No. 07-___

IN THE
Supreme Court of the United States

GARY BRADFORD CONE,
Petitioner,

v.

RICKY BELL, WARDEN,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE – NO DATE OF EXECUTION SET

QUESTIONS PRESENTED

On state post-conviction review, the Tennessee courts refused to consider petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), on the ground that the claim had already been "previously determined" in the state system. On federal habeas, a divided panel of the Sixth Circuit held that the state courts' ruling precluded consideration of the *Brady* claim. The court of appeals reasoned (in conflict with decisions of five other circuits) that the claim had been "procedurally defaulted." The court of appeals further reasoned (widening an existing four-to-two circuit split) that the state courts' ruling was unreviewable. Seven judges dissented from the denial of rehearing en banc.

The question presented is whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of *Brady v. Maryland*, which encompasses two subquestions:

1. Is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts?

2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Bradford Cone respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the en banc court of appeals denying the petition for rehearing en banc (Pet. App. 1a-5a) is reported at 505 F.3d 610. The panel decision (Pet. App. 6a-47a) is reported at 492 F.3d 743. A prior ruling of the panel (Pet. App. 48a-85a) is reported at 243 F.3d 961. The memorandum order of the district court (Pet. App. 86a-132a) is unreported.

JURISDICTION

The opinion and judgment of the court of appeals was filed on June 19, 2007. The order denying petitioner's timely petition for rehearing en banc was entered on September 26, 2007. Justice Stevens granted an application to extend the time to file this petition until February 23, 2008, a Saturday. The petition was accordingly due on the next business day, February 25, 2008. *See* S. Ct. R. 30. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 2254 of Title 28 of the United States Code states in relevant part:

> (d) 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 . . . .

STATEMENT

In this case, the State suppressed substantial exculpatory evidence that went to the heart of the petitioner's defense both at trial and at the capital sentencing phase. Although pressed by petitioner at every opportunity, both the state courts and the Sixth Circuit have refused to consider that claim – but only for mistaken and inconsistent reasons that the State cannot and pointedly does not defend. The central question in this case is whether petitioner will ever have the opportunity to receive federal court review of this fundamental claim. The Sixth Circuit's denial of rehearing en banc over the dissenting votes of seven judges and the circuit conflicts created by its decision demonstrate the importance of the question and the necessity of this Court's review.

1. Petitioner is a Vietnam War veteran and recipient of the Bronze Star. Unfortunately, post-traumatic stress disorder, combined with drug abuse, led him to crime. In 1982, a Tennessee jury convicted petitioner of first-degree and felony murder, as well as other charges, arising from his robbery of a jewelry store and subsequent flight from police, which resulted

in the deaths of two individuals. At trial, petitioner did not deny that he had committed the charged acts. Instead, his whole defense was that he did not have the specific *mens rea* necessary for a conviction for capital murder, or that he at least should not be subject to a sentence of death, because his actions were the product of an amphetamine psychosis: post-traumatic stress disorder, combined with a debilitating drug addiction that had begun during the Vietnam War.

At trial, petitioner called three witnesses in support of his defense, including two expert clinicians. Dr. Matthew Jaremko, a clinical psychologist, testified that petitioner suffered from "a substance abuse disorder . . . that is superimposed upon a post-traumatic stress disorder." CA6 J.A. 34. Dr. Jonathan Lipman, a neuro-pharmacologist, testified that petitioner's drug abuse had become so serious that petitioner suffered from "chronic amphetamine psychosis." *Id.* at 53.

The State responded by attacking the premise that petitioner was a drug user at all, much less a drug addict. It maintained that petitioner's experts had relied only on petitioner's own assertions regarding his alleged drug use and aggressively attacked those assertions as "balony [*sic*]" (*id.* at 124). To attempt to establish that petitioner had no relevant drug problem, the State called several witnesses. The officer who processed petitioner upon his arrest – Ralph Roby – testified that he had seen no sign petitioner was a drug user. An FBI agent who interviewed petitioner after his capture – Eugene Flynn – testified that petitioner did not then act as if he were mentally ill or on drugs. A companion of petitioner – Ilene Blankman

– testified that she had seen no sign of petitioner using drugs. The jury convicted petitioner on all charges.

At sentencing, the State sought the death penalty on the basis of several aggravating circumstances. Petitioner's argument in mitigation mirrored the claim he made in the guilt phase – that he had committed the crimes while in the throes of an amphetamine psychosis. Petitioner's counsel referred the jury to the evidence previously presented and argued that petitioner committed the crimes while "under the influence of extreme mental or emotional disturbance." J.A., S. Ct. No. 01-400, *Cone v. Bell*, 2002 WL 32102936, at *24a. The jury found that aggravating factors outweighed mitigating factors, and sentenced petitioner to death.

The Tennessee Supreme Court affirmed the conviction and sentence on direct review. In so holding, the court underscored the significance of the evidentiary issue of petitioner's mental state to the case:

> The only defense interposed on his behalf was that of insanity, or lack of mental capacity, due to drug abuse and to stress arising out of his previous service in the Vietnamese war, some eleven years prior to the events involved in this case. This proved to be a tenuous defense, at best, since neither of the expert witnesses who testified on his behalf had ever seen or heard of him until a few weeks prior to the trial. Neither was a medical doctor or psychiatrist, and neither had purported to treat him as a patient. Their testimony that he lacked mental capacity was based purely upon his personal

> recitation to them of his history of military service and drug abuse.

State v. Cone, 665 S.W.2d 87, 90 (Tenn. 1984).

2. After the conclusion of direct review, petitioner filed a timely petition for state post-conviction relief. While his timely petition was pending before the trial court, he filed an amendment that included a brief argument that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding exculpatory evidence bearing directly on the disputed question of petitioner's mental state.

