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

DONNIE E. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 97-3052-BBD**
	)	
RICKY BELL, Warden,	)	**CAPITAL CASE**
	)	**EXECUTION SET: November 16, 2004**
Respondent.	)	

RESPONSE IN OPPOSITION TO
MOTION FOR EQUITABLE RELIEF IN THE EXERCISE
OF THIS COURT'S INHERENT ARTICLE III POWERS
AND/OR RELIEF FROM JUDGMENT

INTRODUCTION

Petitioner was convicted in October 1985 of the first degree murder of his wife, Connie Johnson. The jury sentenced petitioner to death. The conviction and sentence were affirmed by the Tennessee Supreme Court on direct appeal. *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987), *cert. denied*, 485 U.S. 994. Petitioner then sought post-conviction relief which was denied by the trial court and on appeal. *Donnie E. Johnson v. State*, No. 61, 1991 WL 111130 (Tenn. Crim. App. 1991), *permission to appeal denied.* The claim of ineffective assistance of counsel was referred directly to the Tennessee Supreme Court which also denied relief. *Donnie Edward Johnson v. State*, No. 02-S-01-9207-CR-00041, 1993 WL 61728 (Tenn. 1993). Petitioner subsequently filed a second post-conviction petition. Although the Court of Criminal Appeals initially granted relief on the issue of waiver, on appeal from that decision the Tennessee Supreme Court remanded for reconsideration in light of *House v. State*, 911 S.W.2d 705 (Tenn. 1995). *Donnie Edward Johnson v. State*, No.

02C01-9111-CR-00237, 1995 WL 603159 (Tenn. 1995). Following the remand the Court of Criminal Appeals denied relief. *Donnie Edward Johnson v. State*, No. 02C01-9111-CR-00237, 1997 WL 141887 (Tenn. Crim. App. 1997).

On November 14, 1997, petitioner filed a petition for writ of habeas corpus in this Court. This Court denied relief on all claims, but issued a certificate of appealability on the claim of ineffective assistance of counsel at sentencing due to the alleged failure to investigate and present mitigating evidence. *Johnson v. Bell*, No. 97-3052-DO (W.D.Tenn. Feb. 28, 2001). On appeal the Sixth Circuit Court of Appeals denied relief. *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003). The United States Supreme Court denied certiorari on April 26, 2004 and denied rehearing on June 28, 2004. *Johnson v. Bell*, 124 S.Ct. 2074 (2004) and 124 S.Ct. 2930 (2004). The State of Tennessee subsequently filed a motion in the Tennessee Supreme Court to set an execution date. On August 10, 2004, that court entered an order setting petitioner's execution for November 16, 2004. *State v. Donnie Johnson*, No. M1987-00072-SC-DPE-DD (Tenn. Aug. 10, 2004) (copy attached). On October 13, 2004, 19 years after his conviction, petitioner filed this motion seeking "equitable relief" under Article III and Rule 60(b), Fed.R.Civ.P.

ARGUMENT[1]

I. ARTICLE III DOES NOT GRANT THIS COURT INHERENT POWER TO INTERFERE IN THE EXECUTION OF A LAWFUL JUDGMENT OF A STATE COURT.

Petitioner asserts first that this Court has the inherent authority under Article III of the United States Constitution to grant equitable relief in this case. He asserts a similar basis for equitable relief in 28 U.S.C. § 2243. This argument ignores the limitations imposed by Congress' enactment of the

[1]Respondent's opposition to the motion for a stay of execution based upon petitioner's motion for relief from judgment is set forth in a separate document filed contemporaneously with this response.

Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). In support of his argument petitioner relies on the language of these provisions that speaks to deciding cases "as law and justice require," and the authority to revise judgments "in the interest of fundamental justice." In so doing, however, petitioner makes the same error that the Supreme Court found fault with in *Carlisle v. United States*, 517 U.S. 416, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996). In that case, the district court granted an untimely motion for judgment of acquittal filed pursuant to Fed.R.Crim.P. 29(c). The Sixth Circuit Court of Appeals reversed the district court's judgment. In the Supreme Court, the petitioner argued that the district court's supervisory powers set forth in Fed.R.Crim.P. 2 vested that court with the authority to grant an untimely motion even if Rule 29(c) did not, citing to the language of Rule 2 outlining the need to provide "just determination" of cases and to ensure "fairness in administration." *Carlisle*, 517 U.S. at 424, 116 S.Ct. at 1465. The Court held that Rule 2 "sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superceding clear rules that do not achieve the stated objectives." *Id.* Similarly, the Court disposed of petitioner's argument relying on the district court's "inherent supervisory power" noting that, "[w]hatever the scope of this 'inherent power,' however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure. . . . Federal courts have no more discretion to disregard the Rule's mandate than they do to disregard *constitutional or statutory provisions.*" *Id.* at 426, 116 S.Ct. at 1466 (emphasis added). As to the final assertion that the district court had authority under the All Writs Act to grant an untimely motion the Court stated that, "*[w]here a statute specifically addresses the particular issue* at hand, it is that authority, and not the All Writs Act, that is controlling." *Id.* at 429, 116 S.Ct. at 1467 (emphasis added).

