CAPITAL CASE
NO DATE OF EXECUTION SET

No. 11-1215

IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

ROLAND COLSON, 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

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Petitioner properly presented the state and federal courts with his claims of ineffective assistance of counsel, violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and prosecutorial misconduct. But the Sixth Circuit erected unsupportable obstacles to recognizing the grievous flaws in petitioner's death sentence. Each question presented is the subject of a circuit conflict. On two questions, respondent does not defend the merits of the Sixth Circuit's rulings. And the stakes could not be higher: absent this Court's intervention, the State will execute petitioner under a sentence of death that is totally unworthy of confidence. As the four *amicus* briefs confirm, it is difficult to imagine a case more appropriate for this Court's review.

I. Certiorari Is Warranted To Review Whether The Federal Courts Are Prohibited From Recognizing The Cumulative Effect Of The Constitutional Violations In Petitioner's Trial.

Respondent does not dispute that the constitutional violations at petitioner's trial – when properly considered in their totality – render his death sentence unworthy of confidence. *See* Pet. 20-21; Judges' *Amicus* Br. 14-24. But the Sixth Circuit held that it must ignore that fact because petitioner did not exhaust a distinct "claim" of cumulative error. Pet. App. 7a. That ruling implicates three recurring circuit splits. Pet. 13-17.

1. Respondent ignores two conflicts, which are reasons enough to grant certiorari in this capital case. First, the Court would resolve the split over

whether cumulative error is a basis for habeas relief. Pet. 16-17. Second, that ruling would prospectively resolve the conflict over whether this Court's precedents are sufficiently "clearly established" to permit the assessment of cumulative error in cases under the AEDPA. *Id.* 17.

2. Respondent's argument that "[e]xhaustion is required of every legal ground advanced for federal habeas relief," BIO 10, is a *non sequitur*. As *amici* former federal judges explain, at 4, respondent "conflates a petitioner's habeas *claim* with the *method* the federal courts use to determine whether the petitioner has established an entitlement to relief."

Petitioner exhausted his constitutional claims that his counsel was ineffective, and that the prosecution violated *Brady* and engaged in gross misconduct. In recognizing a court's duty to assess those errors "collectively, not item-by-item," *Kyles v. Whitley*, 514 U.S. 419, 436 (1995), this Court has never suggested that every defendant must burden the state courts with a duplicative "claim" of cumulative error. *See* Pet. 18 (citing *Kyles*, *supra*; *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000)).

3. The Sixth Circuit recognized that its ruling conflicts with the en banc Fifth Circuit's holding that a habeas petitioner may "raise a cumulative error argument without first making that argument before the state court below." Pet. App. 7a (citing *Derden v. McNeel*, 978 F.2d 1453, 1456-57 (5th Cir. 1992)). *Derden* did not merely hold "that a cumulative-error claim may not include individual errors that are themselves procedurally barred." BIO 12. Rather,

the Fifth Circuit held that it would assess the collective effect of "individual errors" that were not themselves "procedurally defaulted for habeas purposes." 978 F.2d at 1454. Assuming the petitioner in *Derden* raised cumulative error before "the Mississippi Supreme Court," BIO 11 (citing 938 F.2d 605, 618 (5th Cir. 1991) (Jones, J., dissenting)), it appears undisputed that he did not *exhaust* that argument by presenting it to the state *trial* courts. And although respondent says that in *Hughes v. Dretke*, 412 F.3d 582 (5th Cir. 2005), "a cumulative-error claim" was exhausted, he concedes (as he must) that it was actually a different "claim." BIO 12 & n.12 (citing *State v. Hughes*, 24 S.W.3d 833, 844 (Tex. Crim. App. 2000)).

Courts in the Third Circuit similarly hold that "'[c]umulative error' is not an independent claim for relief, but rather a method of assessing the prejudice caused by certain errors that may have occurred at trial." *Robinson v. Coleman*, No. 10-265, 2011 WL 5506069, at *14 (E.D. Pa. May 26, 2011); *see also* Pet. 15 (citing cases).

