No. 07-1114

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR THE PETITIONER

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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 sub-questions:

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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BRIEF FOR THE PETITIONER

Petitioner Gary Bradford Cone respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

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 the petition for certiorari until February 23, 2008, a Saturday. The petition was timely filed 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 OF THE CASE

A Vietnam veteran and recipient of the Bronze Star, petitioner killed an elderly couple in their home after evading police who were pursuing him following a robbery. Petitioner's sole defense at trial and his only argument in mitigation of the death penalty was that he lacked the mental state required for conviction of first-degree murder and was undeserving of the death sentence because he committed the crimes while suffering from a psychosis caused by a massive drug addiction resulting from post-traumatic stress disorder. The jury convicted petitioner and sentenced him to death. It later emerged that the prosecution had suppressed an array of exculpatory evidence that would have supported petitioner's defense. The state and federal courts nonetheless refused to consider petitioner's claim that the prosecution's conduct violated *Brady v. Maryland*, 373 U.S. 83 (1963).

1. Petitioner Gary Bradford Cone was convicted and sentenced to death in Tennessee state court following his conviction on two counts of first-degree murder for the brutal killing of an elderly couple after his flight from a robbery, during which he also shot and wounded a police officer and a bystander. Before trial, defense counsel sought any evidence that supported petitioner's innocence or was

otherwise exculpatory in nature, as well as any evidence that could impeach the prosecution's witnesses. J.A. 5-10. As exculpatory evidence, the prosecution, however, provided the defense with two brief statements concerning the possible time of the victims' deaths and nothing more. J.A. 11-12.

Petitioner's defense at trial was that he lacked the required mental state for a first-degree murder conviction and, in any event, should not be put to death, because at the time he committed the crimes he suffered from post-traumatic stress disorder and a drug-induced psychosis. As this Court explained in a previous opinion in this case:

> The defense conceded that [Cone] committed most of the acts in question, but sought to prove that he was not guilty by reason of insanity. A clinical psychologist testified that [Cone] suffered from substance abuse and posttraumatic stress disorders related to his military service in Vietnam. A neuropharmacologist recounted at length [Cone's] history of illicit drug use, which began after he joined the Army and escalated to the point where he was daily consuming "rather horrific" quantities. Tr. 1722-1763. That drug use according to the expert, caused chronic amphetamine psychosis, hallucinations, and ongoing paranoia, which affected [Cone's] mental capacity and ability to obey the law.

Bell v. Cone, 535 U.S. 685, 690 (2002).

Disputing petitioner's claim that he lacked culpability because he was mentally ill and an "addict out of control" (Tr. 2041), the prosecution

asserted that, in fact, petitioner was not a drug user at all and characterized his claims of drug addiction and abuse as "balon[e]y" (J.A. 107). In doing so, the prosecution established and emphasized that petitioner had not presented any direct evidence that he was a drug addict, and that petitioner's experts had merely rested their opinions on petitioner's statements about his own drug use. *See infra* at 41-42.

The jury rejected petitioner's defense, convicted him of first-degree murder, and sentenced him to death.

On direct review, the Tennessee Supreme Court affirmed the conviction and death sentence, noting that petitioner's defense had appeared to the jury to be "tenuous at best" because his experts' "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). The state supreme court also rejected petitioner's claim that the prosecution had failed to turn over certain witness statements in violation of state law. *Id.* at 94. This Court denied certiorari. *Cone v. Tennessee*, 467 U.S. 1210 (1984).

2. The Tennessee state courts denied petitioner's first application for post-conviction review, which argued that he had received ineffective assistance of counsel. *See Cone v. State*, 747 S.W.2d 353, 355-58 (Tenn. Crim. App. 1987).

In June 1989, petitioner timely filed a second application, which (as initially amended) included an allegation that the prosecution had violated his federal constitutional right to due process under the Fourteenth Amendment by withholding material

exculpatory evidence in violation of *Brady v. Maryland*. J.A. 13-14 (¶ 35).

The State urged the trial court to dismiss petitioner's *Brady* claim without an evidentiary hearing because state law barred courts from considering post-conviction claims that were "previously determined" after a "full and fair hearing" (Tenn. Code Ann. § 40-30-112 (1990) (repealed 1995)), and according to the government the state courts had previously rejected that claim on direct appeal. J.A. 15. In support, the State cited the state supreme court's opinion on direct review, rejecting petitioner's separate state-law claim that the prosecution had violated Tennessee statutory law by not turning over certain required witness statements. J.A. 16 (citing *State v. Cone*, 665 S.W.2d at 94).

While petitioner's second application was pending, the Tennessee courts for the first time construed the state's public records act to allow a criminal defendant to review the district attorney's file in his case. *Capital Case Res. Ctr. v. Woodall*, No. 01-A-01-9104-CH-00150, 1992 WL 12217 (Tenn. Ct. App. Jan. 29, 1992). Exercising that right, petitioner learned for the first time (*see* J.A. 17-18 (¶ 41)) that the prosecution had suppressed an array of evidence confirming not only that petitioner had been a severe drug addict but also that he had indeed been under the influence of drugs at the time he committed the crimes. The evidence also included materials that would have directly impeached the prosecution witnesses who testified to the contrary. For example, a police officer who had testified that he had not seen evidence that petitioner was a drug user in fact had

issued multiple teletypes describing petitioner as a heavy drug user; the police moreover had taken witness statements indicating petitioner had been under the influence of drugs. *See generally infra* at 42-45.

