No. 10-1009

IN THE

Supreme Court of the United States

DONNIE E. JOHNSON,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

Paul R. Bottei
OFFICE OF THE FEDERAL PUBLIC DEFENDER MIDDLE DISTRICT OF TENNESSEE
810 Broadway
Suite 200
Nashville, TN 37203

Thomas C. Goldstein
Counsel of Record
Amy Howe
Kevin K. Russell
GOLDSTEIN, HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
tgoldstein@ghrfirm.com

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REPLY BRIEF FOR THE PETITIONER

The State makes no effort to defend the basis upon which the Sixth Circuit decided this case below. The court of appeals rejected petitioner's request for an evidentiary hearing only because it concluded that although he had presented "some evidence" of fraud on the habeas court, he had not demonstrated the violation by "clear and convincing evidence." Pet. App. 12a. The petition demonstrated that this rule – which provides evidentiary hearings only to those who do not need them – has no basis in the text of the relevant statutes, the decisions of this Court, or basic common sense. Pet. 20-25. The State offers not a word in rebuttal. The obvious error in the Sixth Circuit's decision in this capital case, and the State's inability to defend it, provide ample grounds for summary reversal. *Cf.*, *e.g.*, *Sears v. Upton*, 130 S. Ct. 3259 (2010); *Wellons v. Hall*, 130 S. Ct. 727 (2010).

At the same time, plenary review would also be warranted to resolve a larger division among the courts of appeals over the proper standard for requiring an evidentiary hearing to decide disputed questions of fact underlying a claim of fraud under Rule 60(b). *See* Pet. 11-15. Again, the State does not dispute the petition's showing of an entrenched circuit conflict, nor does it contest that the question is frequently recurring and important, particularly in the context of capital cases. *Compare* Pet. 10-17 *with* BIO 12.

Instead, the State resists certiorari on two grounds – one of which it has waived and neither of which the Sixth Circuit passed upon below. First,

although it made no such argument to the court of appeals, the State insists in this Court that petitioner was required to, but did not, prove fraud on the part of the State's habeas counsel beyond his reassertion of the fraudulent statements made by his colleague at trial. BIO 12-14, 16-18. Second, the State argues that the district court's denial of an evidentiary hearing could be upheld on the alternative ground of procedural default. BIO 15-16. Neither assertion provides a basis to deny certiorari to review the plainly erroneous ground upon which the case was actually decided or to allow the undisputed circuit conflict to persist.

I. The State's Alternative Grounds For Affirmance Provide No Basis To Deny Review.

This Court routinely grants certiorari to consider the grounds upon which a habeas court has denied relief, while allowing the lower courts to consider on remand other alternative defenses the State has raised. *See*, *e.g.*, *Magwood v. Patterson*, 130 S. Ct. 2788, 2802-03 (2010); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486-87 (2010); *Jimenez v. Quarterman*, 129 S. Ct. 681, 684 & n.3 (2009); *United States v. Denedo*, 129 S. Ct. 2213, 2224 (2009). There is no reason to depart from that tradition here. To the extent they are preserved, the State's additional defenses can be considered by the Sixth Circuit on remand. Moreover, the State's arguments are unconvincing in any event.

A. The State's Argument That Petitioner Was Required, But Failed, To Prove Fraud On The Part Of The State's Habeas Counsel Is Waived And Meritless.

The State argues that certiorari is unwarranted because petitioner's "showing was inadequate under any standard" for allowing an evidentiary hearing. BIO 12. In making this assertion, the State does not dispute that petitioner has made a "colorable claim," within the meaning of other circuits' precedent, that the prosecution's affidavits denying the existence of a deal with McCoy are knowingly false. Pet. 17-18. Instead, the State argues that petitioner was required, but failed, to show that the particular attorneys submitting those false affidavits to the habeas court also knew that they were false. *See* BIO 12-13. The State did not make this argument in the Sixth Circuit and cites no authority supporting it here.

