No. 01-9094

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

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

REPLY BRIEF OF PETITIONER ABU-ALI ABDUR'RAHMAN

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ARGUMENT

I. Respondent and its *Amici* Agree that the Lower Courts' Sole Ground for Denying 60(b) Relief Was Erroneous.

The opposing briefs substantially narrow the issues before the Court by declining to defend the only reason given below for denying petitioner's Rule 60(b) motion—that every 60(b) motion in a post-AEDPA habeas case is *eo ipso* a successive application within the preclusion rules of 28 U.S.C. § 2244. JA 36, 40. Expressly rejecting that "stark" and unprecedented rule as inconsistent with the Court's decisions,[1] respondent and *amici* list several extraordinary situations in which they concede that a Rule 60(b) motion is not a "second or successive application" within § 2244: (1) Where the challenged habeas judgment "preclude[d]" "one round of federal review," including a "'dismiss[al] for failure to exhaust.'" CJLF 13, 16; RB 15 (citing *Slack v. McDaniel*, 529 U.S. 473 (2000)). (2) "Denial of the petition based on [a] defect in pleading without giving the petitioner an opportunity to amend."[2] (3) Where "a claim was previously dismissed as premature." RB 12 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998)). (4) Where the petition was dismissed "for failure to pay [a] filing fee" or other "'technical procedural reasons.'" RB 15-16, 18 n.12. (5) Where a 60(b) motion asks the court only to "'readjudicat[e] old arguments,'" not to "'determin[e] the effect of new evidence and arguments'" or to "'reassess[] old theories in light of new evidence'"—*i.e.*, where the motion seeks action "'on the exclusive basis of [the] first federal habeas petition.'" RB 38-39 (quoting

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[1] Brief of Criminal Justice Legal Foundation (CJLF) 6. *See* Respondent's Brief (RB) 31; Brief of Alabama *et al*. (AB) 16-17. Petitioner does not argue that all Rule 60(b) motions challenging habeas denials based on grounds other than the underlying merits avoid a § 2244 bar. *Cf.* RB 9-25. Rather, he shows that his 60(b) motion is one of the very few motions seeking to reopen a habeas denial on *any* ground that is not barred by § 2244.

[2] CJLF 11-12 (citing *Sanders v. United States*, 373 U.S. 1 (1963)); *see Haro-Arteaga v. United States*, 199 F.3d 1195, 1196-97 (10th Cir. 1999) (citing cases).

Calderon v. Thompson, 523 U.S. 538, 554 (1998)). (6) Where 60(b) relief is sought because the original denial was procured by "fraud on the court" or by "prosecution misconduct depriving petitioner of evidence" that refutes the factual basis for denying relief, or where for some other reason there is "no legitimate expectation of finality … [or] legitimate judgment." CJLF 6, 9 (citing *Calderon*, 523 U.S. at 557 ("fraud upon the court, calling into question the very legitimacy of the judgment")).

With the issues thus narrowed, the path to proper decision is guided by the following propositions, developed *infra*: The opposing briefs offer no general rule to determine when a 60(b) motion should or shouldn't be deemed a successive application. They do not improve upon the criterion the Court has already announced, that a post-judgment motion is within § 2244 when it is the functional equivalent of a "second or successive application" for relief, rather than the same application. *Martinez-Villareal*, 523 U.S. at 643-44. Their failure to articulate any other comprehensive principle supports the conclusion of every circuit but the Sixth, that the line between 60(b) and § 2244 does not lend itself to a one-size-fits-all rule. Two conditions explain most habeas situations in which the courts have rightly found that 60(b) and § 2244 do not conflict: (1) *Reconsideration under 60(b) is sought because a crucial premise of the judgment withholding habeas relief is shown to be transitory or illusory.* (2) *The 60(b) motion raises no new issue of fact or law that goes beyond the four corners of the original habeas application, yet commands consideration that it has not yet received.* Because of the clear terms and particular timing of Tennessee Supreme Court Rule (TSCR) 39—on which petitioner's 60(b) motion relies—his motion is unusual in having *both* of these characteristics. Respondent's attempt to censure Rule 39 as ill-motivated or irrelevant inverts every canon of comity and federalism. Finally, petitioner's 60(b) motion is the very rare one that stays within the four corners of the original habeas petition but *also* satisfies the demanding criteria of Rule 60(b) itself.

II. The Opposing Briefs Offer No Usable Rule for Determining When a 60(b) Motion Is or Is Not "Successive."

In attempting to uphold the decision below despite the error of its *per se* predicate, respondent and *amici* cite this Court's decisions holding that the Civil Rules governing post-judgment motions apply in habeas whenever they do not conflict with the habeas statute. *See* RB 28; AB 10; CJLF 6-7. *Compare Pitchess v. Davis*, 421 U.S. 482, 489 (1975) (declining to apply Rule 60(b) where it would "alter the command" of the statute) *with Browder v. Director*, 434 U.S. 257, 271 (1978) (applying Rules 52(b) and 59 where doing so was in "conformity [with] habeas corpus … proceedings") *and Slack v. McDaniel*, 529 U.S. at 489 ("the Federal Rules of Civil Procedure [are] applicable as a general matter to habeas cases"—they fittingly "vest the federal courts with due flexibility to prevent vexatious litigation").

When attempting to articulate a rule more comprehensive than these holdings, however, respondent and its *amici* indefensibly treat merely *relevant* factors as *decisive*. As the Court's caselaw makes clear, neither of the factors they propose—that the prior judgment was "without prejudice," and that the 60(b) motion cites no "new matter"—is controlling.