On the basis of that evidence, petitioner timely amended his second state post-conviction application to allege a substantially more detailed claim under *Brady*:

> 41. Petitioner was denied his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments . . . because the State withheld exculpatory evidence which demonstrated that petitioner did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past, such evidence including but not limited to, statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Herschel Dalton, and patrolman Collins, and other persons unknown at this time, such statements contained in official police reports, and/or contained in other documents unknown and/or through personal recollections of the officers or others. Such evidence was highly exculpatory and exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted petitioner and would not have sentenced him to death.

J.A. 20-21 (¶ 41).[1]

The post-conviction trial court, however, refused to hold an evidentiary hearing and dismissed petitioner's second amended post-conviction application. The court apparently accepted the state's prior assertion that the *Brady* claim had been previously determined, holding without elaboration that the claim was a restatement of a claim "heretofore determined and denied by the Tennessee Supreme Court upon Direct Appeal or the Court of Criminal Appeals upon the First Petition." J.A. 22.

The Tennessee Court of Criminal Appeals affirmed, ruling that petitioner's *Brady* claim was "previously determined either on direct appeal on in the appellant's first petition." *Cone v. State*, 927 S.W.2d 579, 580-81 (Tenn. Crim. App. 1995). Petitioner pressed the *Brady* claim in a petition to

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[1] There is no dispute that under Tennessee law petitioner's second amended application was timely filed and not impermissibly successive. *See generally State v. Masucci*, 754 S.W.2d 90 (Tenn. Crim. App. 1988) (newly enacted three-year post-conviction statute of limitations expires July 1, 1989); *Swanson v. State*, 749 S.W.2d 731, 735 (Tenn. 1988) (successive habeas application is permissible if it presents grounds that were not previously available) (citing *Pruett v. State*, 501 S.W.2d 807, 809 (Tenn. 1973)); *State v. Johnson*, No. 01C01-9610-CR-00442, 1997 WL 738587, at *3 (Tenn. Crim. App. Nov. 25, 1997) (deciding *Brady* claims when capital petitioner "filed his second post-conviction petition in February 1995 after receiving information in 1992 pursuant to a request under the Tennessee Open Records Act"); *O'Guinn v. State*, No. 02C01-9510-CC-00302, 1997 WL 210890 (Tenn. Crim. App. Apr. 29, 1997) (remanding for hearing on the merits of *Brady* claim in successive petition).

the Tennessee Supreme Court, which denied review. *Cone v. State*, CCA No. 02C01-9403-CR-00052 (Tenn. Mar. 4, 1996). This Court denied certiorari. 519 U.S. 934 (1996).

3. In 1997, petitioner sought federal habeas relief, asserting his *Brady* claim and seeking an evidentiary hearing. J.A. 23-30, 31-37; *see* Pet. App. 94a.[2] At the outset, the district court ordered the FBI – which had been involved in the investigation and an agent of which had testified at trial – to disclose its own files on the case. Those files contained still further exculpatory evidence, including multiple FBI bulletins that identified petitioner as a heavy drug user. *See infra* at 44.

In federal district court, respondent abandoned the mistaken argument that the state courts had resolved petitioner's *Brady* claim. Respondent argued instead that the claim was "first raised in his second post-conviction proceeding." J.A. 39. Respondent argued on that basis that the claim was "procedurally defaulted" because petitioner had not raised it earlier. *Id.* Respondent thus contended that the state post-conviction courts had deemed the *Brady* claim to have been "waived." *Id.* In support, respondent pointed to the state court of appeals' general statement that petitioner had waived "all claims raised in his second petition for post-conviction relief which had not been previously determined." *Id.* (citing *Cone v. State*, 927 S.W.2d

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[2] This case is accordingly governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

579, 582 (Tenn. Crim. App. 1995)). Respondent also argued that, in any event, petitioner's *Brady* claim lacked merit.

The federal district court declined to a hold a hearing on petitioner's *Brady* claim, concluding that petitioner had defaulted the claim by not sufficiently presenting it in the state courts. According to the district court, petitioner had merely presented the state post-conviction court with "conclusory assertions that the state had generally withheld exculpatory documents," as well as one specific claim relating to documents that would have impeached prosecution rebuttal witness Ilene Blankman. Pet. App. 112a. The district court accordingly deemed almost all of petitioner's *Brady* claims to be "procedurally defaulted" (Pet. App. 114a), "having never been presented to the state courts" (Pet. App. 112a-13a). The district court rested that finding on its reading of petitioner's second post-conviction application as it stood before petitioner amended it in light of the disclosure of the district attorney's file and the extensive amount of exculpatory evidence discovered in it. *Compare* Pet. App. 112a (citing J.A. 13-14 (initial *Brady* claim)) *with* J.A. 20-21 (subsequently amended *Brady* claim (¶ 41)). With respect to the exculpatory FBI documents, which petitioner did not obtain until the federal proceedings, the district court held that petitioner could not demonstrate prejudice from their suppression. Pet. App. 118a-19a n.9.