1. The State does not contest the Sixth Circuit's assessment that petitioner presented "some evidence that McCoy received favorable treatment based on his testimony," Pet. App. 12a, in conflict with the prosecution's representations to the trial and habeas courts that there was no such deal. Indeed, in light of the new testimony from McCoy's parole officer, petitioner's evidence of fraud was substantial. As Judge Clay observed, the "circumstances surrounding Ronnie McCoy's initial testimony at Petitioner's trial strongly suggest that McCoy and the prosecution made some sort of deal to protect McCoy from incriminating himself." Pet. App. 18a. In the process of attempting to blame the murder on petitioner,

McCoy admitted to serious criminal conduct himself, purportedly without any promise of protection from prosecution. And in fact, although he admitted to helping conceal a murder, he was never charged with any crime. Indeed, his work release was not even revoked. Pet. App. 19a. "At the very least, the prosecution's proposed versions of events strains credulity." Pet. App. 20a.

It was therefore of critical importance to the district court's denial of petitioner's *Brady* claim that both the prosecutor and McCoy gave sworn statements indicating was no deal, while McCoy denied ever telling his probation officer differently. *Id*. 64a-66a. In this context, the new evidence from McCoy's parole officer would, if believed, fatally undermine the State's denial of an arrangement with McCoy. The State has made little effort to undermine the credibility of McCoy's parole officer or otherwise suggested why he would lie or misremember his interview with McCoy. And if the district court found that there *was* a deal between the prosecution and McCoy, it would also be compelled to conclude that the trial prosecutor lied when he denied its existence.

2. The State nonetheless argues that petitioner's proof would be insufficient under the "colorable claim" standard because petitioner "presented no evidence of any improper collusion or other misconduct on the part of respondents' counsel *in this habeas case*." BIO 12-13 (emphasis added). To show fraud on the federal habeas court, the State insists, petitioner must show not only that the trial prosecutor's statements were knowingly false, and that the State presented and relied on those

knowingly false statements in the habeas court; in addition, he also must show that the specific attorneys presenting the prosecution's prior false affidavits to the *habeas court* also knew that those affidavits were false. Otherwise, the State argues, petitioner's "argument is little more than a rehash of his *Brady* claim." BIO 13. That argument is waived and without merit.

a. The State did not press, and the Sixth Circuit did not pass upon, the State's argument that petitioner was required to prove "improper collusion or other misconduct on the part of the Tennessee Attorney General's office in its representation of the respondent in this habeas case" beyond the State's presentation of knowingly false affidavits by the trial prosecutors. BIO 17.

While the trial court faulted petitioner for allegedly failing to provide such evidence, Pet. App. 50a-51a, the State did not defend the district court's decision on that ground on appeal. In the relevant section of its brief, the State simply included a block quotation containing the district court's analysis of petitioner's fraud claim and then argued only that petitioner had not justified the delay in bringing the claim. Resp. C.A. Br. 24-26 (attached as App. A).[1] As a result, the argument is waived. *See*, *e.g.*, *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (holding that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

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[1] The State does not repeat that argument in this Court.

b. The State's argument is meritless in any event. It does not dispute that its attorneys defended the conviction in the habeas court by relying on the allegedly fraudulent affidavits of another state prosecutor. *See* Pet. App. 45a (district court reiterating that its initial habeas decision rejected petitioner's *Brady* claim in reliance upon the "sworn statements of . . . the prosecutor"). Instead, the State insists that repeating knowingly false statements to a habeas court does not constitute a fraud upon that court so long as a new attorney is assigned to the habeas case and kept in the dark about the falsity of his colleagues prior representations. BIO 16-17.

None of the authorities the State cites for this remarkable assertion support its position. Petitioner's claim is not based on "mere allegations of perjury by a witness." BIO 17 (collecting authorities). As the court of appeals recognized, petitioner alleges instead that the State "perpetrated fraud on the district court during the subsequent habeas corpus proceedings by submitting the affidavits from McCoy *and the prosecutor* denying the existence of a deal." Pet. App. 2a (emphasis added). There is no doubt that the state attorneys in this habeas proceeding presented the allegedly false affidavits to the federal habeas court and that the federal court relied on those affidavits. Particularly given that those same attorneys have not denied the falsity of the affidavits or knowledge of that falsity – despite substantial proof that such affidavits are, in fact, false – petitioner has more than adequately made a showing of fraud sufficient for a hearing.

