld, he could not proceed under Fed.R.Civ.P. 60(b). Again Sedley Alley objected to this circular reasoning, noting in his rehearing petition:

> The panel relies on the District Court's conclusion that the alleged fraud is not relevant to the habeas petition, because, when he alleged that the state withheld exculpatory evidence at trial which resulted in an unfair trial (Habeas Petition ¶35), Alley did not specifically plead that the prosecution withheld evidence concerning the time of death. Sedley Alley respectfully asks: How could he plead what he had been misled into thinking did not exist, and which had been unconstitutionally withheld in the first place?

Petition For Rehearing, p. 1.

On rehearing, Sedley Alley also respectfully noted that the panel's opinion conflicted directly with this Court's specific pronouncement in Gonzalez v. Crosby, 545 U.S. ____, ____

n. 5 (2005) that allegations of fraud do not constitute a second or successive habeas corpus petition. See Petition For Rehearing, pp. 6-7 (under *Gonzalez*, Rule 60(b) relief proper "when a Rule 60(b) motion attacks, not the substance of the federal court's ruling of a claim on the merits, but some defect in the integrity of the federal habeas proceedings [n.5] Fraud on the federal habeas court is one example of such a defect.")

Similarly, as Alley maintained, the panel's decision flies in the face of Banks v. Dretke, 540 U.S. 668 (2004), in which this Court held that counsel is manifestly *not required* to scavenge for hints of undisclosed exculpatory evidence, and state officials' false representation that they have complied with their duty to disclose exculpatory evidence is entitled to no "judicial approbation." Banks, 540 U.S. at 696. Petition For Rehearing, p. 7. The Sixth Circuit nevertheless denied rehearing.

REASONS THIS COURT SHOULD GRANT THE WRIT

I. The Sixth Circuit's Decision Is Manifestly Incorrect Under *Gonzalez v. Crosby*, 545 U.S. ____ (2005)

As Sedley Alley explained in his rehearing petition before the Sixth Circuit, *Gonzalez v. Crosby*, 545 U.S. ____, ____ n.5 (2005) categorically prohibits the result here. Allegations of fraud simply do not constitute a second or successive petition for a writ of habeas corpus. They are fully cognizable in proceedings under Fed.R.Civ.P. 60(b):

> In Gonzalez v. Crosby, 545 U.S. ____, 125 S.Ct. 2641 (2005), the Supreme Court specifically held that an allegation of fraud upon the court constitutes a challenge to the 'integrity of the federal habeas proceedings' which does not constitute a second or successive habeas petition. Id., 545 U.S. at ____ & n.5, 125 S.Ct. at 2648 & n.5 (Rule 60(b) relief proper 'when a Rule 60(b) motion attacks, not the substance of the federal court's ruling of a claim on the merits, but some defect in the integrity of the federal habeas proceedings [n.5] Fraud on the federal habeas court is one example of such a defect.'). The panel concludes otherwise. In doing so, the panel does not mention this operative language from *Gonzalez*. The panel's opinion conflicts directly with

Gonzalez.

Petition For Rehearing, pp. 6-7.

As Judge Cole made clear, Sedley Alley does have a proper Rule 60(b) motion: The remaining question is whether, on the facts, he has established fraud, misrepresentation or misconduct and is therefore entitled to equitable relief. See Alley v. Bell, 405 F.3d at 372-373 (Cole, J.). Under *Gonzalez*, Sedley Alley is entitled to a determination of the merits of his 60(b) motion on the question of fraud, misrepresentation, and misconduct. He has been denied that fundamental right.

Because the Sixth Circuit's decision simply cannot be squared with the operative language of *Gonzalez*, this Court should grant certiorari. This Court should grant certiorari and summarily reverse and remand for further proceedings on the motion for equitable relief. See e.g., Bradshaw v. Ritchie, 546 U.S. ____ (2005)(per curiam)(summarily reversing grant of habeas relief); Schriro v. Smith, 546 U.S. ____ (2005)(per curiam)(summarily reversing in habeas case); Dye v. Hofbauer, 546 U.S. ____ (2005)(per curiam)(summarily reversing in habeas case).

II. The Sixth Circuit's Decision Undermines Federal Policy As Expressed In *Banks v. Dretke*, 540 U.S. 668 (2004)

By ultimately holding Alley responsible for the District Attorney's false representations concerning the disclosure of exculpatory evidence, the Sixth Circuit establishes a policy which rewards state actors for withholding evidence and then deceiving or misleading the courts and petitioners about their misdeeds. This is at odds with Banks v. Dretke, 540 U.S. 668 (2004).

In *Banks*, this Court made clear that counsel is manifestly *not required* to "scavenge"

for hints of undisclosed exculpatory evidence – especially where state officials have represented that they have complied with their duty to disclose exculpatory evidence. That, however, is exactly what the Sixth Circuit expected of Sedley Alley. Though false representations by a District Attorney are entitled to no "judicial approbation" under *Banks* (Banks, 540 U.S. at 696), such approbation has been given here.

Indeed, the Sixth Circuit has concluded that Sedley Alley was not denied a fair hearing on claims that he was denied a fair trial through the withholding of exculpatory evidence because, even though the District Attorney represented to the federal court that no exculpatory evidence had been held back, Alley still should have specifically pleaded the existence of withheld evidence which he simply knew nothing about.

Such reasoning is fatally flawed. *Banks* makes clear that when a prosecutor in state proceedings makes false representations about the truth of testimony or makes false statements about compliance with *Brady*, a federal habeas petitioner who files a federal habeas petition is entitled to review of claims arising from the prosecutor's misconduct. Fraud or false representations which occur during federal proceedings should be on equal footing, but in this case they are not. Such misrepresentation throughout federal proceedings has been rewarded under the reasoning of the District Court and the Sixth Circuit.

By burdening Alley with the requirement of specifically pleading constitutional violations despite a District Attorney's fraud and misrepresentation about the existence of withheld evidence, the Sixth Circuit has rewarded the District Attorney for successfully misleading Alley and the District Court. The Sixth Circuit has likewise undermined the very policy expressed in *Banks*: Such misconduct should receive no judicial approval, though in

this case, it has. Because the Sixth Circuit's opinion undermines federal policy as expressed in *Banks*, this Court should grant certiorari and reverse the judgment below.

CONCLUSION

This Court should grant certiorari and summarily reverse under *Gonzalez*. Alternatively, this Court should grant certiorari and reverse.

Respectfully Submitted,

Paul R. Bottei
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Middle District of Tennessee
810 Broadway, Suite 200
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(615) 736-5047

CERTIFICATE OF SERVICE

I certify that I have forwarded a copy of the foregoing petition for writ of certiorari to Joseph Whalen, Office of the Attorney General and Reporter, 425 Fifth Avenue North, Nashville, Tennessee 37243, this the 16 day of May, 2006.

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SEDLEY ALLEY,

Petitioner,

v.

RICKY BELL,

Respondent.

No. 97-3159-D/V

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

This matter is before the Court pursuant to Petitioner's request for relief from this Court's judgment denying him habeas corpus relief on several claims related to his conviction and sentence of death. In 1987, a Shelby county jury convicted Petitioner on charges of kidnapping, rape, and first-degree murder in the death of United States Marine Lance Corporal Suzanne Marie Collins. After Petitioner's sentence and conviction were upheld on appeal, he began a lengthy series of collateral attacks on the sentence in the state and federal courts. In this Court, Petitioner's habeas petition was denied on November 4, 1999, and that decision was affirmed on appeal. See Alley v. Bell, 101 F.Supp.2d 588 (W.D. Tenn. Jan. 18, 2000), aff'd, 307 F.3d 380 (6th Cir. 2002), cert. denied 540 U.S. 839 (2003). Petitioner thereafter began the instant course of litigation, seeking a certificate of appealability and relief from the Court's denial of

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habeas relief pursuant to Fed. R. Civ. P. 60(b) and what he alleges to be this Court's "inherent authority."