1. A hard-and-fast line between judgments that were and were not designated as "without prejudice" when entered is inconsistent with *Slack* and *Martinez-Villareal*. There, the Court endorsed the lower courts' "established practice" of excluding from the category of "second or successive" applications "'a habeas petition filed after a previous petition has been dismissed on exhaustion grounds" and "dismissal of a first habeas petition for technical procedural reasons." *Slack*, 529 U.S. at 488; *Martinez-Villareal*, 523 U.S. at 645. In so ruling, the Court never used the term of art "without prejudice" to identify the only "dismissals" to which the established practice applies; the words "without prejudice" do not appear in *Martinez-Villareal*.

And for good reason. A rule that hinges on such a formality is directly at odds with the Court's resolutely functional ap-

proach to what is and is not "successive." *Slack*, 529 U.S. at 487-88; *Martinez-Villareal*, 523 U.S. at 643; *Calderon*, 523 U.S. at 554. Not surprisingly, the lower-court cases establishing the functional practice that the Court has endorsed do not all involve without-prejudice dismissals.[3]

Nor would a formalistic approach work. In many cases, a federal court cannot tell, when it withholds relief, whether the reason for doing so is permanent or not. A failure to plead facts with the specificity required by Habeas Rule 2(c) may be inadvertent and curable (in which case the dismissal does not render subsequent applications "successive," *see* CJLF 11-12 (citing authority)), or it may be because there are no facts that support petitioner's claims (in which case, a later application is "successive").[4] Habeas dismissals often occur because a petitioner's claims were not previously raised in the state courts, and the district court cannot tell whether state remedies remain. In this event, the dismissal is without prejudice if the state courts thereafter deny the claims on their merits, but with prejudice if the state courts reject the claims as untimely or waived.[5]

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[3] *See, e.g.*, *Benton v. Washington*, 106 F.3d 162, 165 (7th Cir. 1996) ("disregard[ing]" the with-prejudice dismissal of a prior petition, because the formally faulty petition should have been dismissed without prejudice).

[4] *See Benton*, 106 F.3d at 164 (in deciding whether dismissal of a "poorly developed" first petition renders a later one "successive," "[q]uestions of characterization [are important]—was the petition really 'returned' on pleading grounds … or was it dismissed as substantively frivolous? That difference is grave under § 2244(b).").

[5] *See, e.g.*, *Banks v. Horn*, 126 F.3d 206, 214 (3d Cir. 1997) (dismissal is without prejudice unless the state courts "hold that Banks' unexhausted claims are procedurally barred"); *Woods v. Kemna*, 13 F.3d 1244, 1245 (8th Cir. 1994); *Meadows v. Legursky*, 904 F.2d 903, 909 (4th Cir. 1990) (en banc); *Fidtler v. Gillis*, 1999 WL 596940 (E.D. Pa. Aug. 9, 1999) (granting state's post-judgment motion to substitute a with-prejudice denial of a habeas petition for a without-prejudice dismissal, based on state decisions revealing that all state remedies had expired); *see also Ford v. Hubbard*, 2002 WL 31001146, at *6 (9th Cir. Sept. 6, 2002) (habeas dismissal "without prejudice" would be treated as "*with prejudice* unless [Ford] establish[ed] that at the time of dismissal he was entitled to equitable tolling"); *Barnes v. Briley*, 43 Fed. Appx. 969, 973-76 (7th Cir. 2002) (the dismissal of a habeas

Thus, as respondent and *amici* concede, some post-judgment motions seeking reconsideration of habeas dismissals that clearly *were* meant to be *with* prejudice do *not* qualify as successive. *See Slack*, 529 U.S. at 479, 487 (although the district court held that its prior dismissal for non-exhaustion was with prejudice to claims not included in the original petition, the Court holds that the presence of new claims in the later petition does *not* make it "successive"); *Calderon*, 523 U.S. at 554 (recall of a court of appeals' mandate to readjudicate claims that had been denied with prejudice on the merits was not "successive" when it was undertaken "on the exclusive basis of [the] first federal habeas petition"); *id*. at 557 (suggesting that a with-prejudice denial of a habeas petition that was procured by "fraud upon the court" is not "successive"); CJLF 9 (there is no "successive application" impediment to 60(b) relief from denial of a habeas petition based on a statutory bar where "the petitioner [did] not meet the exceptions to the statutory [bar] because the state's misconduct prevent[ed] him from doing so").[6]

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petition—timely when filed—as untimely because the filing fee was not paid until after the limitations period expired, renders a later motion for relief on the same claims "successive" if the delay in payment was in "bad faith," but not otherwise; hearing ordered on "bad faith").

[6] *See also Mobley v. Head*, 2002 WL 31066924, at *6, *8 (11th Cir. Sept. 18, 2002) (separate opinion of Tjoflat, J.) (60(b) motions "rais[ing] questions about the integrity of a prior habeas corpus proceeding"—*e.g*., "that the prior proceeding was rife with fraud" or was based on a judgment that has since "'been reversed'"—do "not [come] under the strictures of … § 2244(b)"); *Workman v. Bell*, 227 F.3d 331, 334-35, 341 (6th Cir. 2000) (en banc) (post-judgment allegations of "fraud upon the court are excepted from the requirements of section 2244"); *Rodriguez v. Mitchell*, 252 F.3d 191, 199, 201 (2d Cir. 2001) (same); *Banks v. United States*, 167 F.3d 1082, 1083 (7th Cir. 1999) (60(b) relief is available if Banks' original petition was filed without his consent, impairing "the integrity of his first habeas proceeding"); *United States v. Washington*, 1999 WL 44092 (10th Cir. Feb. 2, 1999) (ordering 60(b) reconsideration of a § 2255 motion that had been dismissed with prejudice as untimely where the 60(b) motion provided information negating the factual premise of the dismissal); *Deutscher v. Angelone*, 16 F.3d 981, 984 (9th Cir. 1994) (treating a later petition as the "initial" one because the first petition—denied on the merits with prejudice—was filed