Respondent argues that *Albrecht v. Horn*, 485 F.3d 103 (3d Cir. 2007), merely indicated that cumulative error had not been "*addressed* by a state court," which is "very different from whether a federal habeas claim was *presented* to a state court." BIO 13. But the Third Circuit identified which of the petitioner's arguments were "claims" for which exhaustion was required, *e.g.*, 485 F.3d at 115, 123, 127 (sentencing instruction, actual innocence, ineffective assistance, and *Brady*), including a due process claim that was "exhausted" but "not addressed by the state courts," *id.* at 129 n.12. The

court did not treat cumulative error as a claim requiring exhaustion; instead, it treated it as an analysis of the "cumulative prejudice flowing from the errors." *Id*. at 139 n.17. That reading is consistent only with petitioner's argument that cumulative error is a means to assess prejudice, and not a separate claim. Respondent's argument that *Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008), did not consider cumulative error without regard to exhaustion, BIO 13, misquotes language addressing substantive claims set forth in the petitioner's fourth state post-conviction filing. *See* 516 F.3d at 189 ("Fahy's claims raised for the first time in PCRA #4 are not barred by procedural default.").

4. Finally, respondent protests that there is "*not one* circuit-court decision" that considers "the *combined effect* of an alleged Fourteenth-Amendment *Brady* violation and an alleged Sixth Amendment *Strickland* violation." BIO 10-11. Not so. *E.g*., *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003) ("cumulative-error review" may be applied to "legally diverse claims such as" *Strickland*, *Brady*, and prosecutorial misconduct); *see also State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996) (holding that cumulative effect of *Brady* and *Strickland* violations undermined confidence in the verdict).

Amici former judges explain that both inquiries are at bottom the same, and that in this case, because the incompetency of petitioner's counsel facilitated the prosecution's misconduct, "[a]n accurate assessment of the prejudice Abdur'Rahman suffered thus necessarily considers that the effects of those violations worked in tandem." Br. 6-7, 24.

II. Certiorari Is Warranted To Review The Sixth Circuit's Holding That The Prosecution May Suppress Evidence Critical To The Defense, If The Defendant Is Aware Of The Facts In The Evidence.

This case is an ideal vehicle to resolve the recurring circuit conflict over whether *Brady* permits the prosecution to suppress *evidence* whenever the defendant knows of the *facts* recounted in that evidence. *See* Pet. 22-25. The prosecution's star witness against petitioner was Devalle Miller, who testified that the killing occurred during a robbery planned by petitioner. Petitioner's argument against the death penalty depended on proving that petitioner was mentally ill and acted under the influence of the SEGM's plan to scare drug dealers out of the community. Miller's testimony allowed the prosecution to tell the jury that petitioner's defense was "bunk." Pet. App. 10. But the prosecution suppressed statements that would have been "compelling evidence from Devalle Miller's own mouth that he lied on the stand." *Id.* 22a (Cole, J., dissenting).

Without access to Miller's statements, it was petitioner's word against Miller's. Respondent's argument that petitioner knew that "Miller had discussed the SEGM with the prosecution with the prosecution before trial," BIO 18, omits the far more significant fact that petitioner did *not* know that in those discussions Miller had provided information that would flatly contradict his trial testimony.

The Sixth Circuit found no *Brady* violation only because petitioner knew the facts about the SEGM,

Pet. App. 11a, notwithstanding that the suppression prevented petitioner from proving those facts to the jury. The petition demonstrated that this holding requires this Court's review.

1. While the ruling below is consistent with the precedent of the Fifth and Eighth Circuits and the South Dakota Supreme Court, the Third, Fourth, Ninth, Tenth, and Eleventh Circuits all reject that distorted and narrow view of the prosecution's duty of disclosure. *See* Pet. 23-25.

The Eleventh Circuit holds that the prosecution violates *Brady* when it withholds the defendant's own statements, of which he "was certainly aware." *United States v. Severdija*, 790 F.2d 1556, 1559 (11th Cir. 1986). Even assuming the defendant in that case "otherwise *lacked* any means of corroborating the fact that he had made the statement," BIO 23, that is no distinction: petitioner "lacked any means" of impeaching Miller. The *Brady* violation in this case is indeed more egregious, because the prosecution suppressed the statements' existence.