The Court initially stayed its consideration of Petitioner's motion pending the decision of the Sixth Circuit Court of Appeals in In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), vacated 545 U.S. ___, 125 S. Ct. 2991 (2005). Following the release of the decision in that case, the Sixth Circuit issued an opinion holding that Petitioner's motion for relief, before that court pursuant to the Respondent's motion to vacate the stay of execution entered by this Court, was the equivalent of a prohibited second or successive habeas petition and was therefore beyond the pale of this Court's jurisdiction. Alley v. Bell, 392 F.3d 822, 829 (6th Cir. 2004), vacated 405 F.3d 371 (6th Cir. 2005). Accordingly, this Court ordered Alley to withdraw the motion for relief or risk having it transferred to a panel of the Sixth Circuit for consideration as a second or successive habeas petition. See Order To Withdraw Petitioner's Motion For Relief From Judgment, R. 145 at 2-3. However, Petitioner succeeded in persuading the appellate court to grant rehearing en banc, and, upon rehearing, the Sixth Circuit remanded to this Court to determine, in the first instance, whether Petitioner's motion constituted a proper motion for relief or a prohibited second or successive habeas petition. Alley, 405 F.3d at 372. After the remand, this Court again stayed consideration of Petitioner's motion pending the decision of the United States Supreme Court in Gonzalez v. Crosby, 545 U.S. __, 125 S. Ct. 2641 (2005).

In Gonzalez, the Court addressed the interplay of the AEDPA's restrictions on successive habeas applications and motions for relief from judgment pursuant to Rule 60(b). The Court held that, in the habeas context, a proper motion for relief from judgment is one that attacks "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." Id. at __, 125 S. Ct. at 2648. To the extent that a motion for relief from judgment attempts to present "claims" asserting a "federal basis for relief from a state court's judgment of conviction," such a motion is "if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute." Id. at __, 125 S. Ct. at 2647. The Court explained that a prohibited "claim" in such a motion may present a new ground for relief or attack the habeas court's "previous resolution of a claim *on the merits*." Id. at __, 125 S. Ct. at 2648 (emphasis in original). Thus, where a motion for relief merely asserts a non-merits based ground for revisiting the prior federal judgment, there is no prohibition on considering the motion for relief as denominated. Proceeding under this framework, the Court will now address Petitioner's motion for relief from judgment.

As a preliminary matter, consideration must first be given to Petitioner's argument that, regardless of what claims are cognizable under Rule 60(b), as explicated in Gonzalez, all of Petitioner's claims are within the ambit of the Court's

jurisdiction pursuant to the Court's Article III "inherent powers" over its own judgments. Petitioner maintains that this equitable power derives from the Constitution and may not be constrained by congressional action. Thus, Petitioner argues that

> when a petitioner proceeds directly under Article III (as Sedley Alley does), a District Court is not constrained by limitations contained in the AEDPA which, as explained in *Gonzalez*, only limit the scope of available relief under Rule 60(b). Limitations such as 28 U.S.C. § 2244(b)(1), therefore, simply do not apply to motions made under Article III, and a petitioner is entitled to directly invoke a District Court's inherent equitable powers, just as parties did long before Rule 60(b) was ever passed.

Petitioner's Reply To Response In Opposition To Motion For Equitable Relief ("Pet. Reply"), R. 166 at 9. Additionally, Petitioner asserts that this Court may consider each of his grounds for relief pursuant to 28 U.S.C. § 2243, which instructs a federal court considering a habeas application to "dispose of the matter as law and justice require," thus indicating that a District Court enjoys all the powers of equity in considering a habeas application.

Respondent argues that, whatever equitable powers inhere in the Court's dominion over its own judgments, Rule 60(b) both "'reflects and confirms'" those powers, thereby defining their limits, in the context of awarding relief from judgment. Respondent's Response In Opposition To Petitioner's Motion For Relief From Judgment And To Petitioner's Motion For Discovery #2, R. 160 at 8 n. 6 (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 233-234, 234-235 (1995)).

The Court is inclined to agree with Respondent that Rule 60(b) defines the circumstances under which relief from judgment may be granted, and that a District Court should not therefore go "off the map" to reopen past habeas judgments based on amorphous "inherent powers" of equity that are not at least alluded to in Rule 60(b). Such an unprincipled exercise of habeas jurisdiction would circumvent the legislative intent apparent in the AEDPA and would also, as Respondent asserts, render superfluous the express requirements of Rule 60(b) in awarding relief from judgment. The text of Rule 60(b) makes clear that it is attempting to express a court's inherent equitable powers over its own judgment. After listing several circumstances under which relief from judgment might be appropriate, the rule also allows that a District Court may grant relief from judgment for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). This provision of Rule 60(b) has historically been referred to as a "'reservoir of equitable power' to do justice in a particular case." In re Abdur'Rahman, 392 F.3d at 183 (citing Compton v. Alton S.S. Co., Inc., 608 F.2d 96, 106 (4th Cir. 1979)). Additionally, the Court notes that Rule 60(b) contains a "savings clause" which recognizes that the rule does not limit the ability of a court to consider an "independent action to relieve a party from judgment . . . or to set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60(b). However, though the "savings clause" of Rule 60(b) recognizes the continuing viability of these historical remedies, courts have also developed tests for the

propriety of granting relief in such actions which require far more than a district court's simple prerogative or equitable inclinations in a particular case. Rather, "independent actions" and actions to set aside a judgment for fraud upon the court are extraordinary remedies limited to very rare situations. See Buell v. Anderson, 48 Fed. Appx. 491, 497-500 (6th Cir. 2002) (discussing "independent actions" and "fraud upon the court actions" as separate entities and setting forth tests for each). Further, such "independent actions" may not be used as a vehicle to re-litigate a previous judgment, and are still subject to the AEDPA and its restrictions on successive habeas petitions to the same extent as are motions for relief proceeding under the express provisions of Rule 60(b). See Gonzalez v. Sec'y for Dept. of Corr., 366 F.3d 1253, 1277 n. 11 (11th Cir. 2004) and Booker v. Dugger, 825 F.2d 281, 284-85 n. 7 (11th Cir. 1987).

Petitioner appeared to have a firm grasp on these concepts given his explication of the various remedies embraced by Rule 60(b) in his motion for relief from judgment. See Second Amended Motion For Equitable Relief ("Pet. Mot. for Relief"), R. 158 at pp. 14-21. However, Petitioner now seems to have abandoned the "savings clause" of Rule 60(b) as an avenue upon which he may seek relief, instead arguing that "inherent powers" flowing from the Constitution, and thus unaffected by the AEDPA, are the basis upon which all of his contentions, including those apparently barred by Rule 60(b), may be heard by the Court. See Pet. Reply, R. 166 at pp. 7-10. Given all of the above, however, the Court rejects

Petitioner's argument to the extent that it asserts that the Court has the "inherent authority" to grant him relief in circumstances not embraced by Rule 60(b).

The Court notes that, were it inclined to reach a different conclusion regarding the existence of inherent equitable powers which exceed those alluded to in Rule 60(b), the Court would still be constrained by the Sixth Circuit's explicit command to apply only Rule 60(b) in its consideration of Petitioner's motion for relief from judgment on remand:

> We now grant rehearing en banc, and remand the case to the district court to determine, in the first instance, whether Alley's motion can be considered a proper Rule 60(b) motion under this court's opinion in *Abdur'Rahman*.

Alley, 405 F.3d at 372. Thus, it seems clear that, given the Sixth Circuit's acknowledgment of Petitioner's invocation of a district court's "inherent authority" in the panel's first opinion, see Alley, 392 F.3d at 832-33 (discussing Petitioner's claim that a district court's inherent powers empower the court to grant his requested relief, and denying that any such powers also render unconstitutional any statutory provision which divests a district court of the jurisdiction to grant such relief), the Sixth Circuit intended on remand that this Court concern itself only with Petitioner's motion as it relates to the strictures of Rule 60(b) and not any other alleged "inherent powers" of the Court. Indeed, it is perhaps unclear from the Sixth Circuit's remand whether that body intends for this Court to evaluate Petitioner's motion under just the express provisions of Rule 60(b), or whether this Court

may consider the motion as an independent action or action to set aside a judgment for fraud upon the court as alluded to in the "savings clause" of Rule 60(b). Nonetheless, this Court will interpret the Sixth Circuit's remand in this case to encompass all potential actions referenced in Rule 60(b); thus, the Court will consider Petitioner's motion as one made pursuant to both Rule 60(b) and the independent actions referenced in the rule, but not pursuant to any other alleged "inherent powers" of the Court that Petitioner argues free the Court from the strictures of the AEDPA and current habeas jurisprudence.

I. THE COURT SHOULD GRANT RELIEF FROM JUDGMENT ON PETITION ¶ 35

Petitioner attacks the integrity of the Court's judgment denying his habeas claim related to the suppression of exculpatory evidence at his trial. He alleges that the Court's judgment was procured through fraud, misrepresentation, and misconduct on the part of Respondent's counsel. Before addressing the merits of this claim, the Court must first establish its jurisdictional basis for hearing the claim.

