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No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

RICKY BELL, WARDEN,  
*Petitioner,*

v.

GREGORY THOMPSON,  
*Respondent.*

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

**PETITION FOR WRIT OF CERTIORARI**

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**CAPITAL CASE  
QUESTIONS PRESENTED FOR REVIEW**

1. Whether the Sixth Circuit's rejection of the Tennessee Supreme Court's 2004 determination that respondent Gregory Thompson is competent to be executed conflicts with 28 U.S.C. § 2254(d)(1) and *Williams v. Taylor*, 529 U.S. 362 (2000), where *Ford v. Wainwright*, 477 U.S. 399 (1986), neither defined competency in the Eighth Amendment context nor set forth precise procedural requirements for determining competency for execution.

2. Whether the Sixth Circuit erred in concluding, contrary to *Gonzalez v. Crosby*, 545 U.S. 524 (2005), that the Tennessee Supreme Court's 2001 clarification of existing Tennessee appellate procedure was sufficient to warrant relief under Fed. R. Civ. P. 60(b) from the district court's judgment denying respondent Thompson's petition for writ of habeas corpus.

3. Whether the Sixth Circuit's decision exceeds the scope of the certificate of appealability ("COA") — and thus the Court's jurisdiction — under 28 U.S.C. § 2253(c) and conflicts with this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), where it rejected the district court's alternate untimeliness determination as to Thompson's Fed. R. Civ. P. 60(b) motion, after specifically declining to grant a COA on that question

**STATEMENT OF INTERESTED PARTIES**

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of this Court.

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**PETITION FOR WRIT OF CERTIORARI**

The Attorney General of Tennessee, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit remanding two separate federal habeas corpus proceedings to the United States District Court for the Eastern District of Tennessee for further proceedings.

**OPINIONS AND ORDERS BELOW**

The opinion of the court of appeals (Pet. App. 1a) that is the subject of this petition is published at 580 F.3d 423. The memorandum opinion of the district court dismissing respondent Gregory Thompson's petition for writ of habeas corpus challenging his competency for execution is unreported. (Pet. App. 66a). The order of the district court denying Thompson's motion for relief from judgment under Fed. R. Civ. P. 60(b) is unreported. (Pet. App. 158a).

The decision of the Tennessee Supreme Court adjudicating Thompson's competency for execution in 2004 is reported at 134 S.W.3d 168. The state supreme court's 2005 order denying further consideration of the competency question is unreported. (Pet. App. 176a).

**JURISDICTION**

The judgment and opinion of the Sixth Circuit were entered on September 11, 2009. (App. 1). The Sixth

Circuit denied rehearing on January 12, 2010.<sup>1</sup> (App. 179a) Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA), provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2253(c), as amended by AEDPA, provides:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

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<sup>1</sup> On April 7, 2010, Justice Stevens granted petitioner's application to extend the time to file a petition for writ of certiorari from April 12, 2010, until May 5, 2010. *Bell v. Thompson*, No. 09A931. Justice Stevens subsequently granted petitioner's request to extend the period an additional five days from May 5, 2010, until May 10, 2010. *Id.*

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(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Rule 60, Federal Rules of Civil Procedure, provides in pertinent part:

**(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

\* \* \*

(6) any other reason that justifies relief.

(c)(1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Rule 39, Rules of the Supreme Court of the State of Tennessee provides:

**Exhaustion of Remedies.** In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tenn. Code Ann., § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

#### STATEMENT

Respondent Gregory Thompson was convicted for the first-degree murder of Brenda Blanton Lane in Coffee County, Tennessee, in 1985 and sentenced to death. The Tennessee Supreme Court affirmed his conviction and sentence on direct appeal, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), and this Court denied certiorari, *Thompson v. Tennessee*, 497 U.S. 1031 (1990). Thompson's conviction and sentence

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were upheld by the trial court on post-conviction and were affirmed by the Tennessee Court of Criminal Appeals. *Thompson v. State*, 958 S.W.2d 156 (Tenn. Crim. App. 1997) (app. denied Oct. 20, 1997).

In 1998, Thompson filed a petition for a writ of habeas corpus challenging the legality of his conviction and sentence. *Thompson v. Bell*, No. 4:98-cv-00006 (E.D. Tenn.). The district court granted summary judgment in favor of the Warden and dismissed Thompson's habeas petition on February 17, 2000. The Sixth Circuit affirmed the district court's judgment, *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003), and this Court denied a petition for writ of certiorari, *Thompson v. Bell*, 540 U.S. 1051 (2003) (reh. denied Jan. 20, 2004).

### ***1. State-Court Proceedings on Competency for Execution***

On January 21, 2004, the State of Tennessee filed a motion in the Tennessee Supreme Court requesting the setting of an execution date under Tenn. Sup. Ct. R. 12.4(A). Thompson filed a response opposing the State's motion on grounds of mental illness. He also filed a notice raising the issue of present competency to be executed and requesting a competency hearing under *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 2000).<sup>2</sup> The Tennessee Supreme Court granted the State's

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<sup>2</sup> In *Van Tran*, the Tennessee Supreme Court announced the standard for determining competency for execution in Tennessee and the procedures afforded state prisoners asserting claims of incompetency under *Ford v. Wainwright*, 477 U.S. 399 (1986).

motion by order entered February 12, 2004, and set an execution date of August 19, 2004. In addition, finding that Thompson had sufficiently raised the issue of his present competence to be executed, the court remanded the case to the Coffee County Circuit Court, where Thompson was originally tried and sentenced, for competency proceedings, including an initial determination by the trial court of whether Thompson had made the required threshold showing that his competency to be executed was genuinely in issue such that an evidentiary hearing was warranted. (Pet. App. 176a).

The Tennessee Supreme Court summarized the evidence Thompson presented to the trial court on the competency question as follows:

Thompson [ ] submitted the reports of three mental health experts who opined that he presently is not competent to be executed. Although all of these reports indicate that Thompson is suffering from mental illness, described as schizophrenia, chronic undifferentiated type, the reports do not present facts indicating that Thompson is unaware of his impending execution and the reason for it. . . . Significantly, the reports of all three experts either explicitly, or as part of the factual bases underlying their opinions, illustrate that Thompson presently is aware of the fact of his impending execution for the murder of Brenda Lane.