4.a. Petitioner appealed. Respondent changed positions, again. Rather than arguing that petitioner's *Brady* claim had been raised either too early (*i.e.*, it was previously determined on direct

appeal (*see supra* at 5)), or too late (*i.e.*, it was procedurally defaulted because it was raised in the second post-conviction application (*see supra* at 8)), respondent now argued to the Sixth Circuit that the claim was never presented *at all*: "Cone's *Brady* claims were simply never raised in state court." J.A. 41. In doing so, respondent failed to address the amended *Brady* claim contained in petitioner's second amended post-conviction application. *Id.*

The Sixth Circuit affirmed not on the ground advanced by respondent before it, but on respondent's abandoned argument that the state post-conviction court had refused to adjudicate the *Brady* claim because it had been "previously determined" on direct review. Pet. App. 59a. The court of appeals thus held (contrary to both respondent's arguments and the district court's decision) that "this claim was exhausted," but it nonetheless deemed the state courts' holding that the claim was "previously determined" to be an "'independent and adequate'" state ground for rejecting the claim. *Id.*

Though the district court had not held an evidentiary hearing on the *Brady* claim, the panel in dictum went on to briefly indicate its view that some of the withheld evidence was not material under *Brady*. Considering "each category of [withheld] documents separately" (Pet. App. 57a), the court of appeals addressed a single piece of evidence, summarily opining that a report which stated that another police department knew petitioner was a "heavy drug user" was not material "because of the overwhelming evidence of Cone's guilt" (Pet. App. 59a-60a). The court did not address the effect of the

Brady evidence on the jury's decision to impose the death penalty. Nor did it explain why it deemed immaterial both the evidence that petitioner was under the influence of drugs when he committed the offenses, and the evidence that would have impeached the testimony of the witnesses called by the prosecution to rebut petitioner's defense of amphetamine psychosis.

b. Turning to other grounds raised by petitioner in his federal habeas application, the court of appeals twice vacated petitioner's death sentence. It first held that petitioner's counsel had provided constitutionally ineffective assistance of counsel at the capital sentencing hearing. Pet. App. 85a. This Court reversed, holding that counsel's failure to present a closing argument at sentencing did not require habeas relief. 535 U.S. 685 (2002). This Court concluded that petitioner's counsel made a sound strategic judgment regarding whether to argue for mitigation in light of the evidence available and the circumstances at the time. *Id.* at 699-700.

On remand, the court of appeals held that petitioner's death sentence was invalid because the jury had been presented with an unconstitutionally vague aggravating circumstance. *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004). This Court reversed, holding that the aggravating circumstance was appropriately narrowed by the state courts. 543 U.S. 447 (2005) (per curiam). This Court reasoned that the state courts had properly determined that the jury could assess the aggravating and mitigating circumstances reflected by the evidence at trial. *Id.* at 456-57.

On the second remand, the court of appeals returned to petitioner's *Brady* claim. Respondent, however, no longer defended either the state's initial position (*see supra* at 5) or the Sixth Circuit's prior holding (*see supra* at 10) that the claim had been "previously determined." Instead, respondent asserted that the claim had been defaulted and that petitioner had not identified "any justifiable cause for his failure to raise the . . . claims in a timely manner in state court." J.A. 44. Respondent once again did not address petitioner's amended state court *Brady* claim (J.A. 20-21 (¶ 41)), the fact that the claim was raised after petitioner first secured access to the district attorney file (J.A. 17), the state's own previous argument that the *Brady* claim *had* been decided by the state courts (J.A. 16), or the state post-conviction courts' rulings agreeing with that contention (J.A. 22).

c. By a divided vote, the Sixth Circuit adhered to its prior ruling that petitioner had procedurally defaulted his *Brady* claim because the state post-conviction court had deemed it to have been "previously determined." Pet. App. 22a-24a. "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 panel also held that the state post-conviction courts' conclusion that the claim had been previously determined was unreviewable on federal habeas because that "holding amounted to an independent and adequate state law ground barring our considering the claims." Pet. App. 18a.

The majority briefly reiterated in dictum its view that the *Brady* claim lacked merit. Pet. App 25a. According to the majority, "Cone's claim is actually better described as four separate *Brady* claims because Cone asserts that four groups of documents were withheld from him." Pet. App. 18a. It stated that it had "examined these four claims" in its earlier opinion. *Id*. In the view of the majority, the jury had before it "persuasive testimony that Cone was not under the influence of drugs" (Pet. App. 25a) and "had already heard substantial evidence that he was a drug user." (Pet. App. 26a). With respect to the FBI reports that petitioner had been provided for the first time when he filed his federal habeas petition, the majority held that petitioner had not been prejudiced by their suppression. Pet. App. 25a.[3]

d. Judge Merritt dissented. Pet. App. 31a-47a. In his view, the state and federal courts had been led not to adjudicate petitioner's *Brady* claim by "the misrepresentations of the record in the case by the Tennessee Attorney General and his appellate staff," which had engaged in a "complete falsification of the