While the petition was pending, state law for the first time granted petitioner the right to review the district attorney's file in his case. *See Capital Case Resource Ctr. of Tenn. v. Woodall*, No. 01-A-019104CH00150, 1992 WL 12217 (Tenn. Ct. App. Jan. 29, 1992) (state public records law requires disclosure of police and prosecutorial files). The file revealed a wide array of exculpatory evidence suppressed by the State that bore directly on petitioner's defense and argument in mitigation. Other evidence would have impeached the state's witnesses. For example, directly contrary to Officer Roby's testimony that he saw no sign of petitioner's drug use, a series of police teletypes he authorized described petitioner as a "drug user" and "heavy drug user." Contrary to the testimony of Agent Flynn, police reports stated that, both during and after the robbery, petitioner looked "frenzied," "wild-eyed," and like a man on drugs. Contrary to the prosecution's attempt to paint Ms. Blankman as neutral or even a friend of petitioner, correspondence indicated that the State had aggressively courted her. *See generally infra* at 28-29 (further describing the evidence).

Petitioner promptly amended his state post-conviction application twice to set forth a more detailed and elaborate allegations raising the State's *Brady* violation. State law permitted those amendments because the basis for the claims had not previously been available to petitioner.[1]

The State responded that the state post-conviction court should not address petitioner's amended *Brady* claim because that claim had already been decided against petitioner. At that time, Tennessee law barred state courts from hearing a claim for post-conviction relief that had been "previously determined," in that it had been the subject of a ruling on the merits "after a full and fair hearing" on direct review or in earlier state post-conviction proceedings. Tenn. Code Ann. §§ 40-30-111 to 30-112 (1990) (repealed).

In asserting that the *Brady* claim had been previously determined, the State did not point to any disposition of the *Brady* claims arising from the prosecutorial file, but instead relied on an earlier state supreme court ruling that addressed the distinct question whether the State had violated a state procedural rule

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[1] According to state law at the time, a ground for post-conviction relief that had not previously been presented was only forgone if the petitioner "knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground *could have been* presented." Tenn. Code Ann. § 40-30-112(b)(1) (1990) (repealed) (emphasis added). The Tennessee Supreme Court explained that "the waiver provision cannot logically or legally 'apply to a defense [or grounds for relief] . . . which did not exist and could not have been asserted by the most diligent counsel at the [prior] hearing.'" *Swanson v. State*, 749 S.W.2d 731, 735 (Tenn. 1988) (bracketed alterations made in *Swanson*).

by not disclosing witness statements prior to cross-examination. Resp. to Pet. for Post-Conv. Rel. at 2, *Cone v. State*, No. P-06874 (Tenn. Crim. Ct. Aug. 12, 1993). Notwithstanding that the alleged prior ruling did not involve *Brady* and concerned entirely different evidence, the state court denied petitioner's application, summarily concluding that his *Brady* claims (as well as other claims) could not be further considered because they had been "heretofore determined and denied." *Cone v. State*, P-06874, slip op. at 6 (Tenn. Crim. Ct. Dec. 16, 1993).

The state court of appeals affirmed, summarily concluding that the *Brady* claim was "previously determined either on direct appeal or in the appellant's first petition." *Cone v. State*, 927 S.W.2d 579, 580-81 (Tenn. Crim. App. 1995). The state supreme court denied review.

3. Petitioner timely sought federal habeas relief. At the outset, the district court ordered the FBI to release any files relevant to petitioner's case. Those files included still further evidence that supported petitioner's defense at both the guilt and sentencing phases and impeached the State's witnesses: a series of FBI bulletins, authorized by prosecution witness Agent Flynn, that identified petitioner as a drug user, and a notice reporting that petitioner had been caught with amphetamines while in prison.

Petitioner's federal habeas petition reiterated his *Brady* claim arising from the evidence contained in the district attorney's files, as well as evidence newly uncovered in the FBI files.

In response, the State abandoned its previous argument. It no longer defended the state habeas court's ruling that petitioner's claim had been raised and previously determined in earlier proceedings. Instead, the State argued that the claim had actually been waived, and attempted to couch the state court ruling in those terms. In so arguing, the State directed the district court *not* to the state court of appeals' discussion of the paragraphs of petitioner's state post-conviction application addressing his *Brady* claim and its supposed prior determination, but instead to that court's general statement that "'all claims raised in his second petition for post-conviction relief *which had not been previously determined*'" were waived. CA6 J.A. 645-46 (emphasis added).

The district court accepted that argument, concluding that the State had rejected the *Brady* claim as "waived and that decision was affirmed on appeal." Pet. App. 102a. The district court also characterized petitioner's initial *Brady* claim as composed of only "conclusory assertions." *Id.* at 112a. But the district court rested that conclusion entirely on petitioner's initial, brief invocation of *Brady*, ignoring the later *amended Brady* claim stated by petitioner that contained significant details.

4. The court of appeals affirmed on other grounds. Characterizing the issue as "a difficult question," Pet. App. 57a, the court held that petitioner's *Brady* claim had been denied on an "'independent and adequate' state ground" based on "the state court's finding that Cone's claims were previously determined or waived," *id.* at 59a. In so holding, the panel ruled that the federal courts were powerless to determine

whether the state court had erred in holding that petitioner's claim was previously determined, reasoning that "we will not review a claim that has been determined under an independent and adequate state ground." *Id.* at 60a.

The court of appeals, however, granted relief on ineffective assistance of counsel grounds. This Court reversed. 535 U.S. 685 (2002). On remand, the court of appeals held that the State had employed an unconstitutional aggravating factor. This Court again reversed. 543 U.S. 447 (2005).

5. a. On remand, the court of appeals again addressed petitioner's *Brady* claim. The State did not defend the panel's prior conclusion that the state courts had deemed the claims previously determined. Instead, it continued to argue that the claims had never been properly presented to the state courts, and that petitioner had not identified "any justifiable cause for his failure to raise the . . . claims in a timely manner in state court." State's 2d Supp. Br. at 9, *Cone v. Bell*, No. 99-5279 (6th Cir. Mar. 11, 2005).