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In a report dated January 28, 2004, Dr. John S. Rabun, a psychiatrist, states that, when questioned about the reason for his incarceration, Thompson “readily admitted that he ‘killed Brenda Lane.’” Thompson further discussed his trial in Coffee County with Dr. Rabun, stating that he had been convicted of first-degree murder and, during the “second phase,” had been sentenced to “death.” Dr. Rabun includes in his report four factors that suggest Thompson is competent to be executed:

- (1) Mr. Thompson told the examiner that executions in Tennessee are by “lethal injection or the electric chair,” suggesting that he understands how the death penalty is carried out;
- (2) Mr. Thompson told the examiner that he was convicted in 1985 of killing the victim of the instant matter, suggesting that he understands the reason for his death sentence;
- (3) Mr. Thompson told the examiner that he received the death penalty during the “second phase” of his trial, suggesting that he understands the penalty he received; and
- (4) Although Mr. Thompson did not know anything about the current appeal process in his case, he said that he knew the State of Tennessee was seeking to execute him.

Dr. Rabun's ultimate opinion of incompetence is based upon Thompson's alleged delusional beliefs about: (1) his personal status and identity; (2) the State's ability to carry out the death sentence; (3) the likelihood that the sentence will actually be carried out; and (4) what will happen to him upon execution. This Court previously rejected a prisoner's reliance on such delusional or unorthodox beliefs as irrelevant to the question of competency for execution. . . .

Moreover, Dr. Rabun's report, recounting the substance of an interview with Thompson as recently as January 19, 2004, clearly demonstrates Thompson's awareness of the details of the murder of Brenda Lane, the trial and sentencing proceedings resulting in his current death sentence, and further, that he accepts full responsibility for his actions. The report states as follows:

*Committing Offense:* Mr. Thompson was questioned about the reason for his incarceration. Mr. Thompson readily admitted that he "killed Brenda Lane." He noted that he and a female friend had an "idea" to go to Tennessee. He was then living in Georgia, estimating that he returned to Georgia in 1984. He told the examiner that he and his female friend drove to Tennessee, and he kidnapped "Brenda Lane" who worked at a "Methodist newspaper." He again reported that he "killed Brenda Lane." In other words, he accepted

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responsibility for his actions. At no point in either interview with the examiner did he try and claim he was innocent or allege that another party committed the offense. Subsequently, he discussed his trial in Coffee County, Tennessee. He indicated that he was convicted of "First Degree Murder" and during the "second phase" was sentenced to "death."

In short, Dr. Rabun's report fails to satisfy the threshold showing for a hearing on competency. Indeed, its detailed description of Thompson's awareness of the murder of Brenda Lane, his sentence of death, and his impending execution, undercuts, rather than supports, his claim of incompetence. . . .

The next report is that of Dr. George W. Woods, Jr., a psychiatrist, who evaluated Thompson on February 17, 2004, for three hours. In a report dated February 27, 2004, Dr. Woods diagnoses Thompson as suffering from schizophrenia, undifferentiated type, and opines that Thompson is "currently incompetent to be executed." Dr. Woods reported that Thompson suffers from bizarre delusions and perceptual disorders such as auditory hallucinations and that Thompson believes he cannot die and will stay alive for two years even if he is executed. Thompson also told Dr. Woods that, once it is acknowledged that he is a lieutenant in the Navy, he will receive a trial before a military tribunal and be exonerated. According to Dr. Woods, Thompson also claims that he has a

fortune in gold bullion buried in his hometown in Georgia, denies that he will die from electrocution, and says that he has been electrocuted before and plans to go either to "Gangster's Paradise" or to Hawaii after his death. . . . Although Dr. Woods relates Thompson's delusional beliefs, his report fails to address directly the critical inquiry under Van Tran-whether Thompson is aware of the fact of his impending execution and the reason for it. To the contrary, Dr. Woods's report indicates that Thompson is aware of the fact of his impending execution and the reason for it. For example, the report states:

Mr. Thompson believes that he can not die, and there will be a two year period in which he will stay alive, even if he were *executed*. He also believes *that he will not be executed* since he was a lieutenant in the navy, and once this information is acknowledged, *his current conviction* will be thrown out and he will receive a military tribunal which will exonerate him. Thompson further relates that the electric chair is his method of choice.  
(Emphasis added.)

Again, Thompson's beliefs about what will occur after his death or dissatisfaction with his conviction and sentence do not raise genuine issues regarding his competency for execution unless those beliefs preclude Thompson from being aware of the fact of his impending execution and the reason for it. Dr. Woods's

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report fails to illustrate that Thompson's beliefs pose such an impediment and therefore fails to establish a genuine issue under *Van Tran* regarding Thompson's present competency.

The third report was provided by Dr. Faye E. Sultan, a psychologist, who examined Thompson on January 28, 2004. Dr. Sultan stated that "in a non-medicated state, Mr. Thompson is floridly psychotic" and unaware of his surroundings. Dr. Sultan opined that Thompson is not competent to be executed "in a non-medicated state." Currently, however, as Dr. Sultan acknowledges, Thompson participates in a regular regimen of medications. Dr. Sultan admits that Thompson knows he has been sentenced to death, but she points out that Thompson holds the delusional beliefs that it is impossible for him to be executed or for the execution to occur. Thompson instead talks about leaving prison and returning to Hawaii or to his family.

At best, Dr. Sultan's affidavit establishes that Thompson may become incompetent at some point in the future if he deviates from his current medication regimen, an allegation that has been rejected by this Court on more than one occasion as insufficient to trigger competency proceedings under *Van Tran*. . . . Thus, like the reports of Dr. Rabun and Dr. Woods, Dr. Sultan's report is insufficient to raise a genuine issue regarding Thompson's present competency to be executed. The expert

reports indicate, rather, that Thompson is aware of the fact of his impending execution and the reason for it.

*Thompson*, 134 S.W.3d 168, 171 (Tenn. 2004).