Conversely, applications filed after dismissals that *were* expressly "without prejudice" sometimes are impermissibly "successive." *See Slack*, 529 U.S. at 488-89 (subsequent habeas application filed after a "without prejudice" dismissal to exhaust state remedies may be barred as "successive" if the petitioner does not comply with "conditions the court attaches to the dismissal … to prevent vexatious litigation"); *Dunn v. Singletary*, 168 F.3d 440, 441-42 & n.3 (11th Cir. 1999) (per curiam) ("the section 2244(b) inquiry as to whether a petition is … successive must focus on the substance of the prior proceedings—on what actually happened"—not on formalities; a later habeas petition thus is barred as "successive," although the prior petition was "dismissed 'without prejudice,'" because the prior petition should have been denied "with prejudice").[7]

2. The proposal to bar all post-judgment applications that cite any "new matter" or "development" which was not "before the court when it entertained the original habeas application" (RB 37; AB 16) is no more workable. Every decision of this

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without Deutscher's consent); *Howard v. Lewis*, 905 F.2d 1318, 1323 (9th Cir. 1990) (remanding to decide whether a prior petition's dismissal "with prejudice" occurred because prison officials frustrated Howard's effort to respond to a motion to dismiss; if so, a later petition with the same claims is not "successive"); *Schornhorst v. Anderson*, 77 F. Supp. 2d 944, 948-49 (S.D. Ind. 1999) (although a first petition was "fully adjudicated and dismissed with prejudice," and it omitted the incompetence-to-be-executed claim raised in the second petition, the new claim is not "successive" because it relies on mental problems arising after the first petition was denied).

[7] *See also Nowaczyk v. Warden*, 299 F.3d 69, 83 (1st Cir. 2002) ("A dismissal without prejudice [may], in practice, result in a dismissal *with* prejudice, as happened here."); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (10th Cir. 2000) ("join[ing other] circuits" in holding that a post-judgment motion "filed after a previous petition has been dismissed without prejudice for failure to exhaust" becomes a "successive" petition if the petitioner let the limitations period expire before returning to federal court); *Felder v. McVicar*, 113 F.3d 696, 697 (7th Cir. 1997) (followed in *Garrett v. United States*, 178 F.3d 940, 941-42 (7th Cir. 1999)) (a habeas petition is "successive," though the prior one was dismissed voluntarily without prejudice, where the prior one was withdrawn because it was "evident that the district court [was] going to dismiss it on the merits").

Court treating subsequent habeas filings as non-"successive" involved some new matter. *See Calderon*, 523 U.S. at 548, 554 (recall of court's mandate was not "successive" although it was based on *post hoc* discovery of "procedural misunderstandings" affecting a vote for en banc consideration); *id.* at 557 (suggesting that a 60(b) motion based on new evidence of "fraud upon the court" is not successive); *Slack*, 529 U.S. at 488 (a second petition is not "successive" although it relies on a new state court decision to show that state remedies have now been exhausted on claims previously dismissed as unexhausted); *Martinez-Villareal*, 523 U.S. at 640, 645 (a state court's issuance of a "warrant for [the petitioner's] execution," ripening a claim of incompetence to be executed that had previously been dismissed as premature, did not make a new petition raising the claim successive; nor does payment of a filing fee with a second petition that was not tendered with the first petition).

Respondent's and its *amici*'s inability to improve upon the general rule of *Pitchess* and *Browder* as elaborated by *Martinez-Villareal* and *Slack* is unsurprising. As every circuit but the Sixth has recognized, the judgment as to when a 60(b) motion should and should not be deemed a successive application for § 2244 purposes does not lend itself to a reductionist, formulaic sorting rule. *See Dunlap v. Litscher*, 301 F.3d 873, 875-76 (7th Cir. 2002) (citing cases). The Court's existing rule is the best that can be done: A 60(b) motion should be treated as coming within § 2244 when it is the functional equivalent of a "second or successive application" for relief, rather than the same application. *See Martinez-Villareal*, 523 U.S. at 643-44.

As we show next, however, two conditions that are at the heart of the present case account for most of the cases in which this Court and the lower courts (and respondent and *amici*) agree that post-judgment motions for relief from the denial of a habeas petition are so thoroughly encompassed by the original petition that they are part of that "same" application and not the functional equivalent of a "second or successive" application.

III. Petitioner's 60(b) Motion Is Not "Successive."

As respondent and its *amici* concede, a 60(b) motion to reconsider a habeas application is part of that application, not "successive," if (1) *the motion merely directs the court's attention to unconsidered matters raising no new issues of fact or law that go beyond the four corners of the original application*; or (2) *the basis for denying the original application is shown to have been transitory* (*e.g.*, a since-rectified failure to exhaust state remedies) or *illusory* (*e.g.*, a denial concocted by fraud or prosecution misconduct). RB 11-13, 37-39; CJLF 9. In the former situation, the motion is the "same" as the original application because it relies wholly on the same facts and claims as the original application. In the latter situation, the motion is the "same" because it *stands in* for the original application upon a showing that that application went awry for reasons that are illusory or have expired, so the application should be treated "as though it had not been filed." *Slack*, 529 U.S. at 488.[8]

Post-judgment proceedings sometimes are deemed non-successive when only *one* of these conditions is present. *See id.* at 487 (the non-exhaustion basis for prior dismissal was transi-