The court of appeals rejected the State's argument. Instead, a divided panel held that petitioner was barred as a matter of law from securing federal habeas relief because the state courts had found – however erroneously – that his *Brady* claims had been previously determined. "The Tennessee courts held that Cone's *Brady* claims were previously determined under [the state's procedural] rule, and [the panel's prior decision] found that Cone's claims were therefore procedurally defaulted." Pet. App. 22a. The state courts' "holding amounted to an independent and adequate state law ground *barring our considering* the

claims." *Id.* at 18a (emphasis added). The majority adhered to that ruling: "If the state court decides the petitioner's claims on an adequate and independent state ground, such as a state procedural rule, the petitioner's claims are considered procedurally defaulted and he is barred from seeking federal habeas relief." *Id.*; *see also id.* at 24a ("We again find that Cone's claims are procedurally defaulted and we reject Cone's request to reconsider his *Brady* claims.").

In passing, the court of appeals remarked that, in its view, the evidence was not *Brady* material because it "would not have overcome the overwhelming evidence of Cone's guilt" and in particular "the persuasive testimony that Cone was not under the influence of drugs" at the time of the crimes. Pet. App. 25a. The majority concluded that "[i]t would not have been news to the jurors[] that Cone was a 'drug user.'" *Id.*

b. Judge Merritt dissented. Pet. App. 31a-47a. As he explained, "[f]our courts – two state courts and two federal courts – have now misconstrued the record and declined to hear the merits after invoking the doctrine of 'procedural default.'" *Id.* at 32a-33a. He recognized that the state courts had erred in deeming petitioner's *Brady* claims to have been "previously determined." The state courts had genuinely "overlooked" that petitioner had in fact amended his post-conviction application to include a detailed *Brady* claim, and "the State trial court and Court of Appeals mistakenly asserted that the claims had been 'previously determined' at earlier stages of the review process." *Id.* at 32a. As a consequence, "no court, state or federal, has as yet reviewed the claim on the merits." *Id.*

Judge Merritt further characterized the State's argument that petitioner had never presented his *Brady* claim to the state courts "as a deliberate falsehood." Pet. App. 40a. The record, Judge Merritt explained in detail, demonstrates the contrary, as petitioner set forth the claim upon finally being provided the suppressed evidence. *Id.* at 40a-46a.

With respect to the majority's suggestion that the withheld evidence was not material, Judge Merritt found that determination to have been made "without any analysis of the record, or the *Brady* and mitigation lines of cases," and noted that the majority had "state[d] no basis for its conclusory statement." Pet. App. 46a. In his view, "[t]he undisclosed, withheld documents" were a persuasive answer to "the prosecutor's false, death knell" argument that petitioner had no evidence supporting his claim to have been acting while in a state of drug-induced psychosis. *Id.*

6. Petitioner sought rehearing en banc. The full court denied rehearing en banc over the dissent of seven judges. Pet. App. 1a-5a. The seven dissenters emphasized that the State had abandoned the rationale advanced by the state post-conviction courts for not hearing petitioner's *Brady* claims – namely, that those claims had been previously addressed and determined. Furthermore, respondent's assertion to the Sixth Circuit panel that petitioner had not presented his *Brady* claim to the state courts misstated the case's history by ignoring the detailed claim in his amended post-conviction application. Respondent acknowledged the error and pointedly advised the Sixth Circuit that "[t]he attorney who authored the State's principal

brief" was no longer employed by the State. Resp. Br. in Opp. to Rhg. 7 n.7.

The dissenters criticized the State for having switched gears, as the State was now arguing *yet another* position: that although petitioner had been entitled to raise his *Brady* claim before the state post-conviction court, even his amended post-conviction application had failed to do so in sufficient detail. The dissenters explained that, in their view, the State's newest position was as meritless as all its previous litigating positions had been, because it would impose a stringent pleading requirement that is contrary to "pleading rules in habeas cases under both Tennessee and federal law." *Id.* at 4a. "Cone's lawyers have tried diligently to comply only to be confronted by a prosecutorial smoke screen designed to obscure, confuse and mislead the court." *Id.*

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding rests on the dual propositions that (i) federal courts have no power to review a state court's ruling that a *Brady* claim was "previously determined," and (ii) that previous determination of a claim amounts to procedural default. Pet. App. 18a-19a. Those rulings warrant this Court's review. Indeed, the decision is so profoundly wrong that the State has not defended *either* of those rulings. That is for good reason: both holdings squarely conflict with this Court's precedents and decisions of other circuits, and each of those errors independently requires reversal.

First, the court of appeals' holding that previous determination of a claim in state court bars federal

court review gets habeas law exactly backwards. State-court exhaustion of a claim is generally a *prerequisite*, not a *barrier*, to the filing of a petition for a writ of habeas corpus in federal court. A defendant who has properly exhausted a federal claim does not somehow default that claim by unnecessarily raising it a second time before the state courts. Second, the law is well-established that a procedural-default finding does not preclude federal habeas review if the state court has not correctly or consistently applied its procedural rule. Here, even the most cursory examination would have revealed that petitioner's *Brady* claims had been ignored, not determined, in prior state court proceedings. Such a profound departure from foundational habeas corpus principles in a death penalty case, and in conflict with precedent of this Court and other courts of appeals, merits further review by this Court.

I. Certiorari Is Warranted To Resolve The Conflicts Between The Rulings Below And The Decisions Of This Court And Of Other Courts Of Appeals.

A. The Sixth Circuit's Ruling That A Claim "Previously Determined" By The State Courts Is "Procedurally Defaulted" For Purposes Of Federal Habeas Corpus Conflicts With The Rulings Of Other Courts.

The court of appeals' holding that petitioner's consistently presented but never resolved *Brady* claims had been procedurally defaulted stands federal habeas corpus law on its head, in conflict with the holdings of numerous other circuits.