On March 8, 2004, the trial court concluded that the expert reports submitted by Thompson demonstrated that “he presently is aware both of the fact that he has been sentenced to death for the murder of Brenda Lane and of the fact of his impending execution” and did not warrant an evidentiary hearing on the issue of competence. *Thompson*, 134 S.W.3d at 171.

## ***2. Appellate Review by the Tennessee Supreme Court***

On May 12, 2004, the Tennessee Supreme Court affirmed the judgment of the trial court, concluding, following a *de novo* review of Thompson’s petition and evidentiary submissions, that he was competent for execution under the standard established in *Van Tran*.

The reports of Thompson’s mental health experts show that, despite any delusions, Thompson understands that he is going to be executed for murdering Brenda Lane. . . . [W]hile Thompson professes unorthodox beliefs about what will happen *after* his execution, those beliefs do not vitiate Thompson’s awareness of the fact of his execution and the reason for it. . . . [A] prisoner’s delusional or unorthodox beliefs about what may occur upon

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death or the prisoner's irrational beliefs about the legal processes and/or the ability of the State to carry out the execution are not pertinent to the question of incompetency because they do not impede the prisoner's ability to understand the *fact* or the impending execution and the *reason* for it

*Thompson*, 134 S.W.3d at 183. The Tennessee Supreme Court then reiterated its February 25, 2004, order that Thompson's execution be carried out on August 19, 2004. *Id.* at 185.

### ***3. Federal Habeas Proceedings on Competency for Execution***

On June 14, 2004, Thompson filed a federal habeas petition under 28 U.S.C. § 2254 challenging the state court's competency determination. One week later, on June 21, the district court entered an order granting a "brief stay" of Thompson's execution, to expire immediately upon issuance of an order denying Thompson's petition, but to remain in place upon issuance of an order granting it, and directing Warden Bell to respond to the petition.

In the meantime, however, on June 23, 2004, the Sixth Circuit issued an order amending and reissuing the opinion it had originally filed on January 9, 2003, in Thompson's first habeas corpus case. On the premise that, because the court had not yet issued its mandate in the earlier case, it was free to reconsider its prior opinion, it reversed the district court's 2000 judgment denying habeas relief in that case and

remanded for an evidentiary hearing. *Thompson v. Bell*, 373 F.3d 688, 691 (6th Cir. 2004). This Court granted the Warden's petition for writ of certiorari and reversed, holding that the Court had abused its discretion by withholding the mandate of its original judgment after the denial of certiorari. *Bell v. Thompson*, 545 U.S. 794, 813-14 (2005).

Following this Court's ruling, the Warden filed an answer to the competency-for-execution challenge in the district court on August 19, 2005, arguing that the Tennessee Supreme Court's 2004 disposition of Thompson's competency claim was neither contrary to nor an unreasonable application of clearly established federal law. In reply, Thompson argued that, without an execution date, his competency claim was no longer ripe. On September 16, 2005, the district court lifted the stay of execution to allow the State to file a motion to set an execution date and allow Thompson to raise the issue of his present mental competency in response to the State's motion to set. The district court stayed the habeas proceeding to allow the parties to initiate further state-court proceedings for litigating Thompson's competency for execution, and the Tennessee Supreme Court reset Thompson's execution date for February 7, 2006.

On September 29, 2005, Thompson filed a motion in the Tennessee Supreme Court requesting a stay of execution, citing a "substantial change" in his mental health status since the state court's previous

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competency determination.<sup>3</sup> The Tennessee Supreme Court denied Thompson's motion on December 13, 2005, finding that he had failed to show that there had been "a substantial change in his mental health since the previous determination of his competency that raises a substantial question about his present competency to be executed." (Pet. App. 174a).

On December 21, 2005, Thompson filed a motion in the district court requesting reinstatement of the stay of execution to permit consideration of the merits of his petition for writ of habeas corpus. The district court stayed Thompson's execution on January 5, 2006, and allowed him 30 days to submit any supplemental evidentiary materials considered by the state court. On May 4, 2006, the district court dismissed Thompson's petition, concluding that Thompson's state-court proceedings satisfied *Ford's* due process requirements and that the state-court decisions on Thompson's competency-for-execution claim – both the initial competency determination in May 2004 and the December 2005 determination that Thompson had failed to show a substantial change in his mental health since May 2004 – were neither contrary to or an unreasonable application of clearly established federal

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<sup>3</sup> Under *Van Tran*, if a prisoner has previously been found competent for execution, subsequent *Ford* claims are disallowed unless the prisoner "by way of a motion for stay, provides [the Tennessee Supreme Court] with an affidavit from a mental health professional showing that there has been a substantial change in the prisoner's mental health since the previous determination of competency was made and the showing is sufficient to raise a substantial question about the prisoner's competency to be executed." 6 S.W.3d at 272.

law, nor an unreasonable determination of the facts given the evidence before it. Following an exhaustive review of the evidence presented to the Tennessee courts, the district court concluded:

The evidence before this Court reflects that Thompson suffers from a severe mental illness with psychotic features. In addition, the record indicates that although Thompson is mentally ill and expresses several delusional beliefs, including that his conviction will be reversed and that his gold bars and Grammy Award will mitigate his death sentence, the expert reports reflect that Thompson knows he is sentenced to death for murdering Brenda Lane. In addition, his delusions acknowledge his criminal conviction and impending death sentence. . . .

Thompson's delusions do not consist of a perception that he did not commit the murder or that he did not receive a death sentence for the murder, but rather, his delusions pertain to circumstances he claims will result in him being awarded a new trial and sentencing hearing. Thompson's delusional beliefs do not bear on the question of whether he knows he is sentenced to be executed for committing a murder. Thompson's experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather, that his perception of himself and his perception of the future is at times distorted by a delusional system in which he believes he is a rich song

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writer who will receive a new trial because he was previously a lieutenant in the Navy.