Moreover, *Workman v. Bell*, 484 F.3d 837 (6th Cir. 2007), actually undermines the State's position.

Contra BIO 16. In that case, the Sixth Circuit simply held that the State's attorney did not commit a fraud upon the court by presenting testimony he had no basis to believe was false. *Id*. at 840. Notably, however, the court had considered a more analogous question in a prior appeal in the case, when the defendant had alleged fraud upon the court based on false evidence submitted by the State Medical Examiner's Office. Upon rehearing en banc, the Sixth Circuit divided equally on the question whether the defendant was required to show that the Attorney General's office was aware that the Medical Examiner's evidence was false. *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000). Half the court concluded that because the Medical Examiner's Office was an "arm of the government," its fraud was attributable to the State and could constitute fraud upon the court even if the State's attorneys were unaware of it. *Id*. at 336 (opinion of Merritt, J.). The other half of the court concluded that such a showing was insufficient because the alleged fraud was perpetrated "not by an officer of the court, but by the Shelby County Medical Examiner." *Id*. at 341 (opinion of Siler, J.). Of critical importance here, however, even these judges agreed that fraud upon the court is established if "perpetrated by an attorney." *Id*. None of the judges suggested that so long as the State assigns different attorneys to different stages of the proceedings, it can rely on knowingly false attorney affidavits without risk of undermining a conviction.

Nor has the State identified any other case from the Sixth Circuit or elsewhere adopting its position. That is hardly surprising. The point of allowing courts to set aside judgments procured through fraud

on the court is not to punish individual attorneys for wrongful behavior, but rather to ensure the integrity of the judicial process. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). That integrity is violated whenever a knowingly false statement by a prosecutor affects the outcome of a case, even if the statement is presented to the court by another attorney who is unaware of the fraud.

c. Finally, petitioner has presented sufficient evidence to warrant an evidentiary hearing even if he is required to show that habeas counsel was aware of the fraud in order to ultimately prevail. If trial prosecutors had a deal with McCoy and knowingly suppressed that fact at trial, as petitioner's evidence colorably establishes, it is fair to infer that the State's other lawyers were also aware of the truth. At the very least, that possibility is sufficiently real to warrant examination in an evidentiary hearing.

B. Petitioner's Fraud Claims Provide Cause To Excuse Any Procedural Default.

The State's only other significant argument against certiorari is its assertion that petitioner's claim is procedurally defaulted. BIO 14-15. But that is not an independent ground for affirmance. The very fraud that petitioner seeks to prove to justify reopening the habeas judgment would simultaneously provide cause to excuse his failure to raise his *Brady* claim in state court.

In *Banks v. Dretke*, 540 U.S. 668 (2004), this Court explained that a state's suppression of *Brady* evidence constitutes cause for the failure to properly litigate the *Brady* claim in state court. *Id*. at 691. Of

course, the district court has decided that there was no such suppression in this case. Pet. App. 45a, 66a. But it did so on the basis of an incomplete record, having wrongfully denied petitioner an evidentiary hearing. If this Court were to reverse that decision, and petitioner established fraud on the court sufficient to reopen the judgment under Rule 60(b), he would also establish cause to excuse his failure to present the claim in state court. *See Banks*, 540 U.S. at 691 ("[A] petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence.").[2]

II. The Allegations Of Fraud Go To The Heart Of The State's Death Penalty Case Against Petitioner.

The truthfulness of the State's representations regarding whether it had a deal with Ronnie McCoy

