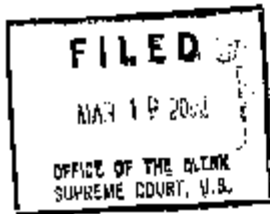


No. 07-9095



In The
Supreme Court of the United States

In re Abu-Ali Abdur'Rahman,

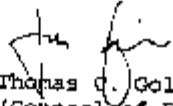
Petitioner.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Abu-Ali Abdur'Rahman respectfully requests leave to file the attached petition for an original writ of habeas corpus without prepayment of costs and to proceed in this Court in *forma pauperis*. Pursuant to 28 U.S.C. § 840, Petitioner was previously granted pauper status in the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Middle District of Tennessee.

Respectfully submitted,

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March 18, 2002

CAPITAL CASE - EXECUTION DATE: 4/16/02 1:00 a.m.

No. 01-__

IN THE
Supreme Court of the United States

In re Abu-Ali Abdur'Rahman,

Petitioner.

On Petition for an Original Writ of Habeas Corpus
and Other Extraordinary Relief

**PETITION FOR AN ORIGINAL WRIT OF HABEAS
CORPUS AND OTHER EXTRAORDINARY RELIEF**

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March 18, 2002

QUESTION PRESENTED

The district court in this case held that it was powerless to consider many of Petitioner's federal habeas claims because they had not been sufficiently presented in a petition for discretionary review to the Tennessee Supreme Court. The district court granted Petitioner relief as to other claims in a ruling that was later reversed on appeal. While the appeal was pending, however, the Tennessee Supreme Court issued Rule 39 ("TN Rule 39"), which on its face applies to Petitioner's case, and which expressly "clarifies]" that such a discretionary application is *not* required for "exhaustion of state remedies for federal habeas corpus purposes." Petitioner's claims thus had properly been exhausted. See *Randolph v. Kenna*, 276 F.3d 401 (CA8 2002) (applying similar Missouri rule); *Swoopes v. Sublett*, 196 F.3d 1008 (CA9 1999) (Arizona), *cert. denied*, 529 U.S. 1124 (2000).

Petitioner's parallel Petition for a Writ of Certiorari challenges the Sixth Circuit's determination that there is no procedural vehicle through which the district court may apply TN Rule 39 to this case. The Sixth Circuit thus held that Petitioner's motion for relief from judgment is prohibited as a matter of law as a "second or successive" habeas application, and furthermore refused to remand the case to the district court to apply TN Rule 39.

This Petition seeks relief in the event this Court holds (a) that it lacks jurisdiction to consider the Petition for a Writ of Certiorari, or (b) that Petitioner is not entitled to relief under either of the two questions presented by the Petition for a Writ of Certiorari.

The Question Presented is:

Whether a habeas petitioner's federal constitutional claims are barred from consideration on the merits when an important clarification of state law (rendered before the judgment on the habeas petition became final) establishes that those claims were properly exhausted in state court.

**PETITION FOR AN ORIGINAL WRIT OF HABEAS CORPUS
AND FOR OTHER EXTRAORDINARY RELIEF**

Petitioner Abu-Ali Abdur'Rahman ("Petitioner") respectfully petitions for an original writ of habeas corpus pursuant to 28 U.S.C. 2241 and 2254, as well as for other extraordinary relief pursuant to 28 U.S.C. 1651(a).

STATEMENT PURSUANT TO S. CT. R. 20

Pursuant to this Court's Rule 20, Petitioner states as follows.

1. Petitioner is detained under the authority of Warden Ricky Bell, an agent of the State of Tennessee, pursuant to a conviction for murder and a sentence of death.
2. Petitioner has exhausted all available remedies in the state courts. As the district court explained, the claims in question were presented to the Tennessee intermediate appellate court but were not presented to the Tennessee Supreme Court in a petition for discretionary review. See Pet. App. C2, E15-E16. It is uncontested that Petitioner has no opportunity to present them now to the state courts through the normal appellate process.
3. Petitioner does not bring this Petition in federal district court because the Sixth Circuit has held that it is a "second or successive" application under 28 U.S.C. 2244 and therefore may not be presented in that forum. See Pet. App. A2-A3, B2. Petitioner therefore cannot secure adequate relief from any other court.
4. If this Court denies Petitioner's parallel Petition for a Writ of Certiorari, he will be unable to secure adequate relief in any other form.
5. In his parallel Petition for a Writ of Certiorari, Petitioner asks this Court to review the Sixth Circuit's predicate determination that his Rule 60(b) Motion constitutes a "second or successive" habeas application, which is reviewable in this Court. In this Petition, Petitioner protectively invokes this Court's authority to issue extraordinary writs in aid of its jurisdiction

pursuant to 28 U.S.C. 1651(a) in the event this Court concludes that 28 U.S.C. 2244(b)(3)(E) more broadly prohibits review of the Sixth Circuit's decision.