For this Court to grant Thompson's application for a writ on this claim, it must find that the conclusions reached by the trial court and the Tennessee Supreme Court as to Thompson's failure to make a threshold showing that a genuine issue exists regarding his present competency to be executed, and the Tennessee Supreme Court's decision that Thompson failed to demonstrate a substantial change in his mental health since the previous determination of his competency, are objectively unreasonable and contrary to United States Supreme Court precedent or an unreasonable determination of the facts. This Court cannot reach such a conclusion.

Accordingly, Thompson is not entitled to habeas relief on his competency-to-be-executed claim. The conclusions by the state courts that Thompson failed to meet the threshold showing required under *Ford* and *Van Tran* to mandate a hearing and that Thompson failed to demonstrate a substantial change in his mental health since the initial determination of his competency, were not contrary to or an unreasonable application of federal law, nor an unreasonable determination of the facts.

(Pet. App. 105a-107a).

Thompson appealed the district court's judgment to the United States Court of Appeals for the Sixth Circuit.

**4. *Rule 60(b) Proceedings in Thompson's First Habeas Proceeding***

Among the claims summarily dismissed by the district court in its disposition in 2000 of Thompson's original habeas proceeding were four sub-parts of an ineffective-assistance-of-counsel claim that were deemed procedurally defaulted due to Thompson's failure to seek discretionary review to the Tennessee Supreme Court during his state post-conviction appeal. When Thompson appealed the district court's dismissal, however, he did not directly challenge the district court's default determination as to those claims. And, in January 2003, the Sixth Circuit affirmed the district court's judgment. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003). This Court denied Thompson's petition on December 1, 2003, and denied rehearing on January 20, 2004.<sup>4</sup> *Thompson v. Bell*, 540 U.S. 1051 (2003), *reh. denied*, 540 U.S. 1158 (2004).

On January 20, 2006, Thompson filed a motion in the district court requesting relief from the habeas judgment under Fed. R. Civ. P. 60(b), asserting that

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<sup>4</sup> The Sixth Circuit ultimately issued its mandate in the original habeas corpus proceeding on December 1, 2005, following this Court's determination that it had abused its discretion by withholding issuance following the denial of certiorari. *Bell*, 545 U.S. at 804-06.

extraordinary circumstances warranted relief from that portion of the judgment denying relief due to procedural default. Specifically, Thompson argued that Tennessee Supreme Court's 2001 promulgation of Rule 39 "unambiguously establishes that [the district court] erred in holding Thompson's claims were procedurally defaulted for failure to seek discretionary review."

The district court denied the motion on March 27, 2006. (Pet. App. 158a). Applying the rationale in *Gonzalez*, the district court found, first, that Tenn. Sup. Ct. R. 39 did not qualify as an extraordinary circumstance for purposes of Rule 60(b), since "it is hardly extraordinary that subsequently, after petitioner's case was no longer pending, the Tennessee Supreme Court 'arrived at a different interpretation' of what constitutes procedural default." (Pet. App. 165a). The district court further found that, even if Rule 39 did qualify as an extraordinary circumstance, Thompson failed to meet Rule 60's "reasonable time" filing requirement. The district court specifically noted that Thompson waited more than four and one-half years after the enactment of Rule 39 before filing his Rule 60(b) motion. (Pet. App. 167a-168a). Finally, the district court denied a certificate of appealability ("COA") after finding that Thompson failed to make a substantial showing of the denial of a constitutional right. (Pet. App. 172a).

Thompson then applied to the Sixth Circuit for the of issuance of a COA on two issues: (1) whether Thompson presented extraordinary circumstances warranting Rule 60(b) relief; and (2) whether

Thompson's Rule 60(b) motion was filed within a reasonable time. (Pet. App. 183a-184a). On June 19, 2007, the Sixth Circuit granted a limited COA on the issue of "whether the Tennessee Supreme Court's enactment of Tenn. S. Ct. R. 39 is an extraordinary circumstance sufficient to warrant re-opening Thompson's original § 2254 petition." (Pet. App. 65a). However, the court specifically denied Thompson's request to appeal the timeliness question – "We also determine that Thompson's remaining issue does not warrant further review. Consequently, we deny Thompson a COA for that issue." (*Id.*).

### ***5. The Sixth Circuit Reverses Both Habeas Judgments***

In an opinion filed September 11, 2009, the Sixth Circuit reversed the judgments of the district court in both habeas proceedings, remanding them for further proceedings. The court concluded that *Ford* established a clear rule that, for purposes of execution, prisoners are incompetent to be executed "if they are unaware of the punishment they are about to suffer and why they are to suffer it." (Pet App. 15a) (citing *Ford*, 477 U.S. at 422 (Powell, J., concurring)). The court further found that this Court had "clarified" *Ford's* competency-for-execution and "substantial threshold showing" standards in *Panetti v. Quarterman*, 551 U.S. 930 (2007), by imposing, first, a constitutional requirement that a prisoner possess a "rational understanding" of the reason for his execution and, second, a constitutional entitlement to an evidentiary hearing where a prisoner makes a substantial showing of incompetency under that

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standard. (Pet. App. 16a-18a). Under its reading of *Ford* and *Panetti*, the Sixth Circuit thus held unreasonable the Tennessee Supreme Court's rejection of Thompson's alleged delusional beliefs as a basis for a finding of incompetency and further held that the evidence before it "at least created a genuine issue about [Thompson's] competency" that "warrants an evidentiary hearing." (Pet. App. 19a-20a).

As to Thompson's Rule 60(b) motion, the Sixth Circuit concluded that the enactment of Tenn. Sup. Ct. R. 39 is an extraordinary circumstance, because "refusing to recognize it 'would disserve the comity interests enshrined in AEDPA by ignoring the state court's view of its own law.'" (Pet. App. 34a) (citing *In re Abdur'Rahman*, 392 F.3d 174, 187 (6th Cir. 2004), *vacated*, 545 U.S. 1151 (2005) (remanded in light of *Gonzalez v. Crosby*, 545 U.S. 524 (2005))). As to the State's finality interests in its criminal judgment, the Sixth Circuit concluded that the State's interests "must be balanced against the more irreversible finality of [Thompson's] execution, as well as the serious concerns about ineffective assistance that caused [the Sixth Circuit panel] so much angst upon its prior consideration of Thompson's petition." (Pet. App. 37a).