A federal constitutional claim generally is not cognizable in federal habeas if the state courts have denied the claim on an adequate and independent state ground, absent a showing of cause and prejudice or that failure to consider the claim will produce a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Harris v. Reed*, 489 U.S. 255, 260-63 (1989). In this case, the Sixth Circuit denied petitioner's post-conviction application because the state courts ruled that the *Brady* claim had been "previously determined" and thus could not be reconsidered. 927 S.W.2d at 580-81 (Tenn. Crim. App. 1995); *Cone v. State*, P-06874, slip op. at 6 (Tenn. Crim. Ct. Dec. 16, 1993). On that basis, the court of appeals held that petitioner's federal habeas claims were "procedurally defaulted," and there thus was "an independent and adequate state law ground barring our considering the claims." Pet. App. 18a.

That was profoundly wrong. The state courts decided only that their previous determination of petitioner's *Brady* claims precluded reconsideration of those same claims by the state courts as a matter of state law.[2] That state-court ruling *opens* the door to federal habeas review; it does not close it. The previous determination of a federal claim establishes that the claim has been *exhausted* in the state system, not that it has been *defaulted*. The court of appeals' contrary view leads to the illogical conclusion that claims

[2] As noted, the state courts had not, in fact, previously decided petitioner's *Brady* claims. The relevant point here, however, is that, even if those claims *had* been "previously determined," they were nonetheless not defaulted for purposes of federal habeas review.

presented twice to a state court system – claims that have been doubly exhausted – have somehow been forfeited just because state law (as it commonly does) bars reconsideration the second time around.

A procedural default occurs not when a claim has been presented twice to the state courts, but when "a habeas petitioner . . . has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 732. The procedural default rule is meant to "ensure[] that the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Id.* Those concerns have no application when, as here, the state's procedural ruling rests upon a determination that the state courts *have* ruled on the merits of the claim.

Indeed, the court of appeals' decision cannot be reconciled with this Court's decision in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which specifically addressed the situation in which a "later state decision rests upon a prohibition against further state review – for example, . . . preventing the relitigation on state habeas of claims raised on direct appeal." *Id.* at 804 n.3. This Court concluded that, "[s]ince a later state decision based upon ineligibility for further state review *neither rests upon procedural default* nor lifts a pre-existing procedural default, *its effect upon the availability of federal habeas is nil*." *Id.* (emphasis added).

The Sixth Circuit's ruling likewise conflicts with the decisions of five other courts of appeals. In *Brecheen v. Reynolds*, 41 F.3d 1343, 1358 (10th Cir. 1994), the Tenth Circuit hewed to *Ylst* and held that, "[i]f a state court addresses the merits of a particular federal

claim on direct appeal, . . . then its subsequent refusal to grant 'further' state review in an application for postconviction relief should be given no effect and does not constitute a procedural bar for purposes of federal habeas corpus review."

The Fifth Circuit has similarly followed *Ylst*, holding that "[a] state's refusal to listen to a habeas claim because it was decided on direct appeal does not impose a procedural bar to federal review of the constitutional issue." *Bennett v. Whitley*, 41 F.3d 1581, 1582 (5th Cir. 1994). Such a rule, the Fifth Circuit explained, "is not a procedural bar in the traditional sense," and thus "[i]t did not bar the district court from addressing the merits of" the petitioner's claims. *Id.* at 1583; *see also, e.g.*, *Guillory v. Cain*, No. 05-30894, 2007 U.S. App. LEXIS 23613, at *5-6 (5th Cir. Oct. 8, 2007) (noting that the court had twice reversed a denial of habeas relief, when the district court mistakenly perceived a procedural default based on a rule against reconsideration).

Other circuits have also held that application of a rule against reconsideration does not amount to a procedural bar. The Ninth Circuit holds that a state finding of "[p]reclusion" based on prior adjudication "does not provide a basis for federal courts to apply a procedural bar." *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996); *see also Maxwell v. Sumner*, 673 F.2d 1031, 1034-35 (9th Cir. 1982) (when, under state law, claims were rejected on direct appeal and barred from reconsideration in state habeas, the petitioner is "not barred from seeking federal habeas relief" because the "claim had been considered and rejected on the merits on direct appeal").

The Second Circuit, in turn, expressly adopted *Maxwell*'s logic and holding in *Silverstein v. Henderson*, 706 F.2d 361 (2d Cir. 1983), holding that a state court ruling that a claim "was previously determined . . . does not constitute a finding of procedural default that would bar federal consideration." *Id.* at 368.

Relatedly, the Seventh Circuit has rejected procedural default when state law principles of *res judicata* barred reconsideration of prior decisions denying federal constitutional claims. *Davis v. Lambert*, 388 F.3d 1052, 1058 (7th Cir. 2004) ("'[W]e have repeatedly held that *res judicata* is not a bar to consideration of claims in a federal habeas action.'") (quoting *Moore v. Bryant*, 295 F.3d 771, 776 n.1 (7th Cir. 2002), and citing *Patrasso v. Nelson*, 121 F.3d 297, 301 (7th Cir. 1997)); *see also Porter v. Gramley*, 112 F.3d 1308, 1316 (7th Cir. 1997).

In short, had petitioner's habeas petition been filed within the Second, Fifth, Seventh, Ninth, or Tenth Circuits, his *Brady* claims would have been considered. The ability of federal courts to enforce the Constitution and to adjudicate properly preserved *Brady* claims in habeas corpus should not turn upon accidents of geography, particularly when the petitioner is under a sentence of death.

B. The Sixth Circuit's Ruling That A Federal Habeas Court Cannot Determine The Correctness Of A State Court's Ruling That A Claim Has Been Procedurally Defaulted Conflicts With Decisions Of This Court And Other Courts Of Appeals.

In addition to applying a rule of procedural default that has been rejected by numerous other courts of appeals, the Sixth Circuit erred in holding, contrary to decisions of this and other courts, that the district court lacked the power to examine the state courts' application of a procedural bar rule.