Petitioner argues that there are three separate bases upon which the Court may consider this claim: 1) Rule 60(b)(3); 2) as an independent action pursuant to the "savings clause" of Rule 60(b); and 3) as an action to set aside judgment for fraud upon the court. Regarding Rule 60(b)(3), allowing relief from judgment in cases of fraud, misrepresentation, or other misconduct, Petitioner argues that the rule's one-year limitation on the filing of a motion for relief should be equitably tolled because he was prevented from

filing the motion due to the conduct of the Respondent. However, Petitioner ignores the mandate of this circuit's precedent establishing that the one-year limitation applicable to Rule 60(b)(3) is absolute: "Regardless of circumstances, no court can consider a motion brought under Rule 60(b)(1), (2), or (3) a year after judgment." In re G.A.D., Inc., 340 F.3d 331, 334 (6th Cir. 2003). Petitioner first submitted his motion for relief from judgment in 2003, nearly four years after this Court entered its judgment denying habeas relief. Thus, this Court is precluded from considering this claim of Petitioner pursuant to Rule 60(b)(3).

Petitioner also asserts that this Court may consider this claim under both the "independent action" and "fraud upon the court" prongs of the "savings clause." Petitioner correctly relates that these are two separately available remedial actions when proceedings are tainted with fraud. See Buell, 48 Fed. Appx. at 497-98. Further, there are no time limitations on the pursuit of either of these two actions, other than the equitable requirement that they be brought in a reasonable time. However, before the Court may subject Petitioner's fraud claim to substantive analysis under either prong of the "savings clause," the Court must first establish whether Petitioner's fraud claim should proceed as denominated.

The root of Petitioner's claim is that during his trial the prosecution provided him and the court with a document which represented that the state had complied with all due process requirements regarding the disclosure of exculpatory evidence.

Further, that document was entered into the record during habeas proceedings in this Court. Petitioner now asserts that he has discovered considerable exculpatory evidence which proves his due process rights were violated during his trial. This allegedly exculpatory evidence consists of: 1) a report authored by a Shelby County Sheriff's Department officer which contains the following statement:

> the writer talked with Asst. ME, Dr. Bell, was advised the victim died sometime between 7-11-85 10:30 PM and 7-12-85 approximately 3:30 AM- that in his opinion the victim had been died [sic] approximately six (6) hours when he saw the body and made the crime scene at 9:30 AM, 7-12-85;

and 2) handwritten notes of Dr. Bell wherein Dr. Bell recounts "I suggested to S White [that the victim had been] dead 6-8 hours at least before the 0930 time of pronouncement [of time of death]." Petitioner's remaining claims of withheld exculpatory evidence are based merely on inference and speculation. For example, Petitioner asserts that a Naval Investigative Service (NIS) report prepared during the investigation of the murder withheld exculpatory evidence concerning the boyfriend of the victim because it merely stated that he was interviewed and did not provide any "pertinent information." Petitioner now argues that the report was false and misleading because, based on his investigator's own interview with the boyfriend, he has uncovered evidence that the boyfriend committed the murder. Similarly, Petitioner asserts that exculpatory evidence related to testing on hair found at the crime scene was withheld from him during his trial. Petitioner extracts

this claim from "a careful inspection" of the testimony of the state's witness who conducted tests on the various hair samples gathered at the crime scene. The witness testified that a pubic hair collected at the scene was not sufficient for him to fairly compare to Petitioner's. Petitioner argues, however, that such a fair comparison can be rendered with only a "small cross-section of hair," and therefore the witness must have performed a comparison which failed to match the hairs, thus causing the witness to deem the hair insufficient for fair comparison.

Petitioner argues that the suppression of the above evidence throughout his trial and all post-conviction proceedings, despite the state's assurance that it had complied with its disclosure requirements, constitutes fraud upon the court sufficient to grant him relief from this Court's previous judgment denying ¶ 35 of his habeas petition. Paragraph 35 reads as follows:

> 35. In violation of the Fourteenth Amendment, the trial court and/or the prosecution withheld evidence which otherwise would have entitled Sedley Alley to a new trial, in violation of the Fourteenth Amendment. That evidence includes: the fact that the judge met with the jury *ex parte* during the course of the trial; the trial judge made derogatory profane comments about Petitioner during the course of the proceedings; the judge had other *ex parte* contact with the victim's family, including letter(s) and a Christmas card; and the withholding of Dr. Zager's opinions about mitigation, all in violation of Brady v. Maryland.

Petition For Writ Of Habeas Corpus ("Pet."), Alley v. Bell, no. 97-3159, R. 60 at 43, ¶ 35. The Court found this claim procedurally defaulted due to Petitioner's failure to present the claim in the

state courts. Alley v. Bell, 101 F. Supp.2d 588, 619 (W.D. Tenn. 2000).

The Court's judgment as to this claim was not procured through the fraud, misconduct, or misrepresentation of Respondent. Paragraph 35 raised claims related only to the suppression of evidence that might have entitled the Petitioner to a new trial due to the allegedly improper conduct of the trial judge. If the worst of Petitioner's allegations were true and Respondent had purposely deceived this Court regarding the evidence now offered by Petitioner, such deception would still be irrelevant both to the claims raised in ¶ 35 and to the Court's rationale for denying that part of the habeas petition. See Baltia Air Lines, Inc. v. Transaction Management, Inc., 98 F.3d 640, 643 (D.C. Cir. 1996) (dismissing motion for relief because allegations of fraud and misrepresentation were not relevant to basis for contested judgment of the court) and Simons v. Gorsuch, 715 F.2d 1248, 1253 (7th Cir. 1983) (denying motion for relief because "materials presented in support of the motion are essentially irrelevant to the legal issues upon which the case turned"). Rather, Petitioner is essentially offering newly discovered evidence that his due process rights were violated during his trial. As such, he is not attacking the integrity of the Court's previous judgment denying habeas relief as to ¶ 35, and the newly proffered evidence may not be considered by this Court in a motion for relief from judgment. See Gonzalez, 545 U.S. at __, 125 S.Ct. at 2646-2647. Because the Court finds this claim to be a prohibited attempt at re-litigating

the constitutionality of his conviction and sentence, the Court is required to treat this portion of Petitioner's motion for relief as the fundamental equivalent of a second or successive habeas application thus obviating the need to consider Petitioner's claim under either prong of the "savings clause." Accordingly, this portion of Petitioner's motion for relief is DISMISSED.

II. THE COURT SHOULD GRANT RELIEF FROM JUDGMENT ON PETITION ¶ 29

In his motion for relief from judgment Petitioner argues that he is entitled to relief from this Court's previous judgment denying ¶ 29 of his habeas petition. Paragraph 29 sets forth Petitioner's claim that the "heinous, atrocious, and cruel" statutory aggravating factor relied upon in sentencing him to death was unconstitutionally vague in violation of the Eighth and Fourteenth Amendments. This Court denied relief on ¶ 29, holding that a valid narrowing construction had been adopted in Tennessee and applied in Petitioner's case, thus curing any facial invalidity in the aggravator. Alley, 101 F. Supp.2d at 643.

Petitioner initially advanced two arguments in support of his motion for relief from judgment. First, Petitioner asserted that the Sixth Circuit's decision in Cone v. Bell, 359 F.3d 785 (6th Cir. 2004), rev'd. 545 U.S. __, 125 S.Ct. 847 (2005), and the Supreme Court's subsequent decision in the same case demonstrate that this Court's previous judgment was erroneous. Next, Petitioner argued that he is entitled to relief from the Court's judgment denying him a certificate of appealability ("COA") on this claim in light of intervening case law and this Court's decision to

grant a COA on a "identical claim" in another case. See Order On Petitioner's Motion to Certify Claims On Appeal, Payne v. Bell, no. 98-02963 at 4-5 (W.D. Tenn. Feb. 3, 2003).

Petitioner apparently, and correctly, now concedes that Gonzalez forecloses his claim for relief from this Court's judgment denying ¶ 29 on the merits because he may not attack this Court's adjudication of a claim on the merits in a motion for relief from judgment. See Pet. Reply, R. 166 at 13-14; Gonzalez, 545 U.S. at __, 125 S.Ct. at 2646-47. However, Petitioner continues to assert that he is entitled to relief from this Court's judgment denying him a COA because the request for a COA seeks only "procedural relief," and thus involves only a request for relief from a nonmerits aspect of the habeas proceedings. Pet. Reply, R. 166 at 12.