The Sixth Circuit remanded both habeas cases to the district court with instructions for the court to consider the merits of Thompson's remaining ineffective assistance of counsel claims and to address the competency question only if it rejects the ineffectiveness claims on the merits. "If the court rejects the ineffective assistance claims, it must then

conduct an evidentiary hearing to determine Thompson's competency for execution." (Pet. App. 37a-38a).

### REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision disposes of appeals in two separate habeas cases. Both dispositions adversely impact the interests of the State of Tennessee, and both are fatally flawed and warrant review by this Court. First, in rejecting the Tennessee Supreme Court's 2004 competency determination, the decision below conflicts with *Williams v. Taylor*, 529 U.S. 362 (2000), and fails to accord the state-court decision the proper level of deference under 28 U.S.C. § 2254(d). Next, in holding that the promulgation of Tennessee Supreme Court Rule 39 — a rule that, by its terms, merely clarified the state of Tennessee law since 1967 — constitutes an extraordinary circumstance warranting relief from a judgment in a habeas case under Fed. R. Civ. P. 60(b)(6), the decision conflicts with *Gonzalez v. Crosby*, 545 U.S. 524 (2005), which turned away a similar request based on an outright change in the law. Finally, in rejecting the district court's alternate determination that Thompson's Rule 60(b) motion was untimely notwithstanding its merit, the Sixth Circuit's decision exceeds the scope of the certificate of appealability under 28 U.S.C. § 2253(c), contrary to *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In combination, these errors inflict "profound injury" to Tennessee's "all but paramount" interests in the finality of its criminal judgments, thus presenting important federal

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questions worthy of review. *Calderon v. Thompson*, 523 U.S. 538, 556-57 (1998).

This Court has repeatedly stressed the “highly deferential” standard for evaluating state-court decisions under AEDPA. *See, e.g., Renico v. Lett*, \_\_ S.Ct. \_\_, 2010 WL 1740525 (U.S. May 3, 2010); *Berghuis v. Smith*, 130 S.Ct. 1382 (2010); *Smith v. Spisak*, 130 S.Ct. 676 (2010); *Bell v. Cone*, 543 U.S. 447 (2005); *Holland v. Jackson*, 542 U.S. 649 (2004). The damage to Tennessee’s interests is particularly great here. This Court recognized five years ago that the Sixth Circuit failed to accord the appropriate level of respect to the finality of Tennessee’s criminal judgment when it withheld its mandate for months while the State took steps to carry out Thompson’s execution in reliance on the apparent finality of the habeas proceeding. The court now reopens the same case for little more than error-correction that could have occurred on appeal from the district court’s 2000 judgment, while at the same time usurping the role of the Tennessee Supreme Court as to its 2004 competency-for-execution determination. Review of both decisions is warranted.

**I. THE SIXTH CIRCUIT'S DECISION  
CONFLICTS WITH WILLIAMS V. TAYLOR  
AND THE PLAIN LANGUAGE OF 28 U.S.C.  
§ 2254(d)(2), BECAUSE FORD V.  
WAINWRIGHT ESTABLISHED NO  
SUBSTANTIVE STANDARD NOR  
PROCEDURAL FRAMEWORK FOR  
DETERMINING COMPETENCY FOR  
EXECUTION.**

In rejecting the Tennessee Supreme Court's 2004 competency determination, the Sixth Circuit concluded that the state court unreasonably applied the substantive standard of competence for execution established in *Ford v. Wainwright*, 477 U.S. 399 (1986). But *Ford* established no such standard. To the contrary, this Court has repeatedly stressed that there is no uniform definition of competency for execution under its precedent. See *Panetti v. Quarterman*, 551 U.S. 930, 957, 960-61 (2007) ("The opinions in *Ford*, it must be acknowledged, did not set forth a precise standard for competency.") ("[W]e do not attempt to set down a rule governing all competency determinations."). Where a state court has adjudicated a constitutional claim on the merits, habeas corpus relief may be granted only where the state court's decision was contrary to, or an unreasonable application of, "clearly established Federal law, as determined by the United States Supreme Court." 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court made clear that a legal principle is "clearly established" within the meaning of this provision only when it is embodied in a holding of this Court as of the time of the relevant state-court

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judgment. *Id.* at 412; see also *Thaler v. Haynes*, 130 S.Ct. 1171, 1173 (2010); *Carey v. Musladin*, 549 U.S. 70, 74 (2006). Where, as here, there is no clearly established rule, § 2254(d)(1) may not be invoked to invalidate a state-court merits adjudication.

In *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), the Tennessee Supreme Court established both the standard for determining competency for execution in Tennessee and the procedures afforded state prisoners asserting *Ford* claims. Noting the absence of any articulated standard for competence by the *Ford* majority, the state court observed that a number of other states had adopted the standard in Justice Powell's concurrence, often described as the "cognitive test" for competence, ultimately holding, consistent at that time with the states of Arizona, Georgia, Kentucky, New York, Texas and Wyoming, that, "under Tennessee law a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it." *Id.* at 262-63, 266. See *Ford*, 477 U.S. at 422 ("I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.") (Powell, J., concurring). The Tennessee Supreme Court's application of the *Van Tran* standard for competency in Thompson's case is not "contrary to . . . clearly established federal law" under § 2254(d).