In the present case, the AEDPA provides specific authority for the manner in which a state court judgment may be challenged on collateral review in federal court. It sets specific procedural requirements and filing limitations. Adopting petitioner's argument would circumvent the limitations imposed by Congress when it enacted the AEDPA. Such action is no different than the attempt to avoid the impact of Fed.R.Crim.P. 29 condemned in *Carlisle*. *See also Felker v. Turpin*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (holding that the AEDPA's elimination of the right to seek review from the denial of authorization to file a second or successive petition is not a violation of the Suspension Clause); *Mueller v. Angelone*, 181 F.3d 557, 572-73 (4th Cir. 1999) (AEDPA does not strip federal courts of the "judicial power" vested in them by Article III, it only places an additional restriction upon the scope of the remedy); *United States v. Barrett*, 178 F.3d 34 (1st Cir. 1999) (petitioner could not avoid AEDPA's restrictions on filing second or successive petition by proceeding under All Writs Act).

II. IN A HABEAS ACTION, A MOTION FILED PURSUANT TO FED.R.CIV.P. 60(B) CONSTITUTES A SECOND OR SUCCESSIVE PETITION AND IS SUBJECT TO THE GATEKEEPING REQUIREMENTS OF 28 U.S.C. § 2244(B).

The Sixth Circuit has stated that "[w]e agree with those Circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition. . . ." *McQueen v. Scroggy*, 99 F.3d 1335 (6th Cir. 1996). Here, petitioner seeks to relitigate several claims that were presented and adjudicated in his first habeas petition; he challenges the prior judgment in this case on the basis of proffered new evidence and new law. Under these circumstances, it is particularly appropriate to treat this motion as a second or successive petition, "[o]therwise, petitioners could evade the bar against relitigation of claims in a prior application" under 48 U.S.C. § 2244(b)(1). *Calderon v. Thompson*, 523 U.S. 538, 553, 118 S.Ct. 1489, 1500, 140 L.Ed.2d 728 (1998)

(observing that a motion to recall the mandate on the basis of new evidence can be regarded as a second or successive petition). Because the pleading petitioner has styled as a "Motion for Equitable Relief" or "Motion for Relief from Judgment" is, in actuality, a successive habeas petition,[2] the proper procedure would be to transfer the matter to the Sixth Circuit for their determination of whether the petition satisfies the gateway criteria of § 2244(b). *See In re Sims*, 111 F.3d 45 (6th Cir. 1997).

III. EVEN IF IT DOES NOT CONSTITUTE A SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. § 2244(B), FED.R.CIV.P. 60(b) DOES NOT AFFORD PETITIONER RELIEF IN THIS CASE.

Petitioner asserts that Fed.R.Civ.P. 60(b) provides a basis upon which this Court may grant relief. As he notes, by its terms, Rule 60(b) makes provision for a court to relieve a party from a final judgment for any one of six separate reasons. Those reasons are:

> (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 or 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.

Petitioner appears to be seeking relief under sub-section (3) — fraud, misrepresentation or other misconduct — and (6) — intervening legal developments.

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[2]Respondent acknowledges that the petition also alleges official misconduct and that the Sixth Circuit has previously held that a post-judgment pleading is not subject to the restrictions against successive habeas petitions if there was a fraud on the court. *See Workman v. Bell*, 245 F.3d 849, 851 (6th Cir. 2001), *cert. denied*, 532 U.S. 955 (2001). Nevertheless, noted in section B, *infra*, his mere invocation of the word "fraud" is insufficient; his allegations fail to establish a fraud on the court.