Assuming, *arguendo*, that such a contention is indeed valid, Petitioner is not entitled to a COA on this claim. As Petitioner noted in his motion for relief, this Court granted a COA on a purportedly "identical" issue in Payne v. Bell. In Payne, the Sixth Circuit ruled that, under the Supreme Court's decision in Cone, the lack of an affirmative indication in the state supreme court opinion affirming Payne's conviction that the Court was not relying on its established precedent setting forth a valid narrowing construction to the HAC aggravator was sufficient to conclude that such a construction had been applied. See Payne v. Bell, 418 F.3d 644, 657-58 (6th Cir. 2005). The Supreme Court of Tennessee's language in affirming Petitioner's conviction and

sentence tracks closely its language in the Payne case and makes clear that the court was relying upon its precedents in evaluating the arbitrariness of Petitioner's sentence:

> We have carefully reviewed this case in accord with the requirements of T.C.A. § 39-2-205(c) and find that the sentence was not imposed in any arbitrary fashion, that the evidence supports the jury's findings of the aggravating circumstances in T.C.A. § 39-2-203(i)(5) and (i)(7), the absence of any mitigating circumstances and that the sentence of death was not disproportionate to the penalty in similar cases.

State v. Alley, 776 S.W.2d 506, 519 (Tenn. 1989); cf. State v. Payne, 791 S.W.2d 10, 21 (Tenn. 1990)(holding, in a passage cited approvingly by the Sixth Circuit, "[p]ursuant to Tenn. Code Ann. §§ 39-13-205 we have reviewed the sentence of death and are of the opinion that it was neither excessive nor disproportionate to the penalty imposed in similar cases"). The Sixth Circuit's decision in Payne makes clear that this Court was correct in denying Petitioner habeas relief on this claim and he therefore cannot show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000)(setting forth burden of proof required of petitioner seeking a COA). Petitioner's argument that he is entitled to relief from this Court's judgment denying him a COA as to ¶ 29 is without merit and, accordingly, this portion of his motion for relief is DENIED.

III. THE COURT SHOULD GRANT RELIEF FROM JUDGMENT FOR ALL CLAIMS DENIED ON THE BASIS OF PROCEDURAL DEFAULT OR THE STANDARD OF REVIEW SET FORTH IN 28 U.S.C. § 2254(d)

Petitioner argues that he is entitled to relief from judgment on all habeas claims dismissed by this Court on the basis of procedural default or application of the standard of review required by 28 U.S.C. § 2254. Petitioner asserts that his claims should not be subject to procedural default or AEDPA's standard of review given congressional action in the Theresa Schiavo matter. In essence, he argues that Congress' passage of S.686 ("An Act For The Relief Of The Parents Of Theresa Marie Schiavo") in March, 2005, makes clear that "the principle that when the fundamental right to life is involved - as it is here: A federal petitioner cannot be subjected to procedural default, and state court determinations which will result in the deprivation of life are entitled to no deference." Pet. Mot. for Relief at 44. This is so, Petitioner argues, because Congress intended to give Schiavo's parents plenary review in federal court of any claim that their daughter's constitutional rights were violated, regardless of whether such a claim had previously been adjudicated, or even raised, in the state courts. Petitioner asserts that it violates his Fifth Amendment equal protection rights for Congress to grant such unprecedented review in Schiavo's case while denying him the same. Petitioner and Schiavo are similarly situated, he believes, because, like Schiavo's parents, he seeks "federal relief from a state court judgment which, if enforced, would deny the fundamental right to life." Pet. Mot. for Relief at 48.

To the extent that Petitioner argues that he is entitled to relief from the Court's judgment dismissing several of his habeas

claims on the merits pursuant to the standard of review required by § 2254, Gonzalez makes clear that such claims are subject to the limitations on second or successive habeas applications, and may not now be asserted in a motion for relief from judgment:

> [a] motion can also be said to bring a 'claim' if it attacks the federal court's previous resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.

Gonzalez, 545 U.S. at __, 125 S.Ct. at 2648 (emphasis in original)(footnote omitted). Though Petitioner attempts to characterize this claim in language suggesting that he is merely attacking the integrity of the Court's previous judgment, which he argues is compromised by the Court's review of his claims under a "completely erroneous and constitutionally invalid standard of review," there is no basis for the Court to consider the claim as anything but either an allegation of error in the Court's judgment on the merits or an attempt to take advantage of a purported intervening change in substantive law. Gonzalez makes clear that neither ground is sufficient to sustain a motion for relief, see id. at 2647, and remove it from the strictures applicable to second or successive habeas applications. Accordingly, Petitioner's claim that he is entitled to relief from the Court's judgment denying his habeas claims under the standard of review mandated by § 2254 is DISMISSED.

Petitioner also relies on the argument set forth above in support of his claim that he is entitled to relief from the Court's

judgment dismissing several of his habeas claims on the grounds of procedural default. He maintains that this claim is cognizable as a "true" Rule 60(b) claim because it attacks the Court's previous resolution of several of his habeas claims on a non-merits basis. Though he invokes no particular provision of Rule 60(b) in arguing that he is entitled to relief from judgment, the "equitable reservoir" of Rule 60(b)(6) provides the only conceivable basis for considering the claim pursuant to the Rule. However, Petitioner has failed to demonstrate the existence of any "'extraordinary circumstances' justifying the reopening of a final judgment," as is required in obtaining relief pursuant to Rule 60(b)(6). Id. at 2649. Congress' passage of S.686 does not address in any fashion the doctrine of procedural default as it is applied in federal habeas actions and cannot therefore constitute an "extraordinary circumstance" entitling Petitioner to have his habeas petition reopened for consideration of claims found barred under that doctrine. The Schiavo Act endows only the parents of Schiavo with standing to bring a suit in the Middle District of Florida seeking to vindicate their daughter's constitutional rights related to her husband's decision to deny her life sustaining treatment. The jurisdiction for such an action, whether or not such was constitutionally valid, inhered in the special grant of jurisdiction set forth in the statute, not in habeas corpus. See Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1271 (11th Cir. 2005)(Birch, J. concurring). Thus, Schiavo and Petitioner are not "similarly situated" because only Petitioner is aggrieved by

the application of the traditional procedural default doctrine in habeas cases. Importantly, the Act expressly disclaims that it creates any substantive rights or that it may constitute precedent for any future legislation. Pub. L. No. 109-3, 119 Stat. 15, §§ 5 & 7. Thus, it is apparent that Congress intended for the act to be strictly limited in scope to the circumstances expressed within the Act, and did not intend for the Act to function as a tool for abrogating current habeas law and jurisprudence. Accordingly, Petitioner has failed to demonstrate the "extraordinary circumstance" necessary to reopen his habeas judgment pursuant to Rule 60(b)(6).

For the same reasons given above, Petitioner is not entitled to relief on this claim pursuant to the "independent action" prong of the "savings clause." Relief from judgment pursuant to the "independent action" prong is rarely granted and is reserved for cases demonstrating "exceptional circumstances" where relief is necessary to prevent a grave miscarriage of justice should the judgment stand. Barrett v. Sec'y of Health and Human Serv., 840 F.2d 1259, 1263 (6th Cir. 1987). The Court need not further subject Petitioner's claim to the elements of the "independent action" because, just as Petitioner's attempt to avail himself of the special legislation passed in the Schiavo matter fails to constitute an "extraordinary circumstance" for purposes of relief under Rule 60(b)(6), it also fails to constitute the type of "exceptional circumstance" required as a predicate for granting relief in an "independent action." Accordingly, for all of the

reasons given above, this portion of Petitioner's motion for relief from judgment is DISMISSED.

IV. THE COURT SHOULD GRANT RELIEF FROM JUDGMENT ON PETITION ¶ 28

Paragraph 28 of Petitioner's habeas petition set forth his claim that he was denied his fundamental right to present mitigating evidence at his sentencing due to the trial court's exclusion of videotaped hypnotic interviews of Petitioner. This Court denied Petitioner's claim, finding that the evidence was inadmissible, and that, therefore, exclusion was not improper. Alley, 101 F.Supp.2d at 640. Petitioner now asserts that an intervening decision of the Tennessee Supreme Court, State v. Carter, 114 S.W.3d 895 (Tenn. 2003), makes clear that this Court's prior holding was erroneous.