*Ford* itself was a splintered decision in which the majority agreed only that the Eighth Amendment "places a substantive restriction on the State's power

to take the life of an insane prisoner.” *Ford*, 477 U.S. at 405. The *Ford* majority did not address the meaning of sanity in this context. Instead, writing for four justices, Justice Marshall stated that the Eighth Amendment “prohibits a State from carrying out a sentence of death upon a prisoner who is insane.” *Id.* at 409-10 (Marshall, J.). Justice Marshall’s plurality in *Ford* did not go so far as to state that there should be a uniform standard for insanity, let alone define such a standard. *Panetti*, 551 U.S. at 970 (Thomas, J., dissenting). The Sixth Circuit in Thompson’s case thus turned to Justice Powell’s concurrence as stating “clearly established” law for purposes of § 2254, reasoning that it was “needed to create a majority,” thereby becoming “the controlling opinion” in *Ford*. (Pet. App. 15a) (citing *Panetti*, 551 U.S. at 949). But the *Ford* majority did not address the meaning of insanity, which was one point that led Justice Powell to write separately. *Id.* at 418 (“The Court’s opinion does not address [the meaning of insanity in this context].”) (Powell, J., concurring). Thus, contrary to the Sixth Circuit’s rationale, there was no “controlling opinion” of this Court as to any standard of competency<sup>5</sup> and, thus, no “clearly established” definition for competency against which to judge the Tennessee Supreme Court’s competency determination

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<sup>5</sup> The Sixth Circuit’s reliance on *Panetti* for this proposition is misplaced. In speaking of Justice Powell’s *Ford* concurrence as controlling, the *Panetti* majority was addressing his opinion regarding the threshold showing required to trigger procedural due process protections, not his proposed competency standard. Indeed, even the *Panetti* Court acknowledged that “the *Ford* opinions did not set forth a precise competency standard.” *Panetti*, 551 U.S. at 933.

under 28 U.S.C. § 2254(d). *Id.* at 960-61 (“Although we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all competency determinations.”).

The Sixth Circuit’s decision turns on its derivation from *Ford* and *Panetti* of a constitutional requirement that condemned prisoners must possess a rational understanding of their impending execution such that the state court’s rejection of Thompson’s alleged delusions as a basis for incompetence rendered its decision unreasonable under *Ford* – “[T]he Tennessee Supreme Court unreasonably applied *Ford* when it determined that Thompson’s ‘severe delusions’ are ‘irrelevant’ to a *Ford* competency analysis.” (Pet. App. 19a). The panel misreads both *Ford* and *Panetti*. First, as already shown, because *Ford* established no substantive standard for competency, logic dictates that the Tennessee Supreme Court could not have unreasonably applied it in Thompson’s case. Moreover, the Court in *Panetti* specifically rejected the notion that it had established a substantive standard for competency. *Panetti*, 551 U.S. at 960-61. And even if it did, the Court’s ruling would still not qualify as “clearly established Federal law” with respect to Tennessee’s disposition of the question three years earlier.

Moreover, to the extent the Sixth Circuit opines that Tennessee’s refusal to hold formal evidentiary proceedings in Thompson’s case constitutes an unreasonable application of *Ford* (“[T]he state courts’ dismissal of Thompson’s petition without conducting an evidentiary hearing was an unreasonable

application of *Ford's* tenets." Pet. App. 18a), that ruling also has no basis in any clearly established rule of this Court. As noted in Justice Powell's opinion, "ordinary adversarial procedures . . . are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." *Ford*, 477 U.S. at 426. Indeed, Justice Powell specifically declined to set "the precise limits that due process imposes in this area," *Ford*, 477 U.S. at 427, and most certainly imposed no requirement that states conduct formal evidentiary proceedings.

[A] constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake.

*Ford*, 477 U.S. at 427 (Powell, J., concurring).

Finally, even if *Ford* and *Panetti* could be read collectively as establishing a substantive competency standard for purposes of habeas review under § 2254(d), the Tennessee Supreme Court's decision could not be viewed as unreasonable, because the delusions asserted in Thompson's case do not "prevent[] him from comprehending the reasons for the penalty or its implications," see *Ford*, 477 U.S. at 417, or undermine his fundamental appreciation of the

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connection between his crime and punishment. In *Panetti*, the prisoner asserted that he was incompetent to be executed because his delusions prevented him from comprehending the reason for his impending execution. Under his belief system, Panetti viewed himself as part of “spiritual warfare” between good and evil and believed that, although the State “is saying that [it wishes] to execute him for [his] murders,” that stated reason was a “sham.” *Panetti*, 551 U.S. at 954-55. Panetti’s “fixed delusion” thus prevented him from any legitimate awareness of the reason for his execution. The Fifth Circuit affirmed the district court’s dismissal of Panetti’s habeas petition in a decision consistent with Fifth Circuit precedent under which “a petitioner’s delusional beliefs – even those which may result in a fundamental failure to appreciate the connection between the petitioner’s crime and his execution – do not bear on the question of whether the petitioner ‘knows the reason for his execution’ for the purposes of the Eighth Amendment.” *Id.* at 958. This Court rejected the Fifth Circuit’s approach as “too restrictive” to afford a prisoner the protections granted by the Eighth Amendment. While acknowledging that *Ford* did not set forth a precise standard for competency, the Court observed that *Ford* “does not foreclose inquiry” into a prisoner’s “rational understanding” of his execution as opposed to simply

his or her awareness of the State's rationale for it.<sup>6</sup> *Id.* at 959.

Here, the Tennessee courts considered evidence of Thompson's delusional beliefs but rejected them as a basis for a finding of incompetency after concluding that those beliefs did not impede Thompson's awareness of the connection between his crime and punishment. Rather, the purported delusions primarily impacted his belief regarding the likelihood that the State would be able to carry out the sentence. In rejecting Thompson's habeas challenge, the district court's opinion highlights this distinction. (Pet. App. 105a-107a). The decision of the Tennessee Supreme Court was reasonable in light of this Court's precedent as of the time of that decision. Review by this Court is warranted.

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<sup>6</sup> It bears noting that, because Panetti's *state-court* competency proceedings had already been deemed constitutionally infirm, the district court's analysis in *Panetti* was *de novo*, and not through the deferential lens of § 2254(d)(1), as in this case. This Court's instructions for proceedings on remand in that case thus have limited precedential value for cases subject to review under §2254(d)(1).