1. The Sixth Circuit's refusal to look behind the Tennessee courts' assertion of a procedural bar to review – the claim of prior determination – cannot be reconciled with *Coleman v. Thompson*, *supra*. In *Coleman*, this Court held that "federal habeas courts must *ascertain for themselves* if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds." 501 U.S. at 736 (emphasis added). This means that, just as this Court would do on direct review of a state-court criminal judgment, a federal habeas court must examine for itself "'whether the asserted non-federal ground independently and *adequately* supports the [state court] judgment.'" *Id.* (quoting *Michigan v. Long*, 463 U.S. 1032, 1038 (1983)) (emphasis added). A state appellate court's decision "to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court" is not an adequate state-law basis for denying review. *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam).

The federal courts' obligation to consider for themselves whether a rule of procedural bar was properly invoked is reflected in the settled principle that only firmly established and consistently applied procedural rules will result in bar. For example, in *Ford v. Georgia*, 498 U.S. 411 (1991), the state courts applied "a sensible rule" that "any *Batson* claim [must] be

raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths." *Id.* at 422. The state court furthermore deemed that requirement "to be a 'valid state procedural bar' to [the] petitioner's claim." *Id.* This Court, however, looked behind the state court's finding of default and rejected it, concluding that the state's procedural requirement was not firmly established at the time the petitioner had been tried. *Id.* at 425.

Thus, a state court's mere invocation of a procedural barrier to review does not tie the federal court's hands. Whether a rule is a genuinely "adequate" or "independent" ground for decision is a question of federal law for federal courts to determine. A rule that, as here, was misapplied to an inapplicable context presents no more of a barrier to federal rule than an inconsistently applied state rule.

2. The Sixth Circuit's ruling deepens a conflict in the circuits. The Fourth Circuit, like the court of appeals here, has held that a state court's finding of a procedural default that merely purports to invoke an independent and adequate state ground is binding on a federal court. *See Burket v. Angelone*, 208 F.3d 172, 184 (4th Cir. 2000); *Fisher v. Angelone*, 163 F.3d 835, 844, 854 n.11 (4th Cir. 1998); *Williams v. French*, 146 F.3d 203, 209 (4th Cir. 1998); *Ivey v. Catoe*, 36 Fed. Appx. 718, 726 (4th Cir. 2002); *Strickler v. Pruett*, No. 97-29, 1998 U.S. App. LEXIS 12805, at *33-34 (4th Cir. July 17, 1998) (per curiam); *Barnes v. Thompson*, 58 F.3d 971, 974 n.2 (4th Cir. 1995). The Fifth Circuit

adopted the holding of *Barnes* in *Smith v. Johnson*, 216 F.3d 521 (5th Cir. 2000) (per curiam).[3]

But four courts of appeals have held the opposite. In the closely analogous case of *Scott v. Mullin*, 303 F.3d 1222 (2002), the Tenth Circuit reached the merits of the petitioner's *Brady* claim, notwithstanding the state court's determination that the claim had been waived. The Tenth Circuit concluded that the waiver holding was erroneous because the petitioner had not known of the *Brady* material at the time of his direct appeal and the state had thus erred, under state law, in not finding cause for failing to raise the claim previously. *Id.* at 1229-30.

Similarly, in *Williams v. Lane*, 826 F.2d 654 (1987), the Seventh Circuit concluded that a state court procedural ruling does not constitute an "independent and adequate state procedural ground" barring federal review when "the [state] court chooses to ignore the fact that the petitioner has fully complied with the state's articulated procedural rules and simply deems the petitioner's claim waived." *Id.* at 660; *see also id.* ("It is clear from the record that petitioner complied with" Illinois' requirement that defendants preserve claims for appeal by making timely objections to them at the trial level.).[4]

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[3] In two unpublished decisions, the Sixth Circuit has applied the Fourth Circuit's decision in *Barnes*. *See Cooey v. Coyle*, No. 98-3050, 2000 U.S. App. LEXIS 38700, at *63-*64 (6th Cir. Oct. 12, 2000) (citing *Taqwiim v. Johnson*, No. 99-3425, 2000 U.S. App. LEXIS 22254, at *10-*11 (6th Cir. Aug. 22, 2000)).

[4] The First Circuit has cited the *Williams* rule with approval in considering the merits of the state court's finding of default. *Gilday v. Callahan*, 59 F.3d 257, 274 (1995).

Eleventh Circuit law is in accord. That court has held that, when a state court's procedural default ruling was based on a factual finding, that factual finding is subject to review (albeit deferential review) by the federal habeas court. *Francois v. Wainwright*, 741 F.2d 1275, 1280 (1984); *see also Cooper v. Wainwright*, 807 F.2d 881, 885-88 (11th Cir. 1986) (holding that, although the state supreme court had ruled the petitioner's constitutional claim barred for not having been raised on direct appeal, federal review of the claim was nevertheless appropriate, because the record demonstrated that the claim had in fact been addressed on appeal).

Relying on *Williams* and *Francois*, the Second Circuit has held that the federal habeas court may inquire whether there is a "fair or substantial basis" for the state court's finding of a procedural default. *Garcia v. Lewis*, 188 F.3d 71 (1999).

There is, in short, substantial inconsistency in the decisions of the federal courts of appeals concerning whether or not habeas courts should examine the merits of a state court's application of a procedural bar rule. Only this Court's review can bring the uniformity to federal habeas corpus law that is needed to protect the interests both of petitioners and the States.

Moreover, that divergence in court of appeals' law had a material impact on the outcome of this case. Had the Sixth Circuit considered the adequacy of the Tennessee courts' determination that petitioner's *Brady* claims had been procedurally defaulted, the erroneousness of the decision would have been obvious. Indeed, the basis on which the state courts ruled is so facially incorrect that the State notably does not de-

fend it. The state courts simply could not have previously decided a *Brady* claim that did not exist until *after* the state courts' prior rulings, when petitioner received access to the district attorney's files.