The Fourth Circuit holds that *Brady* applies to evidence that proves a fact of which the defendant "was already aware." *United States v. Kelly*, 35 F.3d 929, 937 (4th Cir. 1994). The court's statement that "the Government apparently shared [the defendant's] belief" about that fact, BIO 24 (quoting 35 F.3d at 937), merely explains why the evidence was material. Here, even the Sixth Circuit did not doubt that Miller's statements were material: they impeached the prosecution's star witness on a question central to the jury's determination whether to sentence petitioner to death.

The Third Circuit holds that suppression of a defendant's confession – of which he is obviously aware – violates *Brady*, reasoning that "[t]he police account of the confession is not information which [the defendant] already has or, with any reasonable diligence, he can obtain himself." *Gov't of the V.I. v. Martinez*, 780 F.2d 302, 309 (3d Cir. 1985). The Third Circuit's statement that the confession was "critical" to the defense, *see* BIO 24 (quoting 780 F.2d at 310), again addresses only the purpose for which the defendant would use the evidence. The statements by Miller contradicting his trial testimony were no less "critical" to petitioner's defense to the State's attempt to execute him.

The cases respondent cites in arguing that the circuits agree that *Brady* "is not violated by the nondisclosure of evidence that was within the knowledge of the defendant," BIO 21-22, actually make a different, irrelevant point: that *Brady* does not apply to evidence the defendant has or can reasonably secure. Here, it is undisputed that the evidence was available and known only to the prosecution.

2. The State's shriveled view of its *Brady* obligations reinforces that this Court's intervention is imperative. *See* Pet. 21-27. The Sixth Circuit's decision would require overruling *Brady* itself – in which the defendant knew the facts in the suppressed statement. Respondent's argument that petitioner – unlike the defendant in *Brady* – could cross-examine the witnesses, BIO 20-21; *see also id.* 6 (citing Pet. App. 12a-13a), flies in the face of this Court's precedents. *See United States v. Bagley*, 473 U.S. 667, 678 (1985) (prosecution violates *Brady* even if

the defense is "free to cross-examine the witnesses on any relevant subject," because the defense is entitled to evidence "helpful in conducting the cross-examination"). Here, "Petitioner knew that Miller was lying on the stand, but because Petitioner did not know about his pre-trial statement, Petitioner could not *prove* that Miller was lying. The existence of this evidence, which contradicted the prosecution's position and proved Miller's testimony false, was unknown to the Petitioner." Prosecutors' *Amicus* Br. 13.

Most recently, in *Cone v. Bell*, 556 U.S. 449 (2009), the defendant would have known his own conduct described in the suppressed witness statements. The same attorneys who represented the State in *Cone* argue here that the prosecution remains free to suppress a witness's exculpatory recitation of objective facts known to the defendant – no matter how persuasive that evidence would be to the jury. Respondent says *Cone* merely compels disclosing "those witnesses' perceptions of the defendant's conduct and appearance." BIO 20. But nothing in the decision empowers prosecutors to deprive the defendant of evidence of objective facts critical to his defense. The State's continued bald-faced refusal to recognize its duties under *Brady* requires this Court's intervention. *Cf. Smith v. Cain*, 132 S. Ct. 627 (2012).

3. Respondent's two remaining arguments were not accepted by the court of appeals and lack merit. First, there no basis for respondent's view that a *Brady* claim must be parsed to determine if it alleges the suppression of "facts" or instead "evidence." But in any event, the habeas petition alleges (but

respondent omits) that "[t]he prosecution committed misconduct in breaching its obligations under *Brady* and applicable discovery rules by failing to disclose to the defense exculpatory and other *evidence* which the prosecution had obtained in this case." Reply App., *infra* (emphasis added). The petition's third subclaim specifically alleged the suppression not of facts but of "Miller's *statements* to the prosecution." *Id.* (emphasis added). The petition's subsequent reference to the "statements" as "information," *id.*, merely reflects that "Miller's statements were oral; there were no 'reports' in the government's possession," BIO 18. So respondent admits that the Sixth Circuit did not accept the State's argument that Abdur'Rahman's habeas petition "alleged only the suppression of the *facts* contained in [Miller's] statements." *Id.* 16-17. The Sixth Circuit never suggested that petitioner "may have waived" his *Brady* claim on this basis, *contra id.* 17 (quoting Pet. App. 10a n.2): that language refers to the assertion – which respondent abandons – that the petition did not allege that the evidence would be used for "impeachment." *See* Pet. 27 n.6.