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[3] The Sixth Circuit's prior panel opinion had erroneously understood that petitioner's counsel received the FBI reports when he was provided the files of the district attorney and, on that basis, mistakenly concluded that petitioner defaulted any claim relating to the reports by not raising them in his application for state post-conviction review. Pet. App. 61a. There is no factual dispute, however, that the files were in the possession of the FBI and petitioner received them only in response to the district court's order when he filed his federal habeas opinion, *see* Pet. C.A. Br. 11, and in its subsequent opinion, the Sixth Circuit majority abandoned its earlier rationale for its decision.

procedural record." Pet. App. 33a. As he explained, petitioner had properly presented his *Brady* claim to the state and federal courts, which mistakenly refused to reach them. *Id.* Judge Merritt reasoned, moreover, that the majority announced its "conclusory statement" that the suppressed evidence was not material "without any analysis of the record, or the *Brady* and mitigation line of cases." Pet. App. 46a. Judge Merritt concluded that the withheld documents "directly contradict" the prosecution's central submission that petitioner was not a drug addict and was not suffering a drug-induced psychosis at the time of the crimes. *Id.*

5. Petitioner sought rehearing en banc. Directed to respond, respondent finally acknowledged that (contrary to its assertions to the panel) petitioner had in fact presented an amended *Brady* claim in his second amended state post-conviction application (*see* J.A. 47 n.7) and further pointedly advised the court of appeals that "[t]he attorney who authored the State's principal brief" before the panel was no longer employed by the State (*id.*). Respondent furthermore did not defend the panel majority's holding that petitioner's *Brady* claim was not cognizable because the state post-conviction court had deemed it to be "previously determined." Rather, respondent posited a new theory, arguing that, although petitioner had presented the claim in state court, he had not done so with sufficient specificity to preserve it for federal review.

The Sixth Circuit denied rehearing en banc. Seven judges dissented (Pet. App. 1a-5a) on the ground that the court should not "allow[] Cone to be executed without any effort to get to the merits or

have the district court or a state court investigate the prosecution's concealment of strong exculpatory evidence of drug addiction" (Pet. App. 3a-4a). The dissent sharply criticized respondent's "inconsistent claims that the *Brady* claim was both 'previously determined' and 'never raised'" (Pet. App. 2a), which the dissent concluded amounted to "a prosecutorial smoke screen designed to obscure, confuse and mislead the court" (Pet. App. 4a). The dissent also rejected respondent's newest theory that petitioner did not raise his claim in state court with sufficient specificity because he did not "recite and describe in detail each of the fourteen police documents and witness statements containing the exculpatory evidence of drug addiction withheld by the prosecution." Pet. App. 3a. That argument, the dissent recognized, was "inconsistent with pleading rules under both Tennessee and federal law," which merely require that the defendant present a "colorable claim" under federal law to preserve it for federal habeas review. Pet. App. 4a (quoting *Arnold v. State*, 143 S.W.3d 784 (Tenn. 2004), and citing *Picard v. Connor*, 404 U.S. 270, 278 (1971)).

6. Petitioner sought certiorari in this Court. In response, respondent did not defend *any* of the varied grounds on which he had successfully urged the state and federal courts not to decide petitioner's *Brady* claim: that the claim was "previously determined" (J.A. 15); that petitioner waived the claim by presenting it in his second application but not the first (J.A. 39); that petitioner had never presented it to the state courts (J.A. 41); or that petitioner had presented it with insufficient detail to preserve it for federal review (J.A. 47). Instead, respondent addressed only the merits of the claim, arguing that

the Sixth Circuit had determined on the merits that the evidence suppressed by the prosecution was not material to petitioner's defense and thus not subject to disclosure under *Brady*. BIO 8-9.

This Court granted certiorari. 128 S. Ct. 2961 (2008).

SUMMARY OF ARGUMENT

I. The Sixth Circuit held that petitioner procedurally defaulted his *Brady* claim because the state courts had concluded on post-conviction review that the claim had been "previously determined" on direct review. The Sixth Circuit's ruling was doubly wrong.

A. A prisoner's repeated presentation of his federal claim to the state courts establishes that the claim has been *exhausted*, not that it has been *defaulted*. The doctrine of procedural default guarantees the state courts the opportunity to correct their own federal constitutional errors. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Petitioner gave the Tennessee courts that opportunity. Hence, the "effect upon the availability of federal habeas" of "a prohibition against *further* state review – for example, . . . a rule . . . preventing the relitigation on state habeas of claims raised on direct appeal" – "is nil." *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991).

B. The Sixth Circuit further erred in holding that a federal habeas court is powerless to review a state court's assertion that a federal claim has been defaulted. Preliminarily, it is undisputed that the state courts erred in this case. Petitioner did not present his *Brady* claim on direct review; he was not

even aware of the claim's foundation until the post-conviction proceedings, when state law for the first time granted him access to the district attorney's files.

Nothing required the court of appeals to put on blinders and ignore that the state courts erred in refusing to adjudicate petitioner's federal constitutional claim, particularly given that the case presents no contested issue regarding the meaning of state law. "[F]ederal 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." *Coleman*, 501 U.S. at 736 (emphasis added). It is thus well settled by a long line of this Court's precedent that the federal courts will examine the adequacy of a state court's invocation of a rule of procedural default. A contrary rule would threaten the role of the federal courts generally – and of this Court in particular – as the arbiter of federal constitutional law, as it would permit the state courts to thwart access to federal habeas corpus through the erroneous, unreviewable assertion that federal constitutional claims had been defaulted.