Petitioner concedes that this claim may not proceed in a Rule 60(b) motion because a habeas Petitioner may not "invoke Rule 60(b) to seek application of a 'purported change in the substantive law governing the claim.'" Pet. Reply, R. 166 at 4-5, 13 (quoting Gonzalez, 545 U.S. at __, 125 S.Ct. at 2647-48). However, this Court is also precluded from considering this portion of Petitioner's motion pursuant to the "independent action" prong of the "savings clause" because it clearly seeks to reassert a claim already denied on the merits, and Gonzalez makes clear that any motion for relief, however styled by the movant, which attacks a court's disposition of a habeas claim on the merits is in form and effect a prohibited second or successive habeas application. Therefore, this Court is barred from reconsidering its prior

judgment denying ¶ 28 based on any purported intervening change in the law governing the claim. Accordingly, this portion of Petitioner's motion for relief is DISMISSED.

V. CONCLUSION

For all of the reasons given above, Petitioner's motion for relief from this Court's judgment denying him habeas relief is without merit and is therefore DENIED.

IT IS SO ORDERED this 18th day of November, 2005.

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SEDLEY ALLEY,	)	
Petitioner,	)	
v.	)	No. 97-3159-D/V
RICKY BELL,	)	
Respondent.	)	

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT
ORDER DENYING PENDING COLLATERAL MOTIONS

Before the Court is Petitioner's Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e). Petitioner asserts numerous errors in the Court's judgment denying his motion for equitable relief from the Court's previous judgment granting Respondent summary judgment as to all claims raised in Petitioner's application for habeas relief. The Court entered its judgment granting Respondent summary judgment on November 15, 1999, and subsequently denied Petitioner's motion to alter or amend that judgment. See Alley v. Bell, 101 F.Supp.2d 588 (W.D. Tenn. 2000). The Court's judgment was affirmed on appeal. Alley v. Bell, 307 F.3d 380 (6th Cir. 2002), cert. denied, 540 U.S. 839 (2003). The Court denied Petitioner's motion for relief on November 28, 2005, see Order Denying Second Amended Motion Requesting Relief In The Exercise of This Court's Inherent Authority, And/Or Relief From Judgment, And/Or Certificate Of Appealability ("Order"), R. 169,

and Petitioner subsequently filed the instant motion. On January 12, 2006, Petitioner filed a "Supplement to Motion To Alter Or Amend And/Or Request For Relief From Judgment In Light of Intervening Case Law" ("Supplement"), contending that the Supreme Court's decision in Brown v. Sanders, 126 S.Ct. 884 (2006), makes clear that he is entitled to a certificate of appealability on his claim challenging the constitutionality of the heinous, atrocious, or cruel ("HAC") aggravating circumstance relied upon in sentencing him to death. For the reasons stated below, Petitioner's Motion to Alter or Amend Judgment is DENIED.

I. STANDARDS APPLICABLE TO A MOTION TO ALTER OR AMEND

A motion pursuant to Rule 59 is not an opportunity to re-litigate a case. Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998). Rather, a motion to alter or amend judgment should be granted only if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent a manifest injustice. GenCorp, Inc. v. American Intern. Underwriters, 178 F.3d 804, 834 (6th Cir. 1999)(citations omitted).

II. PETITIONER'S ALLEGATIONS OF ERROR

Petitioner contends that the Court should alter or amend its judgment denying his motion for relief because: 1) the Court's reasoning in denying Petitioner's fraud upon the court claim is "fatally flawed;" 2) the Court has failed to "squarely and properly address" Petitioner's Fifth Amendment argument that he is entitled to be retroactively excused from any finding of procedural default

on the basis of the special legislation passed by Congress concerning the Terry Schiavo matter; and 3) the Court has erroneously refused to consider Petitioner's claim that "inherent powers" of the Court vest it with the authority to reopen and revise past habeas judgments, even where Fed. R. Civ. P. Rule 60(b) and applicable federal statutes forbid the Court from such actions. The Court will consider each of these arguments in turn.

III. ANALYSIS

A. Error in the Court's Denial of Petitioner's Fraud Claim

Petitioner's fraud claim is discussed in the Court's order denying the motion for relief. See Order, R. 169 at 8-12. The essence of the claim is that the prosecution withheld exculpatory evidence from Petitioner during his trial and throughout all post-conviction proceedings, despite having affirmed to the trial court, in a response to a pre-trial discovery motion which is part of the state court record before this Court, that all relevant exculpatory evidence had been or would be disclosed. Petitioner submitted evidence in support of the fraud claim, including handwritten notes of the medical examiner who prepared the autopsy report on the death of the victim, a sheriff's deputy's report concerning a conversation with the medical examiner, and Petitioner's speculation that other exculpatory evidence has been withheld based on inferences he has drawn from his reading of trial transcripts and an investigative report concerning the victim's boyfriend. The Court denied Petitioner's fraud claim because, even assuming that

the prosecution had deliberately withheld the above evidence, the evidence was not relevant to either the Brady claims raised by Petitioner or the Court's basis for finding Petitioner's specific Brady claims procedurally defaulted. See Order, R. 169 at 12-13. The Court concluded that Petitioner's fraud claim, and the evidence submitted in support of the claim, was an attempt to show that his due process rights had been violated at his trial, and was not relevant to proving the perpetration of a fraud upon the Court in its consideration of Petitioner's specific Brady claims. Accordingly, the Court determined that Petitioner's fraud claim was not an attack on the integrity of the prior habeas proceedings, but rather a prohibited attempt to circumvent the AEDPA's restrictions on second or successive habeas petitions, and, therefore, the evidence proffered by Petitioner could not be considered by the Court in a motion for relief from judgment. Id.

Petitioner now contends that the Court has committed grievous error by employing "fatally flawed" reasoning which allows the state "to lie to the habeas petitioner about having disclosed evidence, and then once the petitioner catches the state in the lie, to argue that it was the petitioner's fault he didn't plead his claim with specificity while the state was gaining the benefit of withholding the evidence." Motion to Alter or Amend, R. 170 at 2. Therefore, Petitioner somehow concludes, under the Court's rationale "the state would be able to execute its citizens if the fraud was caught during initial federal proceedings, but not afterwards. This is what has occurred here." Id. at 3.

Petitioner fails to distinguish, or even address, authority cited by the Court supporting its conclusion that evidence irrelevant to the legal issues which the Court considered in rendering its judgment may not sustain a motion for relief from judgment based upon fraud. See Baltia Air Lines, Inc. v. Transaction Management, Inc., 98 F.3d 640, 643 (D.C. Cir. 1996)(affirming district court's dismissal of motion for relief based on fraud claim where "any misrepresentations to the District Court were not relevant to the court's decision to dismiss the motion); Simons v. Gorsuch, 715 F.2d 1248, 1253 (7th Cir. 1983)(affirming district court's denial of Rule 60(b)(3) motion because the "materials presented in support of the motion are essentially irrelevant to the legal issues upon which the case turned.").

The Court reiterates that the Brady claim raised by Petitioner reads as follows:

> 35. In violation of the Fourteenth Amendment, the trial court and/or the prosecution withheld evidence which otherwise would have entitled Sedley Alley to a new trial, in violation of the Fourteenth Amendment. That evidence includes: the fact that the judge met with the jury *ex parte* during the course of the trial; the trial judge made derogatory profane comments about Petitioner during the course of the proceedings; the judge had other *ex parte* contact with the victim's family, including letter(s) and a Christmas card; and the withholding of Dr. Zager's opinions about mitigation, all in violation of Brady v. Maryland.

Petition For Writ Of Habeas Corpus ("Pet."), Alley v. Bell, no. 97-3159, R. 60 at 43, ¶ 35. The Court's consideration of Petitioner's Brady allegations was limited exclusively to the judicial bias and improper withholding of mitigating evidence claims specifically

articulated in the petition, see Alley, 101 F.Supp.2d at 618-20, and Petitioner does not even contend that the Court's finding of procedural default as to those claims was procured through fraudulent conduct on the part of the state's attorneys. When considering a motion for relief from judgment, this Court must concern itself only with the judgment actually rendered and the basis for that judgment. A motion for relief from judgment seeking relief for fraud upon the court simply is not the appropriate forum for wholly separate, and new, Brady claims based on evidence discovered years after the habeas judgment has been rendered and affirmed on appeal. Gonzalez v. Crosby, 125 S.Ct. 2641, 2647 (2005)("Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction - even claims couched in the language of a true Rule 60(b) motion - circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts [and otherwise satisfies the pre-clearance requirements imposed on second and successive petitions by 28 U.S.C. § 2244(b)(2)].").