Second, respondent suggests that the suppression of Miller's statements was not prejudicial, because those statements presumably track Miller's testimony in his own sentencing – which occurred after petitioner's trial – that he and petitioner intended to rob the victim. BIO 18-19. But respondent misleadingly omits Miller's *explanation* for the robbery. Asked in the sentencing "[w]hy did you do it?," Miller testified: "The organization that I'd gotten myself involved in was to help the community to rid the drug dealers, and

things like that, you know, because it was a bad influence." Habeas Ex. 93, at 24-25. In any event, the State suppressed Miller's separate pre-trial statements to prosecutors, which petitioner properly alleges included Miller's admission of the SEGM's central role in planning the crime. *See* Pet. App. 9a-10a.

III. Certiorari Is Warranted To Review The Sixth Circuit's Holding That Defense Counsel Has No Responsibility To Investigate And Introduce Evidence That Could Have Negative Consequences.

The district court found that petitioner's counsel failed to investigate and introduce evidence that – notwithstanding its potentially negative aspects – would have painted petitioner in a far more favorable light, leading at least one juror to spare his life. *See* Pet. App. 209a-220a; Pet. 5-6. This is a recurring issue in capital litigation, in which mitigating evidence often relates to the defendant's significant mental illness. As the *amici* social worker organizations explain, at 23, the jury was not provided with any of the "overwhelming evidence that Abdur'Rahman suffered from serious mental illness, including Borderline Personality Disorder, PTSD, dissociation, and delusional thinking." This Court should review the Sixth Circuit's *per se* rule that defense counsel is excused from investigating and introducing abundant available mitigation evidence, if the evidence could be a "double-edged sword."

1. Respondent cannot and does not deny that the available mitigation evidence would have persuaded

the jury not to impose the death penalty. His sole substantive argument – that "the Sixth Circuit employed no 'categorical rule,'" BIO 28 – blinks reality. The court held that when "mitigating evidence that could have been introduced also contain[s] harmful information," the defendant does "not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death." Pet. App. 117a. Applying that rule, the court did not weigh the positive and negative aspects of the evidence; it flatly denied relief. *Id.*

Notably, respondent does not defend the Sixth Circuit's decision. This Court has repeatedly concluded that counsel provided constitutionally ineffective assistance by failing to investigate and introduce evidence that had more negative connotations. *See* Pet. 33-37. Here, the court of appeals held there was no obligation to introduce evidence that was unquestionably *positive*. "The horrific details of Abdur'Rahman's life history, none of which was heard by the jury, are at least as compelling or more so than in this Court's precedents where prejudice has been found." Social Worker *Amicus* Br. 4.

2. Respondent's argument that this Court is powerless to "reach this question," BIO 26, itself raises a question that only this Court can decide. But his argument is meritless. Respondent cites no basis on which the Court should (or even could) limit its authority. Despite his protests, respondent admits that this Court may review rulings from an earlier stage of the case, even if issued "11 years ago" and

the certiorari petition was "not filed within 90 days after" the relevant ruling. *Id.* Further, "the jurisdictional requirement of a certificate of appealability for habeas appeals," BIO 28 (citing 28 U.S.C. § 2253(c)(3)), is inapplicable to review in this Court.

Respondent argues that this Court should deem itself powerless to review "an earlier final judgment in a case." BIO 26. But a Rule 60(b) motion by its terms *reopens* "a final judgment," not – as respondent erroneously presumes – individual "claims." FRCP 60(b). Thus, "the district court's grant of the Rule 60(b) motion reopened the judgment, and the district court made a fresh inquiry into the no-longer finally decided merits of Petitioner's case." Habeas Scholars *Amicus* Br. 8. This Court obviously must be able to review rulings reopening judgments under Rule 60(b). *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997).

3. Respondent finally errs in arguing that petitioner's "Rule 60(b) motion was limited to reopening *distinct* claims, none of which included his ineffective-assistance-of-counsel-at-sentencing claim." BIO 27-28. As noted, an order under Rule 60(b) reopens the judgment, not a particular claim. By analogy, if a court of appeals were to recall its mandate to consider a particular claim, the judgment would be non-final and this Court would have jurisdiction to review the entire appellate ruling.