II. The Sixth Circuit discussed the merits of petitioner's *Brady* claim only in dictum. To the extent that this Court reaches the issue, it should hold that the claim is meritorious. At the very least, petitioner was entitled to an evidentiary hearing in the district court to address whether the evidence suppressed by the prosecution was material.

The only disputed element of petitioner's *Brady* claim is whether the suppressed evidence indicates that the trial verdict is not "worthy of confidence."

Kyles v. Whitley, 514 U.S. 419, 434 (1995). Here, that standard is easily met. Petitioner offered a single defense – supported by substantial expert testimony – at both the guilt and sentencing stages: he committed the crimes while in the throes of an amphetamine psychosis, coupled with post-traumatic stress disorder. But the prosecution destroyed that defense, and succeeded in portraying petitioner as "a premeditated, cool, deliberate – and even cowardly, really – murderer" (J.A. 113), by establishing that petitioner had presented the jury with no direct evidence of his drug addiction and use. Petitioner's experts had relied only on petitioner's own representations to that effect. And the State put forward its own witnesses to suggest that petitioner was not a drug addict.

In reality, however, the State suppressed considerable evidence that would have validated petitioner's defense. The prosecution withheld statements from witnesses who had seen petitioner recently before and soon after the murders to the effect that petitioner appeared to be wild and on drugs. The State also possessed but withheld a report from another police department that petitioner was a known heavy drug user.

Beyond that, the prosecution suppressed evidence that would have directly impeached its own fact witnesses, whose statements were in turn the basis for the testimony of a prosecution expert. A police sergeant testified for the State that petitioner had no needle marks on his body, but the prosecution did not disclose that the sergeant had personally authorized multiple teletypes describing petitioner as a heavy drug user. An FBI agent testified that

petitioner was calm when interviewed after his arrest, but petitioner was not provided with multiple FBI documents stating that petitioner was a heavy drug user. The prosecution also suppressed documents impeaching the testimony of the final prosecution witness, an acquaintance of petitioner who stated that she had not seen evidence of him using drugs.

If disclosed to petitioner, this evidence would have validated his trial defense and the testimony of his two expert witnesses. Contrary to the State's characterization of petitioner as a cold-blooded murderer, the jury would have been presented with a compelling case of petitioner as a person out of control as a consequence of a grave drug addiction brought on by post-traumatic stress disorder from his service in Vietnam. The evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

The Sixth Circuit's contrary dictum does not withstand scrutiny. The court of appeals avowedly evaluated the evidence suppressed by the prosecution "as four separate *Brady* claims" (Pet. App. 18a), and considered "each category of [withheld] documents separately" (Pet. App. 57a). This Court's precedents, by contrast, require that materiality be determined considering the evidence "collectively, not item by item." *Kyles*, 514 U.S. at 436. Even in its piecemeal assessment, the court of appeals ignored significant pieces of evidence altogether. And the Sixth Circuit's reliance on the "overwhelming evidence of Cone's guilt" (Pet. App. 59a-60a) fundamentally misapprehends petitioner's defense, which

acknowledged that he committed charged acts but argued that he lacked the required mental state for conviction of first-degree murder or at least should not be put to death.

This Court should accordingly reverse the Sixth Circuit with directions to enter judgment in petitioner's favor on his *Brady* claim or, at a minimum, to remand the case to the district court for an evidentiary hearing on the claim.

ARGUMENT

"[T]he Government wins its point when justice is done in its courts." *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963); *see Branch v. State*, 469 S.W.2d 533 (Tenn. Crim. App. 1969) (same). And the government's obligation to ensure a fair and reliable criminal process, rather than to be the "architect of a proceeding that does not comport with standards of justice" (*Brady*, 373 U.S. at 88) weighs most heavily when government seeks to impose death as punishment for a crime.

The lower courts' disposition of this case is the antithesis of that principle. Petitioner's sole defense at both the guilt and sentencing stages was that he acted while under a drug-induced psychosis brought on by post-traumatic stress disorder from his service in Vietnam. The State sought to establish through cross-examination and its own witnesses that petitioner had no drug problem, was not under the influence of drugs at the time of his arrest, and was a stone-cold killer. Materials uncovered from the State's case file – materials that were never turned over to the defense – demonstrate that the prosecution in fact knew that petitioner's defense had

considerable merit. Police officers knew of his extensive drug history and received statements from witnesses who observed him acting erratically and under the apparent influence of drugs at the time of the crimes. Other documents directly impeached the testimony and credibility of key witnesses.

Having grossly misled the jury at trial, rather than admit error or seek a new trial or capital sentencing before a jury that could consider all of the evidence relevant to the defense, the State has spent the last two decades contending (and the state and federal courts have variously held) that petitioner's execution should go forward because his constitutional *Brady* claim variably (i) was decided by the state courts (which it was not), (ii) was procedurally defaulted because it was first raised in a second post-conviction claim (which was neither accurate nor legally relevant), (iii) was waived (which it was not), (iv) was never presented at all in state court (it was), (v) was barred from federal court review *because* the claim was properly raised and exhausted in state court (which makes no sense), (vi) was defaulted because it was filed too late in state court (which it was not), (vii) was previously determined (which it was not), (viii) was raised but was not described with sufficient specificity (which was incorrect), and (ix) was resolved on the merits in federal court (which it was not). The State has been nothing if not consistent in its inconsistency.