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**II. THE SIXTH CIRCUIT'S DECISION  
CONFLICTS WITH GONZALEZ V.  
CROSBY, BECAUSE THE CLARIFICATION  
OF TENNESSEE APPELLATE  
PROCEDURE CODIFIED IN TENN. SUP.  
CT. R. 39 IS NOT AN EXTRAORDINARY  
CIRCUMSTANCE SUFFICIENT TO  
JUSTIFY RELIEF UNDER RULE 60(b).**

Following this Court's 2005 disposition of the Warden's appeal in his initial habeas corpus proceeding, Gregory Thompson returned to the district court requesting Fed. R. Civ. P. 60(b) relief from his habeas judgment – which concluded that four sub-parts of Thompson's ineffective-assistance-of-counsel claim were procedurally defaulted for failure to present them to the Tennessee Supreme Court – based upon the Tennessee Supreme Court's 2001 enactment of a procedural rule, which, by its terms, merely clarified the state of Tennessee law as it has existed since 1967 that criminal defendants need not appeal their post-conviction action to the Tennessee Supreme Court to exhaust their claims. *See Adams v. Holland*, 330 F.3d 398, 405 (6th Cir. 2003). The district court denied Thompson's motion, finding, first, that the state rule in question did not qualify as an extraordinary circumstance for purposes of Rule 60(b) and, second, that Thompson had failed to meet Rule 60's timing requirements in any event. On appeal, the Sixth Circuit rejected both conclusions and reversed. Under Rule 60(b), Thompson was required to demonstrate extraordinary circumstances justifying relief from the district court's 2000 judgment. However, the Tennessee Supreme Court's enactment of Rule 39 does

not constitute such an extraordinary circumstance in this or any other case.

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court was careful to point out that “several characteristics of a Rule 60(b) motion limit the friction between the Rule and the successive-petition prohibitions of AEDPA” and that these characteristics “ensur[e] that [the Court’s] harmonization of the two will not expose federal courts to an avalanche of frivolous postjudgment motions.” 545 U.S. at 534-535. One of these characteristics of Rule 60(b), the Court observed, is the requirement that a movant seeking relief under Rule 60(b)(6) show “extraordinary circumstances” justifying the reopening of a final judgment. *Id.* “Such circumstances will rarely occur in the habeas context.” *Id.* 545 U.S. at 535.

In *Gonzalez*, this Court held that a later-arising *change* in the law, particularly one coming after the petitioner had abandoned any attempt to seek review of the judgment denying habeas relief, was not such a circumstance.<sup>7</sup> Here, Thompson sought relief on something much less — a mere *clarification* of pre-existing law. In *Adams v. Holland*, 330 F.3d 398 (6th Cir. 2003), the Sixth Circuit recognized that Rule 39 “is merely clarifying the state of Tennessee law as it has existed.” *Id.* at 405. If it was the rule in 1997,

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<sup>7</sup> Gonzalez moved for relief from the judgment denying his habeas petition under Rule 60(b)(6), citing the Supreme Court’s decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), which “showed the error of the District Court’s statute-of-limitations ruling.” *Gonzalez*, 545 U.S. at 536.

while Thompson pursued his post-conviction appeals, that Tennessee prisoners need not seek discretionary review of their claims in the Tennessee Supreme Court in order to exhaust them, then “[i]t is hardly extraordinary that subsequently,” in 2001, the Tennessee Supreme Court promulgated a formal rule to “clarify” the point. *See Gonzalez*, 545 U.S. at 536. Indeed, such a circumstance pales in significance to the intervening legal development at issue in *Gonzalez* and thus most certainly fails to qualify as “extraordinary” so as to justify relief under Rule 60(b).<sup>8</sup> *See also Agostini v. Felton*, 521 U.S. 203, 239 (1997) (“Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6).”).

While the Sixth Circuit cited *Gonzalez* for the general proposition that “[r]elief under Rule 60(b)(6) . . . requires a showing of ‘extraordinary circumstances’ . . . and ‘must be made within a reasonable time,’” it went on to find an extraordinary circumstance contrary to the holding of that case. (Pet. App. 33a-34a). If an intervening *change* in the law will rarely constitute extraordinary circumstances under Rule 60(b)(6) — and *Gonzalez* drives this point home in the

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<sup>8</sup> In *Gonzalez*, the petitioner moved for relief from judgment denying his habeas petition under Rule 60(b)(6) on the basis of *Artuz v. Bennett*, 531 U.S. 4 (2000), which “showed the error of the District Court’s statute of limitations ruling.” *Gonzalez*, 545 U.S. at 536. But the Supreme Court held that the decision in *Artuz*, one that presented a “change in the interpretation of the AEDPA statute of limitations,” did not provide the “extraordinary circumstances” required to be shown to justify relief under Rule 60(b)(6). *Id.*

habeas context — then logic dictates that a bid to reopen habeas proceedings on the basis of something *less than* a change in the law cannot possibly succeed. Moreover, Rule 39 “is all the less extraordinary in [Thompson’s] case, because of his lack of diligence in pursuing review of the [procedural default] issue.” See *Gonzalez*, 545 U.S. at 537. If it was the rule in 1997, while Thompson pursued his post-conviction appeals, that Tennessee prisoners need not seek discretionary review of their claims in the Tennessee Supreme Court in order to exhaust them, then there is *no* excuse for his failure to appeal the district court’s 2000 ruling that his claims were procedurally defaulted for failure to exhaust.<sup>9</sup> Instead, as the district court correctly noted, Thompson waited more than four years after the enactment of Rule 39 before filing a Rule 60 motion in the district court. (Pet. App. 167a). “There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.” *Ackermann v. United States*, 340 U.S. 193, 198 (1950).

The Sixth Circuit passed over its own decision in *Adams* in silence, failing to mention its observation that Rule 39 “works no change to” existing state law. Instead, it concluded that the State of Tennessee’s finality interest in this capital case was less weighty when balanced against the “angst” the Sixth Circuit panel had suffered upon its earlier consideration of Thompson’s ineffective-assistance-of-counsel claim.

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<sup>9</sup> Rule 60(b)(6) will not provide a second chance for review of an issue “where parties have made deliberate litigation choices.” *In re Pacific Far East Lines*, 889 F.2d 242, 250 (9th Cir. 1989) (citing *Klapprott v. United States*, 335 U.S. 601 (1949)).