6. Pursuant to S. Ct. R. 20.4(e) and 28 U.S.C. 2241(b), Petitioner suggests the possibility that this Court would transfer this Petition to the United States District Court for the Middle District of Tennessee for disposition.

STATEMENT OF THE CASE

Petitioner's parallel Petition for a Writ of Certiorari sets out the statement of this case, which is incorporated herein by reference. In sum, the district court refused to consider many of Petitioner's federal constitutional claims (including serious claims of prosecutorial misconduct) on the merits because they were not presented in a petition for discretionary review to the Tennessee Supreme Court. The district court thus applied a presumption that, absent any statement from the Tennessee Supreme Court to the contrary, such an application was both an available form of relief for a state prisoner such as Petitioner and necessary to exhaust state remedies. Pet. App. E15-E16. Accord *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Before the judgment on Petitioner's habeas petition became final, however, the Tennessee Supreme Court issued its Rule 39 ("TN Rule 39"), which provides that such a discretionary application is *not* required for "exhaustion of state remedies for federal habeas corpus purposes." TN Rule 39 furthermore applies to Petitioner's case, as it explicitly "clarif[ies]" existing law and expressly applies "[i]n all appeals from criminal convictions or post-conviction matters from and after July 1, 1967" (emphasis added). The Sixth Circuit, however, refused to permit the district court to apply TN Rule 39 either (a) pursuant to a motion for relief from judgment under Fed. R. Civ. P. 60(b), or (b) by remanding the case (which had not yet become final) to the district court for application of TN Rule 39. See Pet. App. A1-A3, B1-B2.

REASONS FOR GRANTING THE WRIT

Petitioner brings this Petition for extraordinary relief protectively. For the reasons set forth in Petitioner's parallel Petition for a Writ of Certiorari, this Court should review and reverse on certiorari the Sixth Circuit's determination that the district court is prohibited from considering the applicability of TN Rule 39 to this case. But if this Court instead concludes that it lacks jurisdiction to consider the Petition for Certiorari or that Petitioner is not entitled to relief under the questions the Petition for Certiorari presents, it should grant this Petition.

Extraordinary relief is appropriate for the simple reason that the failure of the lower courts to consider Petitioner's federal constitutional claims represents a marked departure from basic principles of habeas corpus as long conceived by this Court. The district court determined that many of Petitioner's claims were not sufficiently exhausted in state court. But before the judgment in this case became final, the Tennessee Supreme Court "clarif[ied]" that the state law predicate for the district court's decision was simply wrong. Under TN Rule 39, a state prisoner is not required to present an application for discretionary review to the Tennessee Supreme Court to satisfy "exhaustion of state remedies for federal habeas corpus purposes." Other circuits conclude that such a state court rule obviates the need to file a discretionary application to the state supreme court in order to satisfy the federal exhaustion doctrine. See *Randolph v. Kemna*, 276 F.3d 401 (CA8 2002); *Swoopes v. Sublett*, 196 F.3d 1008 (CA9 1999), cert. denied, 529 U.S. 1124 (2000).

Petitioner respectfully submits that he could be denied relief as to his parallel Petition for a Writ of Certiorari only because he was trapped as the result of an accident of timing. In other words, there is no sound basis in the law of habeas corpus for refusing to correct the district

1. This Petition is filed for the purpose of preserving the issue for review by the Supreme Court. It is not intended to constitute an admission of guilt or an acknowledgment of any wrongdoing. It is also not intended to constitute a confession of any crime. It is filed for the purpose of preserving the issue for review by the Supreme Court.

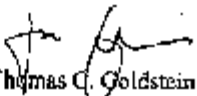
2. This Petition is filed for the purpose of preserving the issue for review by the Supreme Court. It is not intended to constitute an admission of guilt or an acknowledgment of any wrongdoing. It is also not intended to constitute a confession of any crime. It is filed for the purpose of preserving the issue for review by the Supreme Court.

CONCLUSION

For the foregoing reasons, Petitioner's parallel Petition for a Writ of Certiorari should be granted, but in the event relief is not available or appropriate on certiorari, this Petition for an Original Writ of Habeas Corpus or Other Extraordinary Relief should be granted.

Respectfully submitted,

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