A. Petitioner is not entitled to relief on the basis of Cone v. Bell, 359 F.3d 785 (6th Cir. 2004) petition for cert. pending (Case No. 04-394).

Petitioner asserts that he is entitled to relief under Fed.R.Civ.P. 60(b) based on the intervening legal development of *Cone v. Bell*. Although respondent recognizes that generally this Court is bound by the holdings of the Sixth Circuit Court of Appeals, this Court is also bound by the holdings of the United States Supreme Court and the laws of the United States.

1. The holding in Cone v. Bell circumvents the exhaustion requirement of 28 U.S.C. § 2254(b) and is in conflict with the United States Supreme Court's holdings relative to the definition of "fair presentation."

A habeas petitioner is required to exhaust state remedies by presenting the substance of his claim to the state courts prior to seeking federal habeas relief. 28 U.S.C. §2254(b). The exhaustion requirement is satisfied only when the highest state court has been "given a full and fair opportunity to rule on the claim." *O'Sullivan v. Boerckel*, 526 U.S. 838, 846-47 (1999). "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so too must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) ("Exhaustion means more than notice" and was intended to be "serious and meaningful"). To ensure that the State has the necessary "opportunity" to correct alleged violations of its prisoners' federal rights, a habeas petitioner must "fairly present" his claims to the appropriate state courts for consideration before seeking federal relief. *Duncan v. Henry*, 513 U.S. 365, 365 (1995). Just last term, in *Baldwin v. Reese*, 124 S.Ct. 1347 (2004), the Supreme Court emphasized the importance of the federal-state comity concerns underlying the exhaustion requirement by requiring that a state prisoner's presentation of a federal claim to a state court be explicit.

In *Baldwin*, the habeas petitioner had been convicted of kidnapping and sexual offenses in Oregon state court. In state collateral proceedings, petitioner complained that he received ineffective assistance of trial and appellate counsel. After the lower courts denied relief, petitioner filed a petition for discretionary review with the Oregon Supreme Court. Although the petition specified that *trial* counsel's conduct violated several provisions of the Federal Constitution, it contained no such specification as to his separate *appellate* ineffective assistance claim. The Oregon Supreme Court denied review. *Baldwin*, 124 S.Ct. at 1349-50.

In federal habeas proceedings, the district court held that petitioner had not "fairly presented" his ineffective assistance of appellate counsel claim because his brief to the state supreme court failed to indicate that he was complaining of a violation of federal law. *Id*., 1350. The Ninth Circuit reversed, finding that, although the petition did not itself assert the "federal nature" of the claim, the Oregon Supreme Court had the "opportunity to read" the lower court opinion. Had they read that opinion, the Ninth Circuit majority reasoned, the Oregon Supreme Court would have, or should have, realized that petitioner's claims rested upon federal law. *Id*.

The Supreme Court reversed, holding that a state prisoner does not "fairly present" a claim to a state court if that court must read beyond the petition or a brief (or other similar document) that does not alert it to the presence of a federal claim in order to find material that does so. *Id.*, at 1351. Citing *Duncan v. Henry*, 513 U.S. 364 (1995) (*per curiam*), the Court reiterated the long-standing requirement that, in order to provide a state with the necessary "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights, a habeas petitioner must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of

discretionary review), thereby alerting that court to the existence and nature of a federal claim. *Id*. at 1349; *see also Boerckel*, 526 U.S. at 845.

The Sixth Circuit's decision in *Cone* flouts the "fair presentation" requirement described in *Baldwin* and *Duncan*. As in this case, Cone's vagueness challenge to the HAC aggravating circumstance was not presented to the Tennessee Supreme Court on direct appeal, and there was not the slightest mention in that court's opinion of any such challenge. Nevertheless, the Sixth Circuit held in *Cone* that the state court "implicitly decided" the issue as part of its statutorily-mandated review under Tenn. Code Ann. §39-2-205(c)(1) (1982) (repealed) to determine whether "[t]he sentence of death was imposed in any arbitrary fashion."