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[2] The district court attempted to distinguish *Banks* on the ground that the defendant in that case was required to show cause and prejudice to "excuse his failure to fully develop the claim in the state courts," not because he failed to make any *Brady* claim in state court at all. Pet. App. 43a. But nothing in *Banks* distinguished between the cause sufficient to excuse a failure to exhaust and the cause needed to excuse failure to develop the factual basis of a claim. To the contrary, *Banks* relied extensively on the Court's prior decision in *Strickler v. Greene*, 527 U.S. 263 (1999), a failure-to-exhaust case like petitioner's. *See Banks*, 540 U.S. at 692 (explaining reliance on *Strickler*); *id*. (noting that in *Strickler*, the "Court determined that in the federal habeas proceedings, the . . . petitioner had shown cause for his failure to raise a *Brady* claim in state court" by showing that the state suppressed evidence).

go to the heart of the integrity of the federal habeas proceedings and the legitimacy of petitioner's capital sentence.

The State's death sentence rests fundamentally on the jury's willingness to accept McCoy's version of events. The circumstantial evidence of the crime pointed as much to McCoy's guilt as to petitioner's. McCoy, on work release for a previous crime at the time of the murder, admitted to being at the scene of the killing. He further acknowledged that he helped dispose of the body. Having initially denied any knowledge of the crime, McCoy only implicated petitioner after telling the police that he did not "need any more time." Pet. App. 19a.

The State presented no physical evidence that could help the jury decide whether McCoy or Johnson was the true murderer. The jury instead was required to make its life-or-death decision on the basis of a credibility determination. And had the jury known that McCoy had told his parole officer he had a deal with the prosecution in return for his testimony against Johnson, even while denying to the court under oath that any such arrangement had been made, it surely would not have believed his testimony regarding the murder.

The habeas court likewise was required to make its decision on the basis of a fundamental credibility assessment. McCoy and the State have testified under oath that there was no deal. That testimony was undermined by a note in McCoy's presentencing report in which his parole officer recorded McCoy as stating that he had received a deal in exchange for his testimony. McCoy, however, denied making the statement, suggesting that his parole officer simply

made a mistake in notation. While it may have been permissible for the district court to credit that explanation on the basis of the record it initially had before it, petitioner's new evidence precludes any suggestion of a simple mistake – McCoy's parole officer has now sworn under oath that the report is accurate and that McCoy in fact told him there was a deal. Either McCoy or his parole officer is lying.

Our legal system has long rejected the proposition that such swearing contests can be decided on the basis of affidavits. Instead, the law requires that litigants be afforded the opportunity to resolve such disputes though live testimony, allowing the court to "judge by his demeanor upon the stand and the manner in which he gives his testimony whether [a witness] is worthy of belief," *Mattox v. United States*, 156 U.S. 237, 242-43 (1895), and through the crucible of cross-examination, the "greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks and citation omitted).

Those safeguards are especially important in cases like this one. Claims of perjury "often raise material questions of fact, inappropriate for disposition at the summary judgment stage." *Briscoe v. LaHue*, 460 U.S. 325, 343 n.29 (1983). Thus, "if there is newly-discovered evidence of falsity . . . the central issue will be the defendant's state of mind. Summary judgment is usually not feasible under these circumstances." *Id*. (citation omitted). It was no more appropriate to resolve petitioner's habeas claim on the papers.

The imperative to apply the law's best devices for discerning the truth is at its height when a state proposes to take a man's life. The Sixth Circuit's decision withheld those truth-seeking tools from petitioner because it concluded that he could not make his case without them. That conclusion simply underscores the court of appeals' error and the need for this Court's intervention.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

Paul R. Bottei
OFFICE OF THE FEDERAL PUBLIC DEFENDER MIDDLE DISTRICT OF TENNESSEE
810 Broadway
Suite 200
Nashville, TN 37203

Thomas C. Goldstein
Counsel of Record
Amy Howe
Kevin K. Russell
GOLDSTEIN, HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
tgoldstein@ghrfirm.com

May 2, 2011

APPENDIX A

Respondent's Final Brief of Respondent-Appellee in the Sixth Circuit argued, in relevant part:

[*24] . . . .