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[8] *Slack* is not functionally distinguishable from the present case. *Slack* holds that a petition filed after a prior one was dismissed for non-exhaustion, and after state remedies were exhausted, is not "second or successive." 429 U.S. at 485-86. The situation is the same, and the outcome would be the same, if the district court dismisses based on *two* explicit rulings—(1) that available state remedies were not exhausted, and (2) that a state remedy still appears to be available—and if the petitioner renews the federal application after state courts have negated *both* conclusions by ruling that petitioner (1) previously did everything needed to exhaust then-available state remedies, but (2) now is time-barred from further state review. And Abdur'Rahman's case in turn is no different from the latter situation. The district court denied his prosecutorial misconduct claims based on two premises: (1) that he had not exhausted available state remedies, and (2) that he was now time-barred from further state proceedings. JA 59. Thereafter, TSCR 39 authoritatively negated the first premise by declaring that petitioner *had* previously done everything needed to exhaust then-available state remedies, while preserving the second premise that no state remedies remain. Just as in *Slack*, therefore, petitioner's later motion is not "second or successive" under § 2244.

tory; but the subsequent application presented new claims). The Court needs not go even that far here, however, because petitioner's Rule 60(b) motion meets *both* conditions.

1. Respondent correctly acknowledges that petitioner's 60(b) motion only "reassert[s] … claims for habeas corpus relief that were presented … in his original petition." RB 9. The motion expressly relies solely on "evidence … in the … record" of the original proceeding. JA 169. And the motion's single basis for 60(b) relief is that the district court fundamentally misunderstood the "pre-existing state law" on which petitioner had always relied for the proposition that by presenting his prosecutorial misconduct claims to the Tennessee Court of Criminal Appeals he had exhausted the post-conviction appellate process "'available … under the law of the state.'"[9]

The 60(b) motion's reliance on TSCR 39—which was adopted just before the motion was filed—does not alter this situation. Rule 39 explicitly governs "all appeals from … post-conviction relief matters from and after July 1, 1967." And the Tennessee Supreme Court's Order Establishing Rule 39 explains that it was adopted "in order to clarify" state law in existence since "1967 [when] the General Assembly created the Tennessee Court of Criminal Appeals … to reduce the [Tennessee Supreme Court's] backlog in criminal cases."[10] These clear

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[9] *Compare* Pet. Resp. to Mtn. for Summ. J. 45-46 (Oct. 15, 1997; Dkt. # 91) ("'under the law of the State'" of Tennessee, a "claim is exhausted … if it is presented" on "appeal to the Tennessee Court of Criminal Appeals"; "[i]n State post-conviction, petitioner did not have the right to present his claim to the Tennessee Supreme Court," as is required to make a procedure "'available'" for exhaustion purposes under 28 U.S.C. § 2254(c)) *with* JA 163-64 (60(b) relief is warranted because the district court's conclusion that petitioner failed to exhaust offends "pre-existing Tennessee law" under which all "claims [that] were properly presented to the Tennessee Court of Criminal Appeals in Petitioner's state post-conviction appeal … were therefore exhausted" and under which "discretionary appeal to the Tennessee Supreme Court has never been available … to exhaust state remedies").

[10] Order Establishing Rule 39, Pet. Brf. 5a; *see also* 2001 Adv. Comm. Comment to Tenn. R. App. P. 11 (under TSCR 39, "which works no change to" Tennessee law, discretionary supreme court review is not an "available

statements by the Tennessee Supreme Court have the same legal effect as the Pennsylvania Supreme Court's reply to a question this Court certified to it in *Fiore v. White*, 528 U.S. 23 (1999)—whether a recent decision of that court was a "correct interpretation of [a Pennsylvania] statute … 'from the very beginning,'" or "whether it *changed* the interpretation." *Id*. at 29 (emphasis added). The Pennsylvania court's reply, that the recent decision "'merely *clarified*' the statute and was the law … as properly interpreted" since the statute was enacted, *Fiore v. White*, 531 U.S. 225, 228 (2001) (emphasis added), is identical to the language of Rule 39's promulgating order. Both clearly demonstrate that the state high court's pronouncement "was *not new law* [and] presents no issue of retroactivity." *Fiore II*, 531 U.S. at 228 (emphasis added).[11]

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state remed[y]" for "error" in a "decision by the Court of Criminal Appeals"). July 1, 1967, is doubly crucial. On that day, *both* the state's Court of Criminal Appeals *and* its current post-conviction review act came into existence. Tenn. Pub. Acts 1967, ch. 226, 310. From then until now, the only section of the post-conviction statute on "Appeal after judgment" has said that "an appeal may be taken to the court of criminal appeals"; it has never mentioned Tennessee Supreme Court review. *Id*. ch. 310; TCA § 40-30-216.

[11] Rule 39's applicability to "all … post-conviction relief matters from and after July 1, 1967," and the court's explanation that the rule clarifies pre-existing law, distinguish this case from *Wenger v. Frank*, 266 F.3d 218, 225 (3d Cir. 2001) (ruling that Pa. S. Ct. Order 218—providing that, "*effective*" on "*May 9, 2000*," discretionary review is no longer part of the state's standard review process—clearly is a *new* rule (as Wenger conceded) that was not intended (as Wenger claimed) to have "retroactive application"). Since *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), most States have not undertaken to change their procedures in response to *O'Sullivan*'s premise that, "without more," a discretionary review procedure is "part of the ordinary appellate review procedure." *Id*. at 847-48. Two states have continued to enforce pre-existing rules, *see id.* at 847, excluding discretionary review procedures from their "ordinary appellate review" process. *Swoopes v. Sublett*, 196 F.3d 1008, 1009 (9th Cir. 1999) (Arizona); *State v. McKennedy*, 559 S.E.2d 850 (S.C. 2002). Four states have adopted post-*O'Sullivan* rules: Arkansas, like Pennsylvania, made its rule prospective (Ark. S. Ct. R. 1-2(h), effective Feb. 15, 2001); only Missouri, like Tennessee, adopted a rule "stat[ing] existing law." Mo. S. Ct. R. 83.04 (discretionary review "is not part of the standard review process"). Immediately thereafter, the Eighth