But in any event, petitioner's cumulative error argument "necessarily requires an assessment of the cumulative effect of *all* errors, including both the prosecutorial misconduct and the ineffective assistance of counsel." Habeas Scholars *Amicus* Br.

11. Because the grossly ineffective assistance provided by petitioner's counsel facilitated the prosecutor's misconduct, the issues are "inextricably intertwined." *Id.*

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 14, 2012

APPENDIX

Excerpt from *Amended Petition for Writ of Habeas Corpus in a Capital Case*, pp. 53-56 (filed December 2, 1996)

D. PROSECUTORIAL MISCONDUCT.

Throughout the course of this case, the prosecution engaged in an unending pattern of misconduct. In commenting on one instance of prosecutorial misconduct, the Tennessee Supreme Court said, "The conduct of the State's attorney bordered on deception by which he was able to get before the jury information which was not evidence in the case they had under consideration. The action of the State was improper." As the evidence will show in this habeas proceeding, the prosecution pursued a consistent course of deception, in violation of Petitioner's constitutional rights, not only by deviously getting inadmissible information before the jury, but also by refusing to disclose relevant evidence and by altering or improperly influencing the evidence and testimony that was presented. The corrupting influence of the prosecution's misconduct was, to a certain extent, made possible and exacerbated by the failures of defense counsel.

1. Prosecutorial Misconduct: Brady and Other Discovery Violations.

The prosecution committed misconduct in breaching its obligations under *Brady* and applicable discovery rulings by failing to disclose to the defense exculpatory and other evidence which the prosecution had obtained in the case. The *Brady* and other

discovery violations by the prosecution, taken individually and cumulatively, violated in a material and prejudicial way Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The *Brady* and other information and material which the prosecution wrongfully withheld from Petitioner includes but is not necessarily limited to the following:

* * *

> (2) Transcription of Miller's pretrial statement. This was treated by the prosecution as *Jencks* material, not as *Brady* material. It was not furnished to defense counsel sufficiently in advance of the trial to enable defense counsel to make use of it in preparation of a defense. This transcript contained exculpatory information, relevant in both the guilt and sentencing stages of the case, regarding the circumstances surrounding the alleged offenses. Among other things, this transcript included Miller's observations of Petitioner's change in demeanor and appearance at the time of the alleged offenses. According to the prosecution's notes, these observations and other statements made by Miller raised a question as to whether Petitioner was insane, or as to whether Petitioner acted with premeditation and deliberation. Notwithstanding the prosecution's own concerns about these issues raised by

Miller's pretrial statement, the prosecution failed to deliver the transcript of this statement to defense counsel sufficiently in advance of the trial to enable defense counsel to use it in exploring a possible mental health defense.

(3) Miller's statements to the prosecution regarding the involvement of the SEGM in the alleged offenses. This information is exculpatory and would have been relevant in both the guilt and sentencing stages of the case, but it was never disclosed to the defense. This information likely included, but was not limited to, the following facts:

- that Miller and Petitioner joined the SEGM, a racial identity religious organization devoted to bettering the Black community;
- that Miller and Petitioner were "brainwashed" by the organization;
- that there was a paramilitary group within the SEGM that consisted of Alan Boyd, William Beard, Miller and Petitioner;
- that William Beard gave Miller a pistol to be used in "operations" to clean up the Black neighborhoods;
- that Petitioner told Miller that he, Petitioner, got his shotgun from Alan Boyd;
- that on the night of the killing, after leaving Daniels' house, Miller and Petitioner went to Miller's

apartment and Petitioner made a telephone call from a booth; and Alan Boyd showed up a short time later;

- that after leaving the victims' apartment, Miller heard Boyd say something to the effect of "just be cool and go back to work."

- that after Petitioner's arrest, Miller went to Beard who gave him getaway money;

- that Miller intentionally misled Beard as to where he was going because he feared that Beard, Boyd and the SEGM might kill him; Miller also told others while on the run that he was fearful of Boyd, Beard and Mitchell Holley, all of the SEGM; and

- that members of the SEGM provided Miller's wife, Karen, with financial assistance while Miller was on the run.

* * * *