But Tennessee law does not require mandatory review of a trial court's jury instructions associated with statutory aggravating circumstances. Mandatory direct review of aggravating circumstances is confined to the sufficiency of the evidence supporting the jury's findings of a statutory aggravating circumstance or circumstances. Tenn. Code Ann. §39-2-205(c)(2). In assessing whether a death sentence "was imposed in any arbitrary fashion" under §39-2-205(c)(1), Tennessee appellate courts generally confine the inquiry to determining whether the sentencing phase proceeded according to the procedure established in the applicable statutory provisions and Rules of Criminal Procedure. *See, e.g., State v. Berry*, No. M2001-02023-CCA-R3-DD, 2003 WL 1855099, at *30 (Tenn. Crim. App. Apr. 10, 2003), *aff'd*, No. M2001-02023-SC-DDT-DD, 2004 WL 1873706 (Tenn. Aug. 23, 2004) ("[Because t]he sentencing phase in this matter proceeded in accord with the procedure established by the applicable statutory provisions and Rules of Criminal Procedure . . . [w]e conclude that the sentence of death . . . was not imposed in an arbitrary fashion") (copy attached). *See also State v. Carter*, 988 S.W.2d 145 (Tenn. 1999) (death sentence based upon

verdict form that failed to comply with requirements of applicable statute deemed to be imposed in an "arbitrary fashion"); *State v. Stephenson*, 878 S.W.2d 530 (Tenn. 1994) (same); Tenn. R. App. P. 13(b) ("Review [by Tennessee appellate courts] generally will extend only to those issues presented for review"). *Compare Jones v. United States*, 527 U.S. 373, 387-89 (1999) (mandatory review under Federal Death Penalty Act for the "influence of passion, prejudice or any other arbitrary factor" in imposition of death sentence does not include instructional errors; Congress did not intend to equate legal error with phrase "arbitrary factor").

The question of "implicit review" necessarily hinges upon the scope of the state court's mandatory review, which is ultimately a question of state law. *Nave v. Delo*, 62 F.3d 1024, 1039 (8th Cir. 1995). And in the absence of any Tennessee authority extending the state court's mandatory review to an assessment of jury instructions given in the capital sentencing proceeding, a federal court may not presume that the state courts considered such issues, particularly when they have never been raised. Indeed, the sole Tennessee case upon which the Sixth Circuit relies to support its "implicit review" theory, *West v. State*, 19 S.W.3d 753 (Tenn. 2000), plainly does not stand for the proposition advanced by the court. To the contrary, *West* actually confirms respondent's contention that the state courts have never reviewed Cone's vagueness challenge, either expressly or implicitly. In *West*, the petitioner raised for the first time in state post-conviction proceedings a claim that the evidence adduced at his capital sentencing hearing was not sufficient to support the jury's application of the aggravating circumstance under Tenn. Code Ann. §39-2-203(i)(6) (murder committed for the purpose of avoiding arrest or prosecution). *West*, 19 S.W.3d at 754. In reviewing the claim on appeal, the Tennessee Supreme Court observed that, "[a]lthough West casts the issue as concerning the evidentiary sufficiency of the (i)(6) aggravating circumstance,

we think his grievance involves instead the constitutional issue of whether the aggravating circumstance narrows the class of death eligible offenders" under the Eighth Amendment. *Id.* The state court's analysis of West's claim thus reflected its appreciation of the distinction between a challenge to the sufficiency of the evidence supporting an aggravating circumstance, on the one hand, and a challenge to the constitutionality of the aggravating circumstance, on the other. With that distinction in mind, the state court determined that West's claim had been "previously determined" during the statutorily-required review of the sufficiency of the evidence on direct appeal. But, to the extent West's claim challenged the constitutionality of the aggravating circumstance, the court concluded that the claim had been "waived" through West's failure to present it on direct appeal. *Id.*, at 754, 756. Indeed, the Tennessee Supreme Court made clear that, by failing to raise any constitutional challenge to the (i)(6) aggravator on direct appeal, West had "blocked any consideration of this issue by this Court on post-conviction review," *id.*, at 756.

In his dissenting opinion in *Cone*, Judge Norris observed that "the majority's construction of Tennessee law with respect to 'implicit review' as it applies to waiver lacks any clear support from the Tennessee courts." *Cone*, 359 F.3d at 805. And the Sixth Circuit majority concedes that, "without *West*, there would be no Tennessee authority for attempting" the "implicit review" doctrine applied here. *Cone*, 359 F.3d at 792. But since *West* itself provides no authority for the Sixth Circuit's decision, the latter collapses under its own weight.