Petitioner seeks refuge in the opinion of Circuit Judge Cole, concurring in the en banc decision to remand Petitioner's motion for relief to this Court, who stated as follows:

> Alley alleges that state attorneys were aware of the existence of significant exculpatory evidence, and that these attorneys nonetheless filed an affidavit in federal court stating that they had disclosed all exculpatory evidence, while willfully (or at least recklessly) concealing the evidence. These allegations are sufficient to allege fraud. . . . Moreover, Alley's allegation regarding the affidavit, whether true or not, has nothing to do with his state court proceedings and,

> indeed, would not be relevant to a trial-court-related *Brady* claim. . . . As a result, the resolution of Alley's Rule 60(b) motion would be irrelevant to the constitutionality of his state trial, since success on this motion would merely serve to reopen his original habeas proceeding without determining facts that would require a finding that his state trial was unconstitutional. Thus, this claim is not effectively a second or successive petition challenging the validity of his state trial-to the contrary, Alley's allegations of fraud relate *only* to the validity of the federal habeas proceeding.

Alley v. Bell, 405 F.3d 371, 372-73 (6th Cir. 2005)(citations omitted)(emphasis in original). Thus, Petitioner argues, the Court's conclusion that Petitioner's fraud claim was a prohibited attempt at circumventing the restrictions on second or successive habeas petitions directly contradicts the position of five judges of the Sixth Circuit. First, while Circuit Judge Cole's opinion is instructive, the Court's duty on remand was "to determine, *in the first instance*, whether Alley's motion can be considered a proper Rule 60(b) motion." Id. at 372 (emphasis added). The Court has, to the best of its ability, faithfully executed that mandate. Second, the "affidavit" which Judge Cole relies upon in surmising that Petitioner's Rule 60(b) motion is a true motion is not an actual affidavit filed by the state's habeas attorneys during the habeas proceedings, but rather is the prosecution's response to a pretrial motion of Petitioner to obtain discovery of certain materials, wherein the State acknowledged its Brady requirements and pledged to so comply. See First Amended Motion Requesting Relief In The Exercise Of This Court's Inherent Authority, And/Or Relief From Judgment, And/Or Certificate Of Appealability ("motion

for relief"), R. 129 at 15-16 (discussing the prosecution's promise to disclose exculpatory evidence and referencing the trial court response to the discovery motion as exhibit three); Second Amended Motion Requesting Relief In The Exercise Of This Court's Inherent Authority, And/Or Relief From Judgment, And/Or Certificate Of Appealability ("second motion for relief"), R. 158 at 24-25. This document, of course, was part of the technical record from the state courts entered before this Court in Petitioner's federal habeas proceedings. Nowhere else in any of Petitioner's various motions for relief does he highlight any "affidavit" where the state's habeas attorneys have attested to the full disclosure of exculpatory evidence before this Court, nor does he even refer to this document as an "affidavit." Thus, it appears that Circuit Judge Cole may have misapprehended the precise nature of the "affidavit" upon which he bases his entire discussion of Petitioner's fraud claim. Petitioner's allegations regarding the "affidavit" are inextricably related to "his state court proceedings," and are relevant to his "trial-court-related *Brady* claim" because the "affidavit" originated in the trial court when Petitioner made his Brady requests. Moreover, Petitioner has himself intimated that the evidence he proffers in support of his motion for relief is not related to the integrity of the Court's narrow ruling on Petitioner's Brady claims during prior habeas proceedings, but rather is relevant to constitutional violations at his trial:

> Sedley Alley has only recently come upon such exculpatory evidence, because the evidence had been withheld in violation of *Brady*, and he was also misled by trial testimony and documentation which led him to believe that exculpatory evidence did not exist. Nevertheless, having recently conducted further investigation into the circumstances of the offense and the trial, Sedley Alley has uncovered the following evidence which indicates that the prosecution did, in fact, withhold exculpatory evidence which was material to his conviction and/or sentence.

Motion for Relief, R. 129 at 27-28. It is clear that such claims may not form the basis for a motion for relief from judgment pursuant to Rule 60(b). Gonzalez, 125 S.Ct. at 2647. Accordingly, the Court is required to treat Petitioner's allegation of fraud for what it is, a prohibited attempt to bring before the Court evidence of Brady violations during Petitioner's trial that were not raised during his initial habeas proceedings. The Court is without jurisdiction to consider such a claim. Id.; 28 U.S.C. § 2244(b)(3)(A).

Petitioner's penchant for hyperbole aside, the Court's holding does not countenance the execution of habeas petitioners because they do not "catch" the state in a lie in a timely fashion. Rather, the Court's holding simply acknowledges the constraints placed on it by governing habeas law, and yields to its binding authority. If, as Petitioner seems strongly to believe, the Sixth Circuit Court of Appeals determines that Petitioner's newly proffered evidence sufficiently raises a Brady claim deserving of this Court's consideration, then perhaps that body will grant him leave to file a second or successive habeas petition, which is the

only appropriate medium for Petitioner's newly articulated due process claims. See 28 U.S.C. § 2244(b)(3); Felker v. Turpin, 518 U.S. 651, 663-64 (1996). Other courts of appeals confronted with similar scenarios have taken this approach, in order that they not execute citizens for failing to specifically plead potentially meritorious Brady claims they were perhaps unable to articulate due to the conduct of the state. See e.g., In re Johnson, 322 F.3d 881 (5th Cir. 2003)(granting habeas petitioner leave to file second or successive habeas petition raising Brady violations, as discussed by subsequent opinion in Johnson v. Dretke, 2006 WL 598129 (5th Cir. March, 13, 2006)); In re Lott, 366 F.3d 431 (6th Cir. 2004)(granting Petitioner leave to file second or successive habeas petition raising Brady claim); Cooper v Woodford, 358 F.3d 1117 (9th Cir. 2004)(granting habeas petitioner leave to file a second or successive habeas petition based on Brady violation which arguably demonstrates actual innocence). Therefore, adequate procedures exist to ensure that Petitioner will not be executed for his failure to timely discover exculpatory evidence because of the conduct of the State's attorneys; the Court need not belabor this point any further. Accordingly, Petitioner's motion to alter or amend this Court's judgment dismissing Petitioner's fraud upon the court claim is DENIED.

B. Procedural Default and the Schiavo Act

Petitioner asserts that the Court has failed to give proper consideration to his argument that Congress' passage of Public Law 109-3 ("An Act For The Relief Of The Parents Of Theresa Marie

Schiavo") entitles him to be excused from the Court's previous finding of procedural default as to some of his original habeas claims. This claim is patently frivolous. The Schiavo Act clearly limits standing to bring an action under the Act exclusively to the parents of Terry Schiavo. Furthermore, jurisdiction for such an action is vested exclusively in the Middle District of Florida. Petitioner is obviously unable to satisfy either of these essential pre-conditions to seeking relief under the Act. Furthermore, as this Court's previous order makes clear, relief from judgment pursuant to Rule 60(b)(6) is extremely rare in the habeas context, and limited to cases presenting "extraordinary circumstances." Gonzalez, 125 S.Ct. at 2649. Clearly the Schiavo Act is not an "extraordinary circumstance" justifying the reopening of Petitioner's procedurally defaulted habeas claims where Petitioner is not able to satisfy the Act's jurisdictional predicates and the Act has absolutely nothing to do with habeas corpus. Other courts that have considered the equivalent argument of Petitioner's have reached the same conclusion, for the same reasons, as this Court. See Smith v. Bell, 2005 WL 2416504 (M.D. Tenn. Sep. 30, 2005); King v. Bell, 392 F.Supp.2d 964, 1016 (M.D. Tenn. Sep. 27, 2005). This claim does not merit further consideration. Accordingly, Petitioner's Motion to Alter or Amend this Court's judgment denying his claim for relief pursuant to the Schiavo Act is DENIED.