Out of that mélange of arguments and rulings, the only questions before this Court are (i) whether petitioner's longstanding effort just to have his *Brady* claim heard in court is barred because the claim was "previously determined" when presented to the state

courts and on that basis "procedurally defaulted," and (ii) whether the claim lacks merit.[4] Precedent and logic compel the conclusion that federal habeas review of a constitutional claim as substantial as petitioner's neither is defaulted by the claim's prior presentation to the state courts nor is resolved by appeals court dicta uttered without any evidentiary hearing or inquiry.

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[4] Only those two questions were pressed by respondent or passed on by the court below, and only those questions are encompassed within the questions this Court granted certiorari to decide. Respondent, in fact, has acknowledged that his prior assertion that petitioner had failed to present the *Brady* claim *at all* was false because it completely failed to account for paragraph 41 of his second amended state post-conviction application. *See supra* at 14; J.A. 47 n.7. Respondent also did not argue before the Sixth Circuit panel or in his brief in opposition to certiorari in this Court either (i) that petitioner defaulted his *Brady* claim by not raising it prior to his second amended state post-conviction application, or (ii) that paragraph 41 of that application was insufficiently detailed to preserve the claim for federal habeas review. *See supra* at 14 (respondent did not acknowledge paragraph 41 prior to response to request for rehearing). Nor did the court of appeals decide either of those questions. Those issues accordingly are not before this Court. *See generally Illinois v. Gates*, 462 U.S. 213, 221-22 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (this Court has jurisdiction over questions "pressed in or passed upon" by panel below); *Caterpillar v. Lewis*, 519 U.S. 61, 75 n.13 (1996) ("Under this Court's Rule 15.2, 'a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived.'"); *Schiro v. Farley*, 510 U.S. 222 (1994) (noting that finding of waiver is particularly appropriate when the issue would preclude resolution of questions on which certiorari was granted).

I. Petitioner Could Not Procedurally Default His *Brady* Claim By Twice Presenting It To The State Courts.

The Sixth Circuit held that the *Brady* claim in petitioner's habeas application should be summarily dismissed, without an evidentiary hearing or consideration on the merits, because the state post-conviction court had refused to consider that claim on the ground that it had been "previously determined" on direct review. Pet. App. 18a. According to the court of appeals, such a twice-presented claim is "procedurally defaulted" because a state rule proscribing re-adjudication of a claim constitutes "an independent and adequate state law ground barring [the federal court from] considering the claims" on habeas corpus. *Id.* The Sixth Circuit further concluded that it was completely powerless to determine whether the state court was correct and consistent in applying its state law rule to petitioner's case. *Id.* Neither conclusion withstands scrutiny.

A. A State Court Prohibition Against The Repeated Adjudication Of A Federal Constitutional Claim Does Not Give Rise To A "Procedural Default" For Purposes Of Federal Habeas Corpus.

Under the doctrine of "procedural default," a state defendant may not pursue a claim on federal habeas that he previously failed to present to the state court, unless he shows either "cause and prejudice" for that default or that a fundamental miscarriage of justice will result. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Procedural

default occurs because the petitioner's interest in obtaining federal review of a constitutional claim succumbs to "concerns of comity and federalism" (*id.* at 730) when he "prevents adjudication of his constitutional claims in state court" (*id.* at 748). The procedural default doctrine thus precludes consideration of "contentions of federal law which were not resolved on the merits in the state proceeding due to [the petitioner's] failure to raise them there as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).[5]

Under Tennessee law, a claim decided by the state courts on direct review will not be re-adjudicated on state post-conviction review. *See* Tenn. Code Ann. § 40-30-106(f) (2006); *see also* Tenn. Code Ann. § 40-30-111 (1990) (repealed 1995). But that state law has no bearing on the federal law question of whether petitioner's claim was properly exhausted for purposes of federal habeas law. Procedural default is a rule of federal law designed to ensure that state courts have at least one full and fair opportunity to consider a claim before federal courts intervene to review a state-court conviction. *See, e.g.*, *Coleman*, 510 U.S. at 731-32. Once a claim

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[5] *See, e.g.*, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) (failure to object at trial to psychiatrist's testimony); *Murray v. Carrier*, 477 U.S. 478 (1986) (failure to raise claim in state court appeal); *Engle v. Isaac*, 456 U.S. 107 (1982) (failure to object at trial to jury instructions); *Francis v. Henderson*, 425 U.S. 536 (1976) (failure to timely advance challenge to composition of grand jury); *Davis v. United States*, 411 U.S. 233 (1973) (failure to comply with rule requiring pretrial objection); *Brown v. Allen*, 344 U.S. 443 (1953) (failure to timely file appeal papers).

has been squarely presented to the state courts in fulfillment of the procedural default doctrine, this Court has been clear that the vagaries of state law do not cut off federal habeas review.