2. Even if this Court were to apply the holding of Cone v. Bell, it is distinguishable as the direct review in this case post-dated the Tennessee Supreme Court's holding in State v. Williams, 690 S.W.2d 517 (Tenn. 1985), in which the court specifically defined and narrowed its construction of the heinous, atrocious and cruel aggravator in light of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

The majority's holding in *Cone* was based upon its assertion that the "implicit holding" of the Tennessee Supreme Court was contrary to established Supreme Court precedent at the time. *Cone*, 359 F.3d at 797. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). Unlike the jury in *Cone*, which was instructed only in the bare terms set forth be statute, the jury in this case was given the narrowing definitions of the terms as adopted by the Tennessee Supreme Court in *State v. Williams*, *supra*. [Add. No. 1, R.565; Petitioner's Motion, Ex. 2]

The United States Supreme Court has repeatedly emphasized that critical to the disposition of any Eighth Amendment vagueness challenge is an examination of the way in which the state appellate courts have construed the aggravating circumstance. *See Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (allegedly vague provisions in HAC aggravator "must be considered as they have been construed by the [state supreme court]"). In *Godfrey v. Georgia*, the Supreme Court held that Georgia's application of its "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance violated the Eighth Amendment. In analyzing the defendant's vagueness claim, the Court observed, first, that the language of the statute, standing alone, failed to provide sufficient guidance or "any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1765. But just as important as the language of the aggravator itself, and indeed dispositive of *Godfrey*, was the fact that the Georgia Supreme Court, in reviewing the death sentence, had failed to cure the defect by adopting a proper limiting construction. *Id.*, 446 U.S. at 429, 100 S.Ct. at 1765. The Court, in fact, recited the issue in

Godfrey, not in terms of the statutory language of the aggravating circumstance, but rather, the construction of that circumstance adopted by the Georgia Supreme Court. *Id.*, 446 U.S. at 423, 100 S.Ct. at 1762 ("the issue now before us is whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the §(b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution"). *See also Maynard v. Cartwright*, 486 U.S. 356, 365, 108 S.Ct. 1853, 1860, 100 L.Ed.2d 372 (1988) (noting that although the Oklahoma Court of Criminal Appeals had *since* restricted application of the aggravator to murders involving torture or serious physical abuse, it had not done so as of the time of the petitioner's appeal).

In 1981, the Tennessee Supreme Court adopted a constitutionally acceptable construction of the HAC aggravator. *State v. Dicks*, 615 S.W.2d 126, 132 (Tenn. 1981). The definition adopted in *Dicks* was, verbatim, the very construction approved by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In 1985, The Tennessee Supreme Court specifically defined and narrowed its construction of the HAC aggravator in light of the *Godfrey* holding. *State v. Williams*, *supra*. It was the definitions from this case that were given to the jury in reaching petitioner's sentence. *Compare State v. Williams*, 690 S.W.2d at 529 and Add. No. 1, pg. 565. Where the Supreme Court has held that an appellate court's application of a narrowing construction is sufficient to overcome otherwise vague instructions, there is even less danger where the jurors themselves received the appropriately defined instructions. Under the circumstances of this case, not only was the instruction constitutional, but if this Court is to indulge in the fiction of implicit review to overcome the procedural default, then that review must have

implicitly included the application of constitutional narrowing construction of the HAC aggravator previously adopted by the Tennessee Supreme Court in *Williams*.

B. The Supreme Court's decision in Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), does not provide a basis for relief under Fed.R.Civ.P. 60(b).

Initially respondent notes that the *Banks* opinion specifically noted the fact that it involves a habeas petition that is governed by pre-AEDPA law. *Banks*, 124 S.Ct. at 1271 ("We note, initially, that Bank's *Brady* claims arose under the regime in place prior to the [AEDPA]").

In *Banks*, the Supreme Court noted that the defendant had alleged a claim that the State knowingly failed to turn over exculpatory evidence as part of his state collateral review. *Banks*, 124 S.Ct. at 1271. Relief was denied by the district court due to Banks' failure to produce evidence in support of that claim during the state court proceedings. *Id.* at 1272. In contrast, Johnson's sole claim relating to the lack of any action being taken against Ronald McCoy was limited to his claim of ineffective assistance of counsel for failure to cross-examine McCoy. By failing even to assert a *Brady* claim, much less present evidence supporting such a claim, petitioner cannot obtain any relief under *Banks*.