2. The ground on which the federal district court refused to hear petitioner's claims of prosecutorial misconduct is illusory because it was based on a fundamental misunderstanding of *pre-existing* Tennessee law. The crux of the district court's ruling against petitioner is that he "failed … to exhaust the remedies available to him in state court" because he only "present[ed] claims to the Tennessee Court of Criminal Appeals on appeal of the denial of his post-conviction petition" and did not "seek discretionary review from … the Tennessee Supreme Court." JA 50, 53. Rule 39 makes clear that this view of Tennessee procedure is completely unsupportable: "[A]fter July 1 1967, … when [a] claim has been presented to the Court of Criminal Appeals …, and relief has been denied, the litigant … ha[s] exhausted *all available state remedies* … for that claim" (emphasis added). And as this Court repeatedly has held, "the [state] court's construction of the State's own law is authoritative." *Ring v. Arizona*, 122 S. Ct. 2428, 2440 (2002) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (a habeas case)).

In a recent opinion distinguishing petitioner's case from a 60(b) motion before the Eleventh Circuit, Judge Tjoflat made precisely this point in explaining why petitioner's motion is not "successive." *Mobley v. Head*, 2002 WL 31066924, at *8 (11th

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Circuit read the Missouri rule as indicating that discretionary high court review had never been available for federal exhaustion purposes under Missouri law. *Randolph v. Kemna*, 276 F.3d 401, 404 (8th Cir. 2002). Because the Eighth Circuit had applied a similar approach before as well as immediately after *O'Sullivan* (*see id*. at 403-04; *Dolny v. Erickson*, 32 F.3d 381 (8th Cir. 1994)), no post-judgment litigation has arisen there. Likewise, petitioner's post-judgment motion is only one of two pending on the issue in Tennessee. Thus, despite *amici*'s wild doomsaying about "massive loophole[s]" (AB 13; *see* RB 25 n.20), there is nothing remotely resembling any "mass" anywhere in sight.

Kentucky is one of the States where discretionary state supreme court review has long been treated by state and federal courts as a part of the state's ordinary review processes. *See Silverburg v. Evitts*, 993 F.2d 124, 126-27 (6th Cir. 1993) (canvassing state and federal decisions). *Silverburg* continues to state the Sixth Circuit's pre- and post-*O'Sullivan* rule on exhaustion of discretionary review with respect to Kentucky.

Cir. Sept. 18, 2002) (separate opinion of Tjoflat, J.). In rare cases, Judge Tjoflat notes, 60(b) motions are outside § 2244 because they are "designed to cure procedural violations in an earlier … habeas corpus proceeding [] that raise questions about that proceeding's integrity." *Id* at *6. Petitioner's is such a case: "Abdur'Rahman was not trying to use Rule 60(b) to assert [new] constitutional violations" and "[t]herefore … was not using rule 60(b), incorrectly, as the practical equivalent of a 'second or successive' habeas corpus petition but, properly, to seek relief" from a district court judgment inconsistent with a "Tennessee Supreme Court procedural rule." *Id.* at *7-*8.

Equally to the point is *Muniz v. United States*, 236 F.3d 122 (2d Cir. 2001) (per curiam)—one of the rare cases during the last 15 years in which a motion to reopen a section 2254 or 2255 application was held not to be "successive" (*see* the following footnote) and one of the extremely rare cases in which reopening was granted. Muniz filed a 2255 application within one year of AEDPA's effective date but more than a year after his conviction had become final. The district court dismissed the application with prejudice as untimely under AEDPA's one-year statute of limitations. Before Muniz's appellate rights expired, the Second Circuit decided two cases construing AEDPA to provide a one-year grace period, which rendered applications like Muniz's timely. *Id*. at 124. After Muniz's application for a certificate of appealability was denied—it did not mention the new Second Circuit cases—and after his out-of-time appeal was dismissed with prejudice, Muniz filed a second 2255 motion raising the same claims. Relying on Muniz's *pro se* status to excuse both his failure to cite the new Second Circuit decisions in his application to appeal and his untimely appeal, and emphasizing the rarity of the situation, the Second Circuit held that Muniz's subsequent 2255 motion "count[ed]" as the same, not a "second or successive," application. *Id*. at 128-29. It did so because the legal premise of the prior judgment was illusory—*i.e.*, because "the law on which that dismissal was predicated is unarguably no longer good

law." *Id*. at 129.[12] So, too, under TSCR 39, the district court's premise for dismissing petitioner's prosecutorial misconduct claims as unexhausted is "unarguably no longer good law."

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[12] Rule 60(b) motions relying on *new* legal developments that reveal *pre-existing* law with which a habeas judgment *unarguably* conflicts are passing rare. But when they arise, they are consistently treated as non-"successive." *See Blackmon v. Money*, 531 U.S. 988 (2000) (mem.), *on remand*, 27 Fed. Appx. 543 (6th Cir. 2001) (denial of 60(b) motion for relief from unappealed, with-prejudice dismissal of habeas petition as untimely is remanded for reconsideration in light of *Artuz v. Bennett*, 531 U.S. 4 (2000), construing AEDPA's statute of limitations in a way that could make Blackmon's dismissed petition timely); *Thomas v. Roe*, 23 Fed. Appx. 847 (9th Cir. 2001) (granting 60(b) relief from unappealed, with-prejudice dismissal of habeas petition after *Artuz* revealed that dismissing the petition as untimely was unarguably in error); *Guyton v. United States*, 23 Fed. Appx. 539, 540 (7th Cir. 2001) (dicta) (Rule 60(b) motion may be used to reopen a with-prejudice dismissal, as untimely, of a 2255 motion that clearly *was* timely under recent cases applying the "prison mailbox rule" to federal prisoners); *In re Davenport*, 147 F.3d 605, 609-11 (7th Cir. 1998) (Posner, J.) (following *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997)) (where, after Davenport's 2255 motion had been denied, this Court interpreted the statute under which he was convicted as not criminalizing his acts, a later habeas petition did not offend AEDPA; Davenport's failure to raise the claim in his 2255 motion when circuit law was "firmly against him" was no bar because of the "fundamental" difference between relying on "a change in the law" (which AEDPA bars), and relying on an interpretation that has always been the law but "was not widely known"); *see also Cornell v. Nix*, 119 F.3d 1329, 1332 (8th Cir. 1997) ("'A post-judgment change in the law having retroactive application may … constitute an extraordinary circumstance warranting vacation of a judgment' [in a] habeas corpus proceeding.").