If the state court was correct that petitioner's *Brady* claim had been adjudicated by the state courts on direct review (*but see infra* Part II-B), petitioner did not "default" his federal claim by reasserting the *Brady* claim a second time on state post-conviction review. Quite the opposite, petitioner's proper preservation of the claim on direct review would open the door to federal habeas review; giving the state courts a second opportunity to consider the question by raising it again on post-conviction review would not close that door. Instead, the prior presentation of those claims (once or twice) means that the claims have been properly *exhausted* in the state system, not *defaulted*.

This Court has in fact already decided this question. In *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the California courts on post-conviction review had rejected the petitioner's *Miranda* claim based on a state rule that, like Tennessee's, prohibited the relitigation of claims previously decided on direct review. In words that control this case, the Court specifically held that the "effect upon the availability of federal habeas" of "a prohibition against *further* state review – for example, . . . a rule . . . preventing the relitigation on state habeas of claims raised on direct appeal" – "is nil." *Id.* at 804 n.3. Such "state rules against superfluous recourse have no bearing upon [a petitioner's] ability to raise [a federal] claim in federal court." *Id.* at 805. Unsurprisingly, every other federal court of appeals

to consider this question – six circuits in all – has reached the opposite conclusion from the Sixth Circuit in this case, finding no procedural default in the repeated presentation of a claim to state courts. *See Page v. Lee*, 337 F.3d 411, 415 n.1 (4th Cir. 2003); *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996); *Brecheen v. Reynolds*, 41 F.3d 1343, 1358 (10th Cir. 1994); *Bennett v. Whitley*, 41 F.3d 1581, 1582 (5th Cir. 1994); *Silverstein v. Henderson*, 706 F.2d 361, 368 (2d Cir. 1983); *cf. Davis v. Lambert*, 388 F.3d 1052, 1058 (7th Cir. 2004). The Sixth Circuit's directly contrary ruling here – a decision that did not mention, let alone attempt to distinguish *Ylst* – thus collapses in the face of dispositive precedent.

The Sixth Circuit's rule that claims are defaulted when consistently presented to state courts at every turn also makes no sense. The state law prohibition on the re-litigation of claims is simply a statutory codification in the habeas context of the principles of res judicata and collateral estoppel, "by which petitioners are bound by previous judgments and determinations." *Rickman v. State*, 972 S.W.2d 687, 696 (Tenn. Crim. App. 1997); *cf. Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.").[6]

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[6] That is also the consistent understanding of other state courts that prohibit the re-adjudication of claims on state post-conviction review. *See, e.g.*, *People v. Meeks*, 334 N.E.2d 253, 256 (Ill. App. Ct. 1975) ("The purpose of a post-conviction

The application of such a bar to re-litigation, of course, suggests not that the defendant deprived the state courts of the opportunity to decide the claim – which is what animates the federal procedural default doctrine – but that the defendant gave the state courts a second opportunity to right the alleged wrong, albeit an opportunity that it declined. Petitioner thus did not in any respect undermine the state courts' "interest in correcting their own mistakes." *Coleman*, 501 U.S. at 732. Petitioner's "superfluous recourse" to state post-conviction review (*Ylst*, 501 U.S. at 805) is thus beside the point because redundancy is the opposite of a default, and penalizing the diligent presentation of a claim to state courts would disserve, not advance, the principles of "comity and federalism" (*Coleman*, 501

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hearing is to test the constitutional integrity of proceedings which result in a conviction and to provide a remedy to those persons whose substantial constitutional rights have been violated. It is not intended to provide a defendant with a second review of matters which have already been considered or could have been considered, since the piecemeal invocation of post-conviction remedies is to be discouraged."); *Rojem v. State*, 829 P.2d 683, 684 (Okla. Crim. App. 1992) ("Due to the necessity of finality of judgments, our review of an appeal from denial of an application for post-conviction relief is limited to those issues which were not and could not have been raised on direct appeal. Issues which were raised and have been decided on direct appeal are barred from reconsideration by res judicata."); *see also Green v. French*, 978 F. Supp. 242, 251 (E.D.N.C. 1997) (stating that North Carolina's prohibition against re-adjudication "is a codification of the rule of res judicata; it embodies the notion that, if one state court considers a claim on the merits, the claimant is not entitled to a second bite at the apple in the state judicial system").

U.S. at 730) that underlie the procedural default doctrine.

Moreover, the Sixth Circuit's holding would regularly put habeas petitioners in the untenable position of guessing – with their life or liberty on the line – whether a claim will later be deemed to have been previously adjudicated. In a substantial body of cases, such as those involving state appellate courts' summary dispositions of defendants' claims, it will be ambiguous whether a federal claim was in fact resolved on direct review. *See, e.g.*, *Fry v. Pliler*, 127 S. Ct. 2321, 2324 (2007). In such a case, a petitioner faces an extraordinary dilemma in deciding whether to assert the claim on state post-conviction review. If he does, and the state post-conviction court subsequently deems the claim to have been previously adjudicated, the claim is (on the Sixth Circuit's view) defaulted for federal habeas corpus purposes. If he does not assert the claim, and the federal habeas court subsequently deems the claim not to have been decided on direct review, it will be denied on the ground that it was not properly exhausted. Requiring habeas petitioners to play such procedural roulette with their claims would be especially perverse in death penalty cases, where counsel have an obligation to advance all available potentially meritorious claims, and "[p]ost-conviction counsel" in particular are admonished to "seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation." American Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.5(C) (2003). Congress cannot have intended to create a scheme

under which habeas petitioners sentenced to death are literally defaulted both if they do and if they do not present a claim.