C. Petitioner's *Brady* Claims Have Been Properly Presented And Preserved.

In federal court, the State abandoned its original argument that petitioner's *Brady* claim was procedurally defaulted and argued, instead, that petitioner had waived the claim by not raising it in the state courts. That argument is not only wrong, but is wholly irreconcilable with the state courts' ruling that the claim was barred *because it had been previously raised and determined*. Notably, the Sixth Circuit found no merit in the State's assertion of waiver, but instead considered itself bound to accept rotely the state courts' mistaken and undefended conclusion that petitioner's *Brady* claim was procedurally defaulted because it had been "previously determined" in state court. Pet. App. 18a. A prisoner facing death should not have substantial constitutional claims that have been timely pressed at every opportunity completely ignored by the courts because of a state-induced error that the State not only refuses to defend, but in fact defies by its flatly contradictory, *post hoc* rationale. The interests at stake are simply too critical to be whipsawed between uncontested and undefended state-induced error and an irreconcilably contradictory *post hoc* rationale.

The State's waiver argument, moreover, is meritless for four reasons. First, the original petition asserted a *Brady* violation and, as soon as the State granted petitioner access to the district attorney's files,

he expeditiously amended his post-conviction petition to add detailed and precise *Brady* claims demonstrating that exculpatory evidence critical to his defense had been withheld. *See supra* at 5-6.

That amendment was timely because the basis for his amended claims had not previously been available to him, and notably no state court has ruled otherwise. Tennessee law at the time provided that "[a] ground for relief is 'waived' if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1) (1990) (repealed). In words that speak directly to petitioner's case, the Tennessee Supreme Court specifically held that "the waiver provision cannot logically or legally 'apply to a defense [or grounds for relief] . . . which did not exist and could not have been asserted by the most diligent counsel at the [prior] hearing.'" *Swanson v. State*, 749 S.W.2d 731, 735 (Tenn. 1988).

Second, even if the claims had somehow been waived despite their diligent presentation, petitioner established cause and prejudice. Petitioner had good cause for not raising the more developed *Brady* claims earlier because "the reason for his failure to develop facts in state court proceedings" – or, more precisely, in his pre-amended petition – "was the State's suppression of the relevant evidence." *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (citing *Strickler v. Greene*, 527 U.S. 263, 282 (1999)). Until the State opened its file, only the State knew what evidence it had suppressed, and the State could not reasonably charge petitioner with arguing claims the entire basis for which

the State itself had unlawfully suppressed from him and from the courts.

Petitioner has also suffered significant prejudice because the suppressed evidence went to the heart of his defenses at both the guilt and sentencing phases and bore on the central contested issue in the case – whether petitioner could have been under a drug-induced psychosis at the time of the murders. Accordingly, "the suppressed evidence is 'material' for *Brady* purposes." *Id.* (citing *Strickler v. Greene*, *supra*); *see infra* Part II.[5]

Third and alternatively, even if the state courts had held that the *Brady* claims were waived (which they did not), that hypothesized ruling would not constitute an "independent and adequate" ground for refusing to consider his *Brady* claim, because there was no "'firmly established and regularly followed,'" *Ford v. Georgia*, 498 U.S. 411, 424 (1991), rule requiring the assertion of as-yet-unknown *Brady* claims. Quite the contrary, the Tennessee courts had repeatedly entertained *Brady* claims that materialized only after the State granted access to the district attorneys' files. *See State v. Johnson*, No. 01C01-9610-CR-00442, 1997

[5] Further suppressed exculpatory evidence was first discovered in the FBI's files during federal habeas proceedings. The court of appeals held that petitioner had adequate cause for failing to raise the FBI-based claims in state court, but had failed to establish prejudice. That was wrong. If defense counsel had obtained the FBI records in a timely manner, they could have been used to impeach Agent Flynn, discredit the prosecution's case, and further establish that petitioner's drug use prevented him from having the specific intent required to be found guilty of first-degree murder. *See* CA6 J.A. 452 (asserting materiality of evidence). The evidence thus was material to the defense, which, under *Banks*, establishes prejudice.

WL 738586 (Tenn. Crim. App. Nov. 25, 1997); *O'Guinn v. State*, No. 02C01-9510-CC-00302, 1997 WL 210890 (Tenn. Crim. App. Apr. 29, 1997); *Wooden v. State*, 898 S.W.2d 752 (Tenn. Crim. App. 1994); *Workman v. State*, 868 S.W.2d 705 (Tenn. Crim. App. 1993).

Fourth, the Sixth Circuit's procedural bar ruling improperly placed the burden of proving the inadequacy of the state's procedural rule on petitioner. *See* Pet. App. 24a ("Cone has not shown that Tennessee did not consistently follow its procedural rules such that we should have disregarded Tennessee's finding that his *Brady* claims were previously determined."). That ruling directly implicates an acknowledged conflict in the circuits over which party – the State or the habeas petitioner – bears the burden of proof of the adequacy of a state procedural rule. *Compare Bennett v. Mueller*, 322 F.3d 573, 584-86 (9th Cir. 2003) (placing burden on State, specifically rejecting the Fifth Circuit's contrary approach, and following the Tenth Circuit's approach), *and Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999) (placing burden on State), *with Sones v. Hargett*, 61 F.3d 410, 416-17 (5th Cir. 1995) (placing burden on petitioner); *see also McNeill v. Polk*, 476 F.3d 206, 219-20 (4th Cir.) (King, J., concurring in part and concurring in the judgment) (recognizing conflict between the Ninth and Tenth Circuits and the Fifth Circuit), *cert. denied*, 128 S. Ct. 647 (2007).

In sum, there is no merit to the State's waiver argument. A person should not be executed, with substantial and timely presented constitutional claims left wholly unexamined, just because the state government

unabashedly asserts simultaneously that the claims both were and were not presented for review.

II. The Evidence Suppressed By The State Was Material To The Defense.

Although the Sixth Circuit expressly refused to consider the merits of petitioner's claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), it nonetheless opined in passing that the suppressed evidence would not have been material to the outcome of the case. That comment did not purport to consider or address the role the extensively suppressed evidence would have played in proving and corroborating petitioner's only defense to the charges and only argument in mitigation of the death penalty – *viz.*, that he was a drug abuser who was acting in the grip of a drug-induced psychosis. The panel's passing and unexamined observations thus do not diminish the imperative of this Court's review to resolve established conflicts in the circuits concerning petitioner's right to have his *Brady* claims *actually and fully* considered on the merits *one* time.