A thorough Westlaw search has revealed that all but a tiny fraction of the 60(b) motions filed since 1985 were rejected as successive precisely because they relied on new facts or on new law that was not unarguably controlling when the original petition was adjudicated, or because they offered no reason why the grounds for denying the original petition were illusory or transitory. And in most of the cases in which 60(b) motions were deemed *not* successive, the motions were denied because they did not satisfy Rule 60(b). *See, e.g.*, *Mobley*; *Workman*; *Rodriguez*, *supra* note 6 (reaching the merits of 60(b) motions alleging fraud but barring relief because the motions failed on their face to satisfy 60(b)'s narrow "fraud" provision). The cases cited in the preceding paragraph and *Muniz* are thus exceptional in the extreme.

IV. Respondent's and *Amici*'s Effort to Avoid the Effect of TSCR 39 Offends Every Rational Concept of Comity.

Recognizing that TSCR 39's statement of Tennessee law since 1967 brings petitioner's 60(b) motion within the four corners of his original habeas petition—and that the district court denied that petition solely through a contrary understanding of Tennessee law—respondent and *amici* launch an all-out assault on Rule 39. They claim that Rule 39 is "irrelevant" or, worse, an illegitimate effort to "alter . . . objective historical fact" and "change the requirements of federal law as construed by this Court in *O'Sullivan* [*v. Boerckel*, 526 U.S. 838 (1999)]." RB 49; AB 20, 24. *O'Sullivan* itself repels all of these attacks.

As *O'Sullivan*'s careful review of exhaustion doctrine confirms, the Court has "never interpreted" the words of § 2254(c)—"exhaust[ion of] the remedies *available* in the … State"—to "requir[e] a state prisoner to invoke *any possible* avenue of state court review." 526 U.S. at 844. "Section 2254(c) requires only that state prisoners give state courts a *fair* opportunity to act on their claims … by invoking one complete round" of "the standard review process." *Id.* at 844-45. So, when the Tennessee Supreme Court explains in Rule 39 that its discretionary review of post-conviction rulings has not been "available" under Tennessee law since 1967, it is not trying to "alter" the "objective" fact that leave to appeal to the supreme court was a "possible avenue of … review." It is saying simply that supreme court review has not been "available" in Tennessee since 1967 *as the word "available" in § 2254(c) has been interpreted by this Court—i.e.*, that discretionary review has never been part of the "standard" or "ordinary appellate review procedure in the State" that needs to be invoked to "give state courts a fair opportunity to act on [a prisoner's] claims." *Id.* at 844, 847.

It would be the most perverse distortion of federalism for a federal court to ignore as "irrelevant" or *ultra vires* this kind of authoritative description by a state's highest state court of what procedures are and are not "available" under state law in the

sense of being "standard," "ordinary" and necessary to a "fair opportunity for [*state court*] review." For the very concept of comity dictates that "the exhaustion doctrine … turns on an inquiry into what procedures are 'available' under state law," and thus "on [an] interpretation of [the state] Rule" establishing the state's discretionary review process. *O'Sullivan*, 526 U.S. at 847-48. "[T]here is nothing in the exhaustion doctrine requiring federal courts to ignore a state … rule providing that a given procedure is not available."[13] *Id*.

To add insult to injury by suggesting that Rule 39's description of state law since 1967 is illegitimate because the Tennessee Supreme Court "lacks any interest" in the application of state law to cases no longer before it (RB 49; AB 27 n.7) is to ignore the state high court's most fundamental obligation and interest: to say accurately and conscientiously what the law of the state is. *See, e.g.*, *Fiore*, 531 U.S. at 228-29 (treating as decisive a state high court's advisory answer to a certified question—that its interpretation of a state statute in a prior case had "'merely clarified'" state law and did not "change … the law"); *Stewart v. Smith*, 122 S. Ct. 2578, 2581 (2002) (per curiam) (treating as decisive a state high court's advisory answer to a certified question—that applying an exception to a state default rule did not require any consideration of federal law).

Section 2254(c) is a "rule of comity." It aims to "*reduce*[] friction between the state and federal court systems" and to "*avoid* … 'unseem[liness]'" when federal courts usurp the state courts' responsibility to interpret and apply law "in the first instance." *O'Sullivan*, 526 U.S. at 845 (emphasis added). Given "'the respect that federal courts owe the States and the States' procedural rules'" (*Coleman v. Thompson*, 501 U.S. 722, 726 (1991)), respondent's reliance on the exhaustion doctrine as a reason to *disregard* the plain terms of a state procedural rule, and to *distrust* the Tennessee high court's clarification of the

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[13] *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

longstanding statutory division of labor between it and the state's court of criminal appeals, is bizarre.