C. Petitioner's Invocation of "Inherent Article III Powers"

Petitioner contends that the Court has erroneously refused to grant him relief pursuant to purported "inherent powers" which

cannot be constrained by Congress or the various rules of court. As the Court's previous order makes clear, the Court is mindful that the Court possesses traditional, and inherent, equitable powers regarding its judgments, but also that those powers now find their expression in Rule 60(b)(6) and in the "savings clause" of the Rule. See Order, R. 169 at 5-8. The crux of Petitioner's argument in this regard appears to be that the Court enjoys inherent powers which allow it to ignore the constraints of statutes setting forth restrictions on the Court's exercise of its habeas jurisdiction, as well as rules of court which limit the grounds and methods by which one may seek relief from a previous judgment. However, as the Court stated previously, such an exercise of the Court's habeas jurisdiction would be unprincipled, contrary to the limitations on the Court's habeas jurisdiction imposed by Congress, and would render the express requirements of Rule 60(b) completely superfluous. Order, R. 169 at 5. Where appropriate, Petitioner has received consideration of his claims for relief from judgment pursuant to the inherent powers which the Court possesses and which are alluded to in Rule 60(b). See Order, R. 169 at 18-20 (discussing Petitioner's Schiavo claim under both Rule 60(b)(6) and the "savings clause"). Thus, the Court has appropriately considered its "inherent powers" in resolving Petitioner's motion for relief from judgment; that the Court is unwilling, indeed unable, to exercise powers of unprecedented scope and apparently limitless force merely at the behest of the Petitioner cannot serve as a ground to alter or amend judgment.

Accordingly, Petitioner's motion to alter or amend as to this ground is DENIED.

D. Petitioner's "Supplement to Motion to Alter or Amend and/or Request for Relief From Judgment In Light of Intervening Case Law"

Petitioner filed the above captioned document on January 12, 2006, essentially seeking to re-litigate his claim that he is entitled to a certificate of appealability on his previously denied HAC claim on the basis of the Supreme Court's intervening decision in Brown v. Sanders, 126 S.Ct. 884 (2006). In Brown, the Court effectively abandoned the distinction it had drawn in previous cases establishing disparate treatment for "weighing" and "non-weighing" states wherein a defendant has received the death penalty based, in part, on a subsequently invalidated aggravating circumstance or factor. The Court adopted a single rule to cover both weighing and non-weighing states:

> We think it will clarify the analysis, and simplify the sentence-invalidating factors we have hitherto applied to non-weighing States, . . . if we are henceforth guided by the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

Brown, 126 S.Ct. at 892 (footnotes and citations omitted)(emphasis in original). Thus, Brown addresses the Court's concern that a sentencer's decision to impose death can be skewed by the admission of evidence in aggravation that should not be before the jury

because it supports a subsequently invalidated factor and the jury does not have any other ground for considering the evidence (such as the "omnibus" circumstances of the crime factor utilized in California and discussed in Brown). Id.

Petitioner contends that Brown entitles him to a certificate of appealability because, unlike in California, there is no "circumstances of the offense" aggravating circumstance in Tennessee, and, therefore, his jury improperly had before it evidence supporting the allegedly invalid HAC aggravating circumstance which it found as a condition to sentencing him to death. Furthermore, Petitioner argues, because no appellate court has performed a constitutional harmless error analysis or reweighing minus the allegedly invalid circumstance, his constitutional violation persists and entitles him, minimally, to a certificate of appealability on his HAC claim.

While Petitioner is correct in asserting that Tennessee's statutorily enumerated aggravating circumstances do not include an omnibus aggravating circumstance, that alone is not sufficient to grant him relief under Brown. In Brown, two of the aggravating factors found by Sanders' jury, including California's HAC aggravating circumstance, were subsequently invalidated by the California Supreme Court. Id. at 893-94. In Petitioner's case, as made clear by the Court's order denying relief from judgment, the Supreme Court and the Sixth Circuit Court of Appeals have held that the Tennessee Supreme Court cures any facial invalidity in Tennessee's HAC aggravating circumstance by application of a valid

narrowing construction of the aggravator in its mandatory review of all death sentences imposed in Tennessee. See Bell v. Cone, 543 U.S. 447, 455-59 (2005); Payne v. Bell, 418 F.3d 644, 657-58 (6th Cir. 2005). Thus, the HAC aggravating factor relied upon in sentencing Petitioner to death has not been subsequently invalidated; it is cured of any facial invalidity by the Tennessee Supreme Court's application of its narrowing construction on appeal. Furthermore, the Tennessee Supreme Court is entitled to the presumption that it has applied its narrowing construction so long as it does not affirmatively disclaim application of the construction during its mandatory review. Cone, 543 U.S. at 455-56; Payne, 418 F.3d at 657-58. As this Court's prior order demonstrates, the Tennessee Supreme Court is entitled to the presumption that it applied its narrowing construction of the HAC aggravator in Petitioner's case, thus curing any facial invalidity in the aggravator. Order, R. 169 at 14-15. Accordingly, Petitioner's reliance on Brown is misplaced, and his motion to alter or amend and/or request for relief from judgment on the basis of that decision is DENIED.

IV. COLLATERAL PENDING MOTIONS

Petitioner has pending numerous motions which are mooted by the Court's judgments denying his motion for equitable relief and denying the instant motion and supplement. These motions include: Petitioner's Motion For Discovery (#2) In Support Of Motion For Equitable Relief, R. 157; Petitioner's Motion For Status Conference, R. 159; Petitioner's Motion For Extension of Time To

File Reply, R. 164; and Petitioner's Motion For Discovery (#3) In Support of Motion For Equitable Relief, R. 167. Accordingly, the above motions are DENIED as moot.

V. CONCLUSION

For all of the reasons given above, Petitioner's Motion to Alter or Amend Judgment, including his supplement to the motion, is without merit and is therefore DENIED. Accordingly, the collateral motions which remain pending as discussed in section IV, supra, are mooted by the Court's judgment and are therefore DENIED.

IT IS SO ORDERED this 22nd day of March, 2006.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

APPENDIX 3

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 06a0331n.06
Filed: May 9, 2006

Nos. 05-6876, 06-5552

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDLEY ALLEY, *Petitioner-Appellant*, v. RICKY BELL (No. 05-6876), *Respondent-Appellee*, and WILLIAM R. KEY (No. 06-5552), Respondent-Appellee.	)	On Appeal from the United States District Court for the Western District of Tennessee

Before: **BOGGS, Chief Judge; RYAN and BATCHELDER, Circuit Judges.**

BOGGS, Chief Judge. Sedley Alley was convicted in 1987 by a Shelby County, Tennessee jury of kidnaping, rape, and first-degree murder. He is on death row. His habeas petition was denied by the district court, and that decision was affirmed by this panel. *Alley v. Bell*, 101 F. Supp. 2d 588 (W.D. Tenn. Jan. 18, 2000), *aff'd*, 307 F.3d 380 (6th Cir. 2002), *cert. denied*, 540 U.S. 839 (2003).

In October 2003, Alley sought relief from the district court's denial of habeas through a filing that he styled a motion made pursuant to Fed. R. Civ. P. 60(b). The district court stayed Alley's execution pending the relevant outcome of *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (en banc). Following the decision in that case, this panel vacated the stay entered by the district court. *Alley v. Bell*, 392 F.3d 822 (6th Cir. 2004). The en banc court unanimously vacated and remanded so that the district court might make a determination as to whether Alley's motion was a proper Rule 60(b) motion under *Abdur'Rahman* or instead a second or successive habeas petition. *Alley v. Bell*, 405 F.3d 371 (6th Cir. 2005) (en banc).

On November 28, 2005, the district court issued a 22-page denial of Alley's Rule 60(b) motion, ruling that his filing was properly construed not as a Rule 60(b) but rather as a second or successive habeas petition.

We now consider Alley's appeal from the district court's denial of his putative Rule 60(b) motion. This matter has come before us as 05-6876. While acknowledging the diligent and steadfast efforts of Alley's counsel in the prosecution of his client's case, we **AFFIRM** the decision of the court below that Alley's filing is equivalent to a second or successive habeas petition, and not a Rule 60(b). We further affirm the denial of that motion. Because we have ruled on the substance of this appeal, we also **DENY** Alley's motion for a stay of execution pending our consideration of the matter.

With respect to Alley's efforts, in a matter numbered 06-5552, to access and preserve certain physical evidence, we hereby **DENY** his "Motion to Preserve All Evidence Pending Final

Resolution of Appeal," and we **GRANT** his motion for expedited briefing in the appeal from the district court's dismissal of his action for injunctive relief under 42 U.S.C. § 1983.