Moreover, should the Court wish to go further and reach the merits of petitioner's *Brady* claims, the record establishes that the State's suppression of material exculpatory evidence going to the heart of the defense violated the Constitution in a manner that undermines confidence in petitioner's conviction and death sentence.

A. Petitioner's sole defense was that he was acting under the influence of a drug-induced psychosis at the time of the crimes. Two experts offered detailed testimony of his mental incapacity. Dr. Matthew Ja-

remko, a clinical psychologist, testified that, based on his study, petitioner "was suffering from post-traumatic stress disorder as a result of his experiences in Viet Nam, and that upon this was superimposed a serious drug-abuse disorder." *State v. Cone*, 665 S.W.2d at 92; *see* CA6 J.A. 34. Dr. Jaremko testified further that "the post-traumatic stress disorder is the major cause for why he got involved in drugs." CA6 J.A. 34. "This post-traumatic stress disorder is a result of him being exposed to the trauma of combat and the continuing trauma that occurred after he came back as a Vietnam veteran from an unpopular war, in which he became disenfranchised from the society at large, causing him a great deal of personal stress, social maladjustment." *Id.* at 34-35. Dr. Jaremko also testified that, in his judgment, petitioner continued to suffer from Vietnam Veteran's Syndrome because he had never been treated for it. *Id.* at 37-38.

Dr. Jonathan Lipman, a neuro-pharmacologist, testified that, based on his study, petitioner "suffered from 'chronic amphetamine psychosis' as a result of serious drug abuse." *State v. Cone*, 665 S.W.2d at 92; CA6 J.A. 51-53. Dr. Lipman testified in detail about petitioner's substantial and protracted history of drug use, *see id.* at 41-65, and briefly about how his addiction related to his criminal history in that petitioner robbed pharmacies to support his addiction, *see, e.g.*, *id.* at 46.

The State's central response, which proved to be devastating to petitioner's case, was that petitioner's experts premised their testimony entirely on *post hoc* interviews with petitioner, rather than an evaluation of petitioner at the time of the crime. The State thus

called three rebuttal witnesses who "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question, and that he was experiencing severe and extreme symptoms of drug withdrawal after the crimes for which he was on trial." CA6 J.A. 93.

Characterizing the claim that petitioner had been using drugs as "balony [*sic*]," the State portrayed petitioner as a "drug seller," not a drug user. CA6 J.A. at 124. "How do we know if he used drugs? The only thing that we ever had that he used drugs, period, is the fact that those drugs were in the car and what he told people." *Id.* at 146. "He's a calm, cool, professional robber." *Id.* at 152. "No, you're not dealing with a crazy person, an insane man. A man, in their words, out of his mind. You're dealing, I submit to you, with a premeditated, cool, deliberate – and even cowardly, really – murderer." *Id.* at 162. The State persistently rejected the characterization of petitioner as having been "out of his mind" while committing his offenses, *e.g.*, *id.* at 152-54, invoking the contrary testimony of its three rebuttal witnesses, *e.g.*, *id.* at 157-58.

Petitioner's *Brady* claim establishes that the State suppressed precisely the evidence that would have validated his claim of amphetamine psychosis and that would have dramatically undercut the credibility of the prosecution's witnesses. The prosecution suppressed witness statements which indicated that the State knew about petitioner's heavy use of drugs around the time of the crimes. Robert McKinney stated that petitioner "'acted real weird' and appeared to be on drugs." Pet. App. 57a. Charles and Debbie Slaughter stated that petitioner "'looked wild eyed' the

day before the killings." *Id.* Sergeant Grieco (of Florida) described petitioner "as looking 'frenzied' and 'agitated' a few days after the killings." *Id.* at 57a-58a. Chief Daniels (of Arkansas) stated to authorities "that Cone 'was a heavy drug user.'" *Id.* at 58a.

The State also specifically suppressed evidence that would have answered Officer Roby's testimony that petitioner showed no outward signs of drug use. Roby had sent an All Points Bulletin warning "that Cone is not only a 'drug user,' but a 'heavy drug user,'" and Cone's sister "told Officer Roby that [petitioner] had a 'severe psychological problem' and 'needed to work on his drug problem.'" *Id.*

The State further withheld evidence that would have rebutted the testimony of FBI Agent Flynn, who had claimed that petitioner showed no signs of drug use when he was captured. These teletypes and letters – sent in August 1980 – and authorized by Agent Flynn say of Cone: "'Subject believed heavy drug user'"; "'Armed and extremely dangerous; drug user'"; and "'While in prison, Cone was caught in possession of 850 amphetamine pills which had been supplied to him . . . .'" CA6 J.A. 450-52.

Finally, the State suppressed evidence that would have undercut the credibility of Irene Blankman's testimony that she saw no evidence of drug use by petitioner. There was significant evidence that she had ongoing contacts with police, who sought to obtain testimony from her. Moreover, prosecutors' interview notes omit any mention that (as she later asserted in testimony) she had seen petitioner naked immediately before the crimes and had not seen needle marks on petitioner's body. CA6 J.A. 453, 1942-48.

B. The Sixth Circuit twice refused to consider the merits of petitioner's *Brady* claim on the ground that it had been defaulted. Both times, the panel opined briefly and without analysis that the evidence suppressed by the State did not undermine confidence in the outcome of the proceedings. *See* Pet. App. 59a-60a (first opinion; one sentence of explanation addressing only one withheld misstatement); *id.* at 25a (second opinion; summarily concluding that evidence was not material, given evidence of guilt). As Judge Merritt recognized in dissent, the majority made its observations "without any analysis of the record, or the *Brady* and mitigation lines of cases, and state[d] no basis for its conclusory statement." *Id.* at 46a. The terse discussion of the question of materiality thus contrasts starkly with the model for analyzing materiality and prejudice established by this Court in *Kyles v. Whitley*, 514 U.S. 419, 441-54 (1995), and *Banks v. Dretke*, 540 U.S. 668, 698-703 (2004).