This effort to remake federalism in a result-oriented guise subordinates respect for state courts, and even the basic right of sovereign states to organize their judicial systems in ways that serve the state's chosen ends, to the desire of state prosecutors to insulate convictions and sentences from federal judicial scrutiny. If this is what Congress had intended, it would have simply repealed the federal habeas jurisdiction in AEDPA. But it did not. It continued the balancing the Court so aptly described in *Lonchar v. Thomas*, 517 U.S. 314, 323-27 (1996), keeping the federal courts open for a single round of review of every constitutional claim that has first been presented to the state courts in the way that *the state courts* decree meets the state's interests in adjudicating federal claims. *See Coleman*, 501 U.S. at 749 (a "vital purpose" of the "State's … procedural rules" is to "channel … the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently" (internal quotation marks omitted)).

Rule 39—the basis for petitioner's 60(b) motion—makes clear as a matter of pre-existing state law that he fully exhausted his claims in the state's regular review process. Because the contention that he did so does not go beyond the four corners of his original habeas action, and because the district court judgment rejecting that contention was premised on an "unarguable" misunderstanding of the pre-existing state law clarified by Rule 39 (*Muniz*, 236 F.3d at 129), petitioner's 60(b) motion to correct the misunderstanding and afford him a single round of review of his constitutional claims, is within "his first application rather than a successive one." *Calderon*, 523 U.S. at 554.[14]

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[14] The applicability and effect of Rule 39 in petitioner's case are unarguable for reasons that distinguish it from almost every other new interpretation of law on which a 60(b) motion could be based: Rule 39 is set out in a black-letter rule of court that is expressly designed to "clarify" the law governing *all* relevant cases; it interprets state *statutes*, not malleable case law; and its applicability turns on a single, objective date (July 1, 1967). In the

V. Any Proper Exercise of Rule 60(b) Discretion Would Require Relief from the District Court's Judgment.

The fact that a 60(b) motion cannot be viewed as the functional equivalent of a successive application does not mean that the motion will be *granted*. To be granted, the 60(b) motion *also* must satisfy the exacting criteria of Rule 60(b) itself. And almost any motion to reopen a judgment that does *not* raise a new issue of fact or law going beyond the four corners of the original habeas action likewise will *not* present grounds that meet the strict 60(b) criteria for reopening a judgment. QED.

But this case is the rare case in which a 60(b) motion raising no issue outside the four corners of the original habeas application does meet 60(b)'s criteria, and indeed compels an exercise of discretion to reopen the judgment.[15] It does so for the following constellation of extraordinary reasons: (1) The judgment that petitioner seeks to reopen is based entirely on a procedural impediment that prevented the district court from addressing the constitutional merits of substantial claims of egregious prosecutorial misconduct.[16] *Cf. Semtek Int'l Inc. v. Lock-*

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typical case in which a 60(b) motion relies on a new interpretation of law (*see* cases in RB 39 & n.32), the interpretation is in a *judicial opinion* designed to decide only *a single litigant's case*, by applying other *decisional law*. Rarely, if ever, will that kind of interpretation make *unarguably clear* (1) that the new decision says what the law "always" was, without "chang[ing] the interpretation" in effect when the original habeas petition was decided (*Fiore*, 528 U.S. at 29); and (2) that the decision dictates an outcome different from the one the district court reached. *Cf. id.* (even when the new state court decision was in a co-defendant's case with identical facts, this Court still could not be certain that the decision stated the law in effect when Fiore's case was decided).

[15] The district court never exercised Rule 60(b) discretion, thinking it had none in a habeas case. A remand to the district court to exercise discretion "in the first instance" is not required, however, because the proper outcome is clear. *Cf. Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 496 (1942).

[16] Respondent does not dispute the seriousness of petitioner's prosecutorial misconduct claims. *Amici* question the effect of the misconduct—they don't dispute that it occurred—but in doing so they highlight how seriously the violations corrupted the penalty-phase verdict. The *reason* the jury was left (as they say) with "no serious question" that petitioner, not codefen-

heed Martin Corp., 531 U.S. 497, 501-02 (2001) (only a judgment that "'passes directly on the substance of [a particular] claim' … triggers the doctrine of res judicata" and its full range of finality interests); *Slack*, 529 U.S. at 483 (the "writ of habeas corpus plays a vital role in protecting constitutional rights," and "Congress [has] expressed no intention to allow [district] court procedural error"— where "the District Court [erroneously] relies on procedural grounds to dismiss the petition"—"to bar vindication of substantial constitutional rights"). (2) The sole premise of that impediment to reaching the merits was an unarguable misunderstanding of clearly governing state law. *See* pp. 9-13 & n.12, *supra*. (3) This is the rarest of cases in which a 60(b) motion filed after the district court and court of appeals ruled was the first point at which the petitioner could demonstrate this plain fact about pre-existing and clearly controlling state law. Only then did the Tennessee Supreme Court adopt

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dant Miller, stabbed the victim (AB 2-3) was the prosecutor's presentation of Miller's unchallenged testimony to that effect. But presenting that testimony was an egregious misrepresentation, because the prosecutor knew that Miller was lying when he testified that: (1) petitioner wore the "black gangster coat" the whole time *and* stabbed the victim [whereas, according to the prosecutor's file memorandum, "if the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred" because the coat had no blood on it, Pet. Brf. 9a]; (2) no blood splatter accompanied the stabbing [whereas the prosecutor and chief detective knew that multiple stabs to the heart necessarily "would cause [blood] to splatter"; and suppressed police reports showing that a huge amount of splatter did occur); and (3) the "only" deal Miller received in return for testifying was immunity from the death penalty, leaving him exposed to a *90-year-minimum* term [whereas the prosecutor had *also* agreed to adjust Miller's charges so as to make him eligible for parole in only *7-1/2 years*.] Likewise, any credence the jury gave petitioner's bizarre sentencing-phase testimony—that he blacked out and didn't remember what happened but would "submit to" Miller's testimony "about what happened"—was a function of the prosecutor's having hidden from the defense, and having outright lied to the mental health experts and the court about, a myriad of evidence of petitioner's psychosis, blackouts under stress, obsessive head-banging after arrest, "long history of [psychiatric] institutionalization," and other information showing (as the prosecutor admitted in his memorandum) that petitioner is "plain whacko." Pet. Brf. 10-23.