(Pet. App. 37a). And, rather than applying the holding of *Gonzalez*, the Sixth Circuit based its ruling on a pre-*Gonzalez* decision of the Sixth Circuit that had been vacated by this Court and remanded for further consideration in light of *Gonzalez*:

Although the Supreme Court subsequently vacated that opinion in *Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005) (*Abdur'Rahman II*), the rationale behind our finding in *Abdur'Rahman I* remains valid.

(Pet. App. 33a).<sup>10</sup>

In 2005, however, this Court held that the Sixth Circuit had abused its discretion when it withdrew its initial 2003 opinion before issuance of the mandate and issued an amended opinion vacating the district court's judgment and remanding the case for an evidentiary hearing on petitioner's ineffective-assistance-of-counsel claim. In reaching that

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<sup>10</sup> In *In re Abdur'Rahman*, a 7-6 majority of the Sixth Circuit determined in 2004 that the promulgation of Rule 39 was an extraordinary circumstance sufficient to warrant relief under Rule 60(b)(6). 392 F.3d 174, 186 (6th Cir. 2004). Just five days after deciding *Gonzalez*, however, this Court vacated that decision and remanded for further consideration in light of *Gonzalez*. *Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005). Since the Sixth Circuit had already determined, consistent with *Gonzalez*, that petitioner's motion did not constitute a successive habeas application, 392 F.3d at 182, the only possible purpose for the Court's vacatur and remand was for the court to reconsider, in light of *Gonzalez*, its secondary determination that petitioner's motion presented proper grounds for relief under Rule 60(b)(6).

conclusion, the Court gave particular attention to Tennessee's finality interest:

Tennessee expended considerable time and resources in seeking to enforce a capital sentence rendered 20 years ago, a sentence that reflects the judgment of the citizens of Tennessee that Thompson's crimes merit the ultimate punishment. By withholding the mandate for months-based on evidence that supports only an arguable constitutional claim-while the State prepared to carry out Thompson's sentence, the Court of Appeals did not accord the appropriate level of respect to that judgment.

*Bell v. Thompson*, 545 U.S. 794, 812-13 (2005); *see also Gonzalez*, 545 U.S. at 535 ("This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved.") (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting)).

The State's finality interests are even stronger now. The Sixth Circuit's mandate on the original habeas action issued in 2005, leaving only the question of whether the Tennessee Supreme Court's determination that Thompson is competent for execution is unreasonable under the standard set forth in 28 U.S.C. § 2254(d), a question presented *supra*. A state's heightened interest in going forward with its criminal processes at this stage was highlighted in Justice Powell's concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986):

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[T]he Eighth Amendment claim at issue [competency for execution] can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. *Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime.* That interest is not called into question by petitioner's claim. Rather, the only question raised is not *whether*, but *when*, his execution may take place. *This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all.*

*Ford*, 477 U.S. at 425 (Powell, J., concurring) (emphasis added).

The Sixth Circuit's decision ignores the import of *Gonzalez* and fails to acknowledge the plain language of Tenn. Sup. Ct. R. 39 that the rule worked no change to Tennessee's legal landscape. The Sixth Circuit's rationale cannot be reconciled with *Gonzalez*, and review by this Court is warranted.

**III. THE SIXTH CIRCUIT'S DECISION  
CONFLICTS WITH MILLER-EL V.  
COCKRELL AND 28 U.S.C. § 2253(c),  
BECAUSE THE DECISION EXCEEDS  
THE SCOPE OF THE CERTIFICATE OF  
APPEALABILITY.**

The Sixth Circuit's decision also warrants review because it exceeds the scope of the certificate of appealability ("COA") — and thus the Court's

jurisdiction — under 28 U.S.C. § 2253(c). This Court made clear in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), that a COA is a jurisdictional prerequisite in an appeal from a final order in a habeas proceeding under § 2254. “[U]ntil a COA has been issued, federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.” 537 U.S. at 336. Moreover, § 2253(c)(3) mandates that the COA “shall indicate which specific issue or issues satisfy the showing required . . . .”

The district court denied Thompson’s Rule 60(b) motion on two alternative bases: first, that Tenn. Sup. Ct. R. 39 did not qualify as an extraordinary circumstance for purposes of Rule 60(b)(6) and, second, even if it did so qualify, that Thompson had failed to meet the “reasonable time” filing requirements under Rule 60(c). (Pet. App. 166a). The district court denied a certificate of appealability (“COA”) in its entirety after finding that Thompson failed to make a substantial showing of the denial of a constitutional right. (Pet. App. 172a). Thompson then applied to the Sixth Circuit for issuance of a COA on two issues: (1) whether Thompson presented extraordinary circumstances warranting Rule 60(b) relief; and (2) whether Thompson’s Rule 60(b) motion was filed within a reasonable time. (Pet. App. 183a-184a). On June 19, 2007, the Sixth Circuit granted a limited COA as follows:

We conclude that the following issue merits further review by this court, and we grant a COA for the issue: whether the Tennessee Supreme Court’s enactment of Tenn. S. Ct. R.

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39 is an extraordinary circumstance sufficient to warrant re-opening Thompson's original § 2254 petition.

*We also determine that Thompson's remaining issue does not warrant further review. Consequently, we deny Thompson a COA for that issue.*

(App. 65a) (emphasis added).

Despite expressly denying a COA as to the timeliness of Thompson's Rule 60 motion, the Sixth Circuit addressed the issue anyway, concluding, contrary to the district court, that the reasons for Thompson's delay in bringing his Rule 60(b) motion were "understandable"<sup>11</sup> (Pet. App. 35a). But, as the district court's order makes clear, the timeliness of Thompson's Rule 60(b) motion was unrelated to its merits and stands as an independent basis for denial of the motion. The Sixth Circuit lacked jurisdiction to review the district court's denial of Thompson's Rule 60 motion as untimely and, thus, had no alternative but to affirm the judgment of the district court. Review is thus warranted.

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<sup>11</sup> In dissent, Judge Suhrheinrich disputed this conclusion of the panel majority, asserting that, "Thompson had many reasonable opportunities and sufficient notice to bring his Rule 60(b) motion well before this eventual January 20, 2006 filing." (Pet. App. 55a).

**CONCLUSION**

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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