B. The District Court correctly determined that petitioner failed to establish the commission of fraud on the court for purposes of Rule 60(b)(3).

The District Court addressed petitioner's claim that the respondent committed fraud upon the court through the submission of the McCoy affidavit. The court correctly noted that a motion brought under Rule (60)(b)(3) for fraud on the court must be brought within one year after the judgment, order or proceeding. Because petitioner's motion was not filed until well after that time, his motion could have been dismissed on that basis alone. Nonetheless, the District Court chose to review this portion of the claim under the "savings clause" of Rule 60(b)(6). (R. 122, Order denying motion, pg. 24, n.8; Apx. Pg. 539)

After setting out the required elements to sustain a claim of fraud upon the court, the District Court denied relief holding:

> Given these requirements, Petitioner's fraud claim fails on many levels. First, Petitioner is required to show that counsel for Respondent engaged in the conduct which he considers fraudulent. [citation omitted] The persons with which Petitioner appears to be most concerned are Ronnie McCoy, accused of

lying in an affidavit submitted the Court, and the attorney who prosecuted Petitioner's case at trial, also accused [*25] of lying in an affidavit submitted to the Court. [footnote omitted] At no point in his motion for relief does Petitioner so much as allege, much less actually demonstrate, that specifically Respondent's counsel knowingly submitted false affidavits before this court during habeas proceedings. Thus, Petitioner has failed to show fraudulent conduct on the part of an officer of the court, appearing as such before this Court, during prior proceedings.

Further, even if the Court were to concur with Petitioner regarding the conduct which he deems fraudulent, such conduct was not directed at the judicial machinery itself. In other words, conduct sufficient to satisfy the independent "fraud upon the court" inquiry has traditionally been confined to conduct which deliberately seeks to harm the integrity of the judicial process. Therefore, many courts have deemed mere perjury and non-disclosure by witnesses a specie of fraud insufficient to justify vacating a previous judgment. [citations omitted] Given the above, the Court cannot consider the conduct complained of by Petitioner, the submission of allegedly false affidavits by two witnesses to the prior habeas proceedings, conduct which subverted the Court's integrity during those proceedings, particularly where Petitioner cannot show that counsel for Respondent knowingly submitted any such false

> affidavits. . . . In this case, though the state's habeas attorneys submitted a new affidavit from McCoy, given that Petitioner does not even allege, much less prove, that the state's habeas attorneys knew of the affidavit's purported falsity, the Court will not assume such a collusion occurred. Given all of the above, the Court holds that 1) Petitioner has failed to demonstrate any fraudulent conduct on the part of an officer of the court during prior proceedings; and 2) any fraud that occurred was clearly an injury germane to Petitioner as a single litigant, and was not a fraud directed at the "judicial machinery" sufficient to compromise the integrity of this Court.

(R. 122, Order denying motion, pp. 25-28; Apx. Pp.540-43) Because this portion of the motion must be reviewed under Rule 60(b)(6) due to petitioner's failure to seek relief in a timely manner, petitioner is bound by the "extraordinary circumstances" [*26] requirement of that provision. *Gonzalez*, 125 S.Ct. at 2651.

As noted above, petitioner's claim of fraud was supported by the Morrow affidavit. Even ignoring petitioner's failure to establish that this evidence was unavailable during state post-conviction proceedings, petitioner clearly was aware of Morrow's existence during the summary judgment proceedings in the District Court as Morrow was the author of the presentencing report petitioner submitted at that time. Moreover, with the filing of the McCoy affidavit in 1999, petitioner was certainly aware that a dispute existed as to the statements allegedly made

by McCoy. Yet, despite this, petitioner waited more than five years from the filing of the McCoy affidavit, and after completion of the appellate review process, to submit Morrow's affidavit. As the District Court found, petitioner offered no explanation for this delay. Nothing in the record of this case can support a finding of extraordinary circumstances warranting a grant of relief under Rule 60(b)(6). . . .