Rule 39.[17] (4) Petitioner's 60(b) motion was filed and adjudicated *before* the court of appeals issued its mandate reversing the district court's grant of penalty-phase relief—*i.e.*, before the "state's interests in finality [became] compelling" and while the federal courts were under a duty to conform their rulings to existing state law.[18] (5) This is the unique case in which 60(b) re-

[17] No Tennessee caselaw or rule predating Rule 39 speaks remotely to whether petitions for discretionary supreme court review were part of the state's regular post-conviction process. This is because, before *O'Sullivan*, the assumption in the state was that the discretionary nature of such petitions made them unnecessary for exhaustion. Thus, as of the moment the Court announced *O'Sullivan* and rejected that blanket assumption—the very moment petitioner was preparing his Sixth Circuit brief—he was bound by *O'Sullivan*'s ruling that, absent state law "mak[ing] it plain that [the state] does not wish to require [discretionary] applications before its petitioners may seek federal habeas relief," federal courts had to treat state discretionary review as part of the state's ordinary appeal process. *O'Sullivan*, 526 U.S. at 849 (Souter, J., concurring). When petitioner presented his Sixth Circuit appeal, therefore, he had no even oblique basis for disputing *O'Sullivan*'s application to his case; and he committed no default when he did not make a baseless claim. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 n.5 (1992) (failure to present an argument may be excused if "the factual or legal basis for [it] was not reasonably available to counsel"); *Bousley v. United States*, 523 U.S. 614, 622 (1998). The first time the content of pre-existing state law became "plain," revealing both the district court's misunderstanding of it and that *O'Sullivan*'s default rule did not cure the problem, was when the Tennessee Supreme Court adopted Rule 39 *sua sponte*. Petitioner's *certiorari* petition was then pending in this Court, and, upon its denial, he promptly moved for post-judgment relief, citing Rule 39. JA 158-63. In any event, respondent's argument (RB 37 n.29) that the 60(b) motion "abused the writ" by relying on claims petitioner had not raised on appeal comes too late: respondent never made the argument below or in its Brief in Opposition. *See Lee v. Kemna*, 122 S. Ct. 877, 885 n.8 (2002).

[18] *See Calderon*, 523 U.S. at 556. As long as the mandate is stayed, the point of compelling finality has not arrived; the duty remains to conform the judgment to state law; and neither the entry or receipt of an order denying *certiorari*, nor Fed. R. App. P. 41(d), alters that duty. *See, e.g.*, *Calderon*, 523 U.S. at 557 (case would have been different if "the mandate [had been] stayed" during the "disposition of a suggestion for rehearing"); *Calderon v. United States Dist. Ct.*, 128 F.3d 1283, 1286 n.2 (9th Cir. 1997); *United States v. Rivera*, 844 F.2d 916, 919-21 (2d Cir. 1988); Adv. Comm. Note to Fed. R. App. P. 41 ("A court of appeals' judgment … is not final" and the

lief does not subordinate the "State's interest in … its own legal processes" and "procedural rules" to a habeas petitioner's "quite strong" "interest in … federal habeas review of a first petition," but, instead, is *necessary* to effectuate *both* interests. *Cf. Lonchar*, 517 U.S. at 322, 330; *Coleman*, 501 U.S. at 726.[19]

CONCLUSION

In the exceptional circumstances of this case, Rule 60(b) relief is appropriate and offends no statutory proscription or policy concern against second or successive habeas petitions. The Court should vacate the decision below and remand to the district court with directions to grant petitioner's 60(b) motion so that his properly presented federal claims of prosecutorial misconduct can be heard once on the merits by a federal court.

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parties' rights are not "fixed" "until issuance of the mandate"); Pet. Brf. 38-39 (citing cases). The duty to conform federal judgments to state law is so strong that it extends *beyond* issuance of the appellate mandate to the point when the district court *acts* on it. *See* 18B Wright & Miller, *Federal Practice & Procedure* §§ 4478, 4478.3 (3d ed. 2002) (the "most obvious" circumstance compelling a federal court's deviation from the law of the case doctrine and from a higher court's mandate, is action "by … a state court developing state law that controls the decision"). This rule applies even when state "law has been changed." *Id*. § 4478. It has particular force when a state court clarifies what state law has "always meant." *Fiore*, 528 U.S. at 25. Because the only judgment the district court has issued *granted* petitioner the same penalty-phase relief he now seeks (JA 45)—successive stays having kept the district court from acting on the Sixth Circuit's mandate reversing that judgment—respondent does not have the "reliance" interest in the denial of relief that the Court found important in *Calderon*, 523 U.S. at 552.

[19] This also is one of the few cases left in the federal courts in which AEDPA's added finality concerns do not apply to the district court's 60(b) proceedings. *Compare Lindh v. Murphy*, 521 U.S. 320, 336 (1997), *with Slack*, 529 U.S. at 478. Respondent argues that "because petitioner's Rule 60(b) motion constitutes a new habeas application which was filed [after AEDPA]," AEDPA determines whether it "was 'second or successive under the Act." RB 10 n.6. Of course this has it backwards. If the 60(b) motion was appropriate before AEDPA, AEDPA does not apply to determine its status as a "new habeas application . . . under the Act." *See Lindh*, *supra*, at 336.

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