As to the issue of cause and prejudice, in this case it was clear at the time of trial that Ronnie McCoy had not been charged with anything in connection to the murder of Connie Johnson. [Add. No. 1, pp. 386-87] It was equally clear that he had received no disciplinary action relative to his late return to the penal farm on the day of the murder. [Add. No. 1, pp. 386-87] Petitioner has offered nothing in this Court to account for his failure either to assert a claim that the State withheld evidence of a deal or to present proof of his allegations concerning a "deal" during the state court proceedings. Moreover, again unlike the defendant in *Banks*, even in federal court the proffered

proof was extremely limited consisting of a presentencing report from 1988, which pre-dated the post-conviction proceedings, and the declaration of Leslie Fatowe asserting that the existence of a deal was "common knowledge." As an attachment to the present motion petitioner offers the declaration of Wayne Morrow, McCoy's probation officer, who asserts that the basis for the statement in the presentence report was information provided by McCoy. Although this purports to be in response to the affidavit of McCoy filed by respondent as part of the summary judgment proceedings, petitioner offers no explanation for the more than five year delay between the filing of McCoy's affidavit and the declaration of Mr. Morrow. Even if this Court were to find that *Banks* grants sufficient leeway to allow a petitioner who clearly has knowledge that no prosecution of a co-defendant has occurred to forego not only the presentation of proof, but the assertion of a generalized claim, the *Banks* holding certainly cannot stand for the proposition that a petitioner can wait throughout the summary judgment process in the district court, appeal to the Court of Appeals and the Supreme Court and then, nearly four years after this Court's denial of relief, come forward with additional information for consideration, particularly where no explanation is offered for the delay.

The timing of this declaration is also relevant to petitioner's allegation of fraud as a basis to support relief under Rule 60(b). As noted previously, Rule 60(b) allows for relief from a judgment where there has been a fraud upon the court. Fed.R.Civ.P. 60(b)(3). This provision, however, carries with it a one-year limitation from the judgment, order, or proceeding. Even assuming that the conflicting recollections of parties to a conversation that took place 11 to 16 years ago (McCoy and Morrow, respectively) can constitute a fraud on the court, the McCoy affidavit was filed in April 1999 and this Court's judgment addressing that affidavit was filed in February 2001. Petitioner's

failure to obtain Mr. Morrow's affidavit until September 2004 is well outside the parameters of the rule.

C. The Sixth Circuit decision in Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003), cert. denied sub nom Mitchell v. Davis, 124 S.Ct. 2902 (2004), does not provide petitioner with a basis for relief under Fed.R.Civ.P. 60(b).

Petitioner submits that the holding of the Sixth Circuit in *Davis* provides a basis for relief under Fed.R.Civ.P. 60(b). This is based on his assertion that this Court's reliance on the prior holding of *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), is in doubt as the *Davis* opinion creates uncertainty as to its continuing validity. Petitioner's argument overlooks two significant factors. First, in addition to noting that the claim was without merit, this Court found that it was procedurally defaulted as petitioner failed to assert a challenge to the unanimity instruction until his second post-conviction petition. R. 84, Memorandum and Order, at pg. 222. Nothing in the *Davis* opinion addresses the procedural default. Moreover, even if the procedural default is ignored, petitioner has failed to address or even cite the recent Supreme Court decision in *Beard v. Banks*, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004), which renders *Davis* inapplicable to petitioner's case. The holding in *Davis* is clearly predicated upon the Sixth Circuit's finding that the instruction at issue violated the holdings of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). *Davis*, 318 F.3d at 687 and 691. In *Beard*, however, the Supreme Court stated that "*Mills* announced a new rule of constitutional criminal procedure that falls within neither *Teague*[3] exception. Accordingly, that rule cannot be applied retroactively. . . ." Unlike the defendant in *Davis*, whose conviction became final in 1996, petitioner's conviction was final when direct appeal was completed in 1987 with the denial

[3]*Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

of certiorari by the United States Supreme Court. Because his conviction and sentence became final before *Mills* and *McKoy*, those decisions cannot serve as a basis for collateral relief on habeas. *Beard*, 124 S.Ct. at 2515.

CONCLUSION

For the reasons set forth above, petitioner's "Motion for Equitable Relief in the Exercise of this Court's Inherent Article III Powers, and/or for Relief from Judgment" should be denied.

Respectfully submitted,

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Certificate of Service

I certify that a true copy of the foregoing was served by first class mail, U.S. postage prepaid, upon C. Mark Pickrell, 3200 West End Avenue, Suite 500, P.O. Box 50478, Nashville, Tennessee 37205-0478; and Christopher Minton, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37203-3830, on this the 4th day of November 2004.

ALICE B. LUSTRE
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