I

In ruling on Alley's appeal from the district court's decision with respect to his putative Rule 60(b) motion, we take note of the care with which Judge Bernice B. Donald considered the content of Alley's filing. When it first considered Paragraph 35 of Alley's habeas petition (related to suppression of alleged exculpatory evidence, including *ex parte* contact by the trial judge with the jury and victim's family) in 2000, the district court found it procedurally defaulted on the grounds that it had never been raised in the state courts. *Alley v. Bell*, 101 F. Supp. 2d at 619; *see also Alley v. Bell*, no. 97-3159, R. 60 at 43, ¶ 35. Alley's Rule 60(b) claim with respect to ¶ 35 sought to show that fraud, misconduct, or misrepresentation by the state had led the district court to reach an improper conclusion with respect to that portion of his habeas petition. The district court correctly found that this portion of the Rule 60(b) motion was rooted in allegations of withheld evidence–a report by the Shelby County Sheriff's Department and handwritten notes by Assistant Medical Examiner Dr. Bell–that were unrelated to the evidence that formed the basis of the original ¶ 35 habeas claim. The court concluded:

> As such, [Alley] is not attacking [as would be appropriate through a 60(b) motion] the integrity of the Court's previous judgment denying habeas relief as to ¶ 35, and the newly proffered evidence may not be considered by this Court in a motion for relief from judgment. *See Gonzalez v. Crosby*, 545 U.S. at__, 125 S. Ct. 2641, 2646-47 (2005). Because the Court finds this claim to be a prohibited attempt at re-

> litigating the constitutionality of his conviction and sentence, the Court is required to treat this portion of Petitioner's motion for relief as the fundamental equivalent of a second or successive habeas application thus obviating the need to consider Petitioner's claim under either prong of the 'savings clause' [of 60(b)].

Alley v. Bell, 97-3159-D/V, Nov. 28, 2005, Order Denying Motion for Relief from Judgement, 12-13.

The district court reached similar conclusions with respect to the other claims contained in Alley's putative Rule 60(b) motion. Paragraph 28 of Alley's habeas petition claimed that the trial court's exclusion of certain evidence during the sentencing phase--videotapes of the defendant under hypnosis, purportedly supportive of his claim of schizophrenia--denied his fundamental right to present mitigating evidence. When it first considered the claim, the district court found that the evidence was inadmissible. 101 F. Supp. 2d at 640. Alley revived the claim on the basis of the Tennessee Supreme Court's intervening decision, *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003). However, as Alley has acknowledged, a habeas petitioner is not permitted to use a Rule 60(b) motion to apply a "purported change in the substantive law governing the claim." *Gonzalez*, 125 S. Ct. at 2647-48. The district court also noted that this portion of Alley's motion sought to "reassert a claim already denied on the merits," and that, under the terms of *Gonzalez*, it is therefore "in form and effect a prohibited second or successive habeas application." 97-3159-D/V, Order, 20.

Paragraph 29 of the habeas petition had urged that Tennessee's sentencing aggravating factor punishing "heinous, atrocious, and cruel" conduct was unconstitutionally vague. The district court held that the Tennessee Supreme Court had applied a valid and curing narrowing construction to the interpretation of that aggravating factor. 101 F. Supp. 2d at 643. The district court also denied

Alley a Certificate of Appealability on this claim. In his Rule 60(b) motion, Alley sought relief from the denial of the COA. In its order of November 28, 2005, the district court cited Payne v. Bell, 418 F.3d 644, 657-58 (6th Cir. 2005), noting that the Sixth Circuit has already considered the identical legal question and concluded that the Tennessee Supreme Court has applied a valid narrowing construction to the "heinous, atrocious, and cruel" factor, establishing that "reasonable jurists would [not] find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The district court then ruled that the petition for relief from its denial of the COA was without merit. We reach the same conclusion by a different road. First, we note that our court also denied the COA on this claim. Case No. 99-6659, Sixth Circuit Order, May 23rd, 2001 (granting COA only on issues 1, 2, 3, 6, and 9). Second, we note that, where a motion seeks to reopen a habeas appeal, it may be regarded as a successive habeas petition. *Calderon v. Thompson*, 523 U.S. 538, 553 (1998). Third, we find that where both the district court and this court have denied a COA on a particular claim, nothing in *Abdur'Rahman* permits the habeas petitioner to appeal further that denial through the use of a Rule 60(b) motion. Therefore, though the district court did, following examination of the merits of this claim, "deny" rather than "dismiss" this portion of his motion, we conclude explicitly that this claim was also equivalent to a second or successive habeas petition and not properly pursued in the format of a Rule 60(b).

We also affirm the district court's rejection of Alley's claim that Congress's "Act for the Relief of the Parents of Theresa Marie Schiavo," Pub. L. No 109-3, 119 Stat. 15, has relevance for his case and entitles him to relief for all claims denied on the basis of procedural default or the standard of review set forth in 28 U.S.C. §2254(d). It has none and entitles him to none. The district

court correctly concluded that the events and legislation arising from the Terri Schiavo matter do not create a set of "extraordinary circumstances" permitting the reopening of final judgment under Rule 60(b). *Gonzalez*, 125 S. Ct. at 2649. The Act gave jurisdiction to the United States District Court for the Middle District of Florida to consider claims relating to Terri Schiavo's physical condition. It also conferred standing on Ms. Schiavo's parents to bring such claims. Regardless of how Alley's claim here is characterized–as a proper Rule 60(b) motion or as a second or successive habeas petition–the plain language of the Act compels us to conclude that the legislation does not and can not have any relevance to this case.

Concluding that Alley's motion is properly construed as a second or successive habeas petition, we are compelled to affirm the district court's denial and dismissal of his purported Rule 60(b) motion. We do not here examine the merits of the underlying claims beyond the degree necessary to assess whether the motion is properly made as a Rule 60(b), as Alley steadfastly denies any desire to have it considered as a second or successive petition.

Alley's filings raise the possibility of some procedural conundrums. In treating this appeal from the denial of a Rule 60(b) motion on its own terms, rather than as a second or successive habeas petition that a district court found it to be (and the petitioner disclaims it to be), we acknowledge the possibility that this could be considered as authorizing an end-run around the requirements of AEDPA, 28 U.S.C. § 2244(b)(3)(E), which mandates that a denial of "authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

In the circumstances of this case, we find it unnecessary to resolve this difficulty, and express no opinion on it. However, for purposes of completeness, we do note that we are permitted to grant an applicant permission to file a second or successive habeas corpus petition under § 2244(b)(2) only where:

> 1) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> 2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> 3) 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 the applicant guilty of the underlying offense.

Alley's motion does not satisfy these requirements.

II

We further consider Alley's efforts, in the matter numbered 06-5552, to access and preserve certain physical evidence relating to his case now in the custody of Tennessee.

On April 5, 2006, Alley filed an action in the district court pursuant to 42 U.S.C. § 1983 seeking injunctive relief in the form of access to this evidence for the purpose of DNA testing. On

April 20, the district court dismissed this complaint for failure to state a claim upon which relief may be granted. On April 21, Alley filed a "Motion to Preserve All Evidence Pending Final Resolution of Appeal" in the district court. Also on that date, he filed a notice of appeal from the district court's denial of his § 1983 filing. On April 27, Alley filed a similar motion in our court, styled a "Motion to Preserve All Evidence Pending Final Resolution of Appeal." This motion seeks an order that all physical evidence now in the custody of the state court "shall be fully preserved, and not opened, examined, touched, tainted, damaged, harmed, or removed in any way by any person or source whatsoever, pending the final disposition of this matter . . . ." (Motion, April 27, 2006, 2) On April 28, the district court filed an order denying Alley's district court's motion to preserve evidence.

We grant Alley's motion for an expedited briefing schedule in the appeal from the district court's dismissal of his § 1983 complaint. However, seeing little threat to the preservation of the evidence under the status quo, and given the substance of the other rulings contained in this opinion, we deny the motion to preserve evidence.

IV

For the forgeoing reasons, in 05-6876, we **AFFIRM** the ruling of the court below, and we **DENY** Alley's motion for a stay of execution pending the outcome of the appeal of that decision. In 06-5552, we **DENY** the "Motion to Preserve All Evidence Pending Final Resolution of Appeal," and we **GRANT** the motion for expedited briefing in the appeal from the district court's dismissal of Alley's action for injunctive relief under 42 U.S.C. § 1983.

APPENDIX 4

No. 05-6876

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

MAY 15 2006

LEONARD GREEN, Clerk

SEDLEY ALLEY,

Petitioner-Appellant,

v.

RICKY BELL, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, ROGERS, SUTTON, COOK, MCKEAGUE, AND GRIFFIN, Circuit Judges.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Judge Gibbons recused herself in this case.

APPENDIX 5

TIMELINE: JULY 11-12, 1985