There are four additional reasons why the court's passing reference to the merits poses no obstacle to this Court's resolution of the inter-circuit conflicts implicated by petitioner's claims.

First, the issue before this Court is whether petitioner's *Brady* claim merits full consideration by a federal habeas court. Whether, after such full consideration, petitioner prevails on the merits is an issue properly resolved on remand. Petitioner is entitled to his day in court even if, at the end of that day, he were to lose on the merits.[6]

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[6] Because the panel disavowed deciding the merits of petitioner's *Brady* claim, and discussed the question only in dictum, peti-

Second, the court of appeals' passing statements fundamentally misapprehended the basic legal question. The court suggested that the overwhelming evidence of petitioner's "guilt" rendered the suppressed evidence immaterial. Pet. App. 60a (first opinion); *id.* at 25a (second opinion). But petitioner *conceded* guilt in the sense that he acknowledged committing the charged acts. His defense was not that he did not commit the acts charged, but that he did so while suffering from an amphetamine psychosis that negated his mental capacity or that at least established a mitigating factor justifying the imposition of a life sentence rather than the death penalty. *See Strickler v. Greene*, 527 U.S. 263, 291-96 (1999) (determining *Brady* materiality by assessing the likelihood that proper disclosure of the withheld evidence would have resulted in a different verdict on guilt or prevented the imposition of the death penalty); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."); *compare United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The evidence suppressed in *Brady* would have been admissible only on the issue of punishment and not on the issue of guilt, and therefore could have affected only Brady's sentence and not his conviction.").

Third, the majority's conclusory assessment seemed to evaluate the suppressed evidence piecemeal.

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tioner's counsel have concluded that it would not be permissible to state that issue as a distinct Question Presented. This Court could of course reach the issue either by directing the parties to brief it or by recognizing that it is fairly encompassed by the question presented as described in the Petition.

See Pet. App. 59a-60a (referring only to a single witness statement as insufficient to undermine confidence in the verdict). Beyond that solitary reference to one piece of evidence in isolation, the court laid no more foundation for its blanket and conclusory assertion that the evidence was not material. *Id.* at 57a. The second panel opinion repeated the same errors, giving the back of the hand to petitioner's *Brady* claim based on a cursory consideration of only a fraction of the evidence looked at item-by-item. *Id.* at 25a-26a (stating that evidence regarding Roby and Flynn is not *Brady* material, then separately asserting that several witness statements also are not *Brady* material).

Because both of the court's statements were made without full consideration of the question, the court never addressed the combined effect of all the withheld evidence, as *Brady* requires. *See Kyles*, 514 U.S. at 436. And the court paid no heed at all to the evidence bearing on Ilene Blankman's credibility.

Fourth, the court of appeals' passing assessment of the materiality of the evidence suppressed by the State was, in any event, erroneous. For the reasons discussed *supra* at 26-29, that evidence was essential to petitioner's defense and argument in mitigation of the death sentence, and it "undermines confidence in the outcome" of the proceedings. *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). The evidence demonstrated directly and specifically petitioner's defense that he was acting under a psychosis induced by long-term drug abuse, impeached the State's witnesses, and strongly countered the prosecution's critical submission that all of petitioner's expert testimony

rested on petitioner's own belated and self-interested assertions regarding his drug use.

Moreover, the decision below conflicts with the decisions of other courts of appeals, which have consistently found suppressed evidence to be *Brady* material when the prosecution both withheld exculpatory evidence that could help prove the defense theory, and simultaneously argued a theory inconsistent with the withheld evidence. *See, e.g.*, *Trammel v. McKune*, 485 F.3d 546, 552 (10th Cir. 2007) (prosecution's rebuttal "appeared accurate only because" of prosecution's failure to disclose all exculpatory evidence); *Bailey v. Rae*, 339 F.3d 1107 (9th Cir. 2003) (prosecution withheld evidence supporting defense's theory while denigrating that theory); *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003) (prosecution misled jury by arguing witness was truthful while withholding extensive impeaching evidence); *Finley v. Johnson*, 243 F.3d 215, 221 (5th Cir. 2001) (prosecutor claimed defendant had "no defense" when prosecutor had evidence establishing a compelling defense); *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997) (prosecution withheld evidence of eyewitness who accused man other than defendant of the crime); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) (prosecution failed to disclose evidence that would have supported defendant's duress defense); *United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993) (in combating duress defense, government persistently denied existence of a man who coerced defendant).

Beyond devastating petitioner's claim of amphetamine psychosis, the State's suppression of this critical primary evidence fundamentally undercut peti-

tioner's argument for mitigation of his death sentence. The court of appeals never considered how the jury would have weighed a mitigation argument that was backed by full evidentiary support against the State's proof of aggravating factors. The State's argument in favor of the death penalty sought to show that petitioner had a very high and culpable *mens rea* by contending that he knowingly created a great risk of death to two or more persons, murdered in a way that was especially "heinous, atrocious, or cruel," and murdered for the purpose of avoiding lawful arrest. Pet. App. 8a-9a. Had the jury heard more substantial and contemporary evidence of petitioner's mental incapacity shortly before and at the time of the crime, there cannot be confidence that the sentence would have been the same because the evidence precluded the high *mens rea* asserted by the government. If presented with the evidence suppressed by the State, the jury reasonably could have found that a mentally ill man in the clutches of amphetamine psychosis would have been unable to form the design necessary to support finding any of these factors. The only factor remaining would have been petitioner's conviction for robbery with a firearm ten years prior to trial. There can be no reasonable confidence that the jury would have sentenced petitioner to death on the basis of that factor alone, had substantial evidence supporting his case for mitigation not been suppressed.

CONCLUSION

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

Respectfully submitted,

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