B. A Federal Court May Determine Whether A State Court Erred In Its Determination That A Federal Constitutional Claim Falls Subject To A State Default Or Waiver Rule.

Even if the Sixth Circuit were correct that the double exhaustion of a claim in state court may cause that claim to be procedurally defaulted (*but see supra* Part I-A), that would do nothing to sustain the judgment below. There is absolutely no basis in the record, law, or fact to support the conclusion that petitioner's *Brady* claim was adjudicated on direct review in the state court system. Notably, throughout the federal court proceedings, respondent has *never* defended either its prior (but long-since abandoned) arguments asserting adjudication on direct review or the factual or legal accuracy of the state post-conviction courts' rulings that petitioner's *Brady* claim had been "previously determined." Nor did the Sixth Circuit suggest that those prior state court rulings were correct. Instead, the court of appeals declared that a federal habeas court must put blinders on and give full effect to those undefended and indefensible rulings. That is wrong.

1. To begin with, there is *no question* that petitioner's *Brady* claim was not adjudicated on direct review and, in fact, did not even materialize until state law for the first time granted him access to the district attorney's case file on post-conviction review. After his conviction and sentence, petitioner appealed. At that time, petitioner was not and could

not have been aware of the exculpatory evidence that had been withheld; he accordingly did not raise a federal constitutional *Brady* claim on direct review. He did allege a violation of state law governing the required disclosure of statements by certain testifying witnesses. *State v. Cone*, 665 S.W.2d 87, 94 (Tenn. 1984). But that claim, by its terms, was not a federal constitutional claim under *Brady* or otherwise. *Id.*

In 1984, petitioner filed his first state post-conviction application, which the trial court denied, and the state court of criminal appeals affirmed. *See Cone v. State*, 747 S.W.2d 353 (Tenn. Crim. App. 1987). That application similarly did not include a *Brady* claim. *See generally id.*

Petitioner first raised this *Brady* claim in his timely second amended state post-conviction application. He elaborated on that claim to address the evidence now at issue after he received access to the district attorney's files and first became aware of the suppressed evidence of governmental witnesses and records. *See supra at* 5. Thus, the *Brady* claim simply *could not* have been – and necessarily was not – "previously determined" on direct appeal in 1984.

Simply put, the state courts' contrary rulings were mistaken and apparently were made in reliance on the State's own erroneous equation of petitioner's state-law claim with a federal constitutional claim under *Brady* (*see supra* at 5, 7) – a conflation of issues that the State has long since abandoned.

2. The Sixth Circuit's holding that federal habeas courts have no authority to review the correctness of the state courts' rulings refusing to adjudicate petitioner's federal constitutional claim lacks any

basis in law or precedent. Indeed, time and again, this Court has held that federal courts are not only empowered, but obligated to determine whether a procedural bar was properly applied by a state court. That obligation is manifest when the question is not the proper construction of state law, but, as in this case, is merely whether a federal constitutional claim will be extinguished because the state courts simply erred in their understanding of whether that federal claim had been previously presented.

Thus, in *Coleman v. Thompson*, 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). Likewise, it is long settled that "the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (internal quotation marks and citation omitted). Thus, when considering a state court judgment on direct review, it is "this Court's duty to ascertain whether the procedural grounds relied upon by the state court independently and adequately support its judgment." *Wolfe v. North Carolina*, 364 U.S. 177, 186 (1960); *see also* Wayne R. LaFave, *Criminal Procedure* § 28.4(b), at 1336 (4th ed. 2004) ("[T]he adequacy of the state's application of its procedural rule remains a threshold issue in any case in which procedural default is raised as a defense by the state.").

And this Court has repeatedly exercised that duty. For example, this Court looks behind assertions of independent and adequate procedural or

substantive state law grounds to determine if they rest on a "fair or substantial" basis, not hesitating to find the asserted ground inadequate when it does not meet that threshold. *See, e.g.*, *Wolfe*, 364 U.S. at 193 (finding state procedural ground adequate but only after "independent examination of North Carolina law"); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (looking behind two proffered non-federal grounds and finding neither adequate); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944) (looking behind non-federal ground and finding it not to rest on a "fair and substantial basis"); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 282-83 (1932) (looking behind non-federal ground and finding it "unsubstantial and illusory").

The federal courts' obligation to consider for themselves whether a procedural bar was properly invoked is also reflected in the settled principle that only firmly established and consistently applied procedural rules will bar review in federal court. 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.

In *Johnson v. Mississippi*, this Court looked behind the Mississippi Supreme Court's conclusion

that the petitioner had waived his right to challenge the validity of a prior conviction that had been used to enhance his sentence because he had not raised the claim on direct appeal. The court found "no evidence that the procedural bar relied on . . . ha[d] been consistently or regularly applied," and therefore concluded that it was not an independent and adequate state ground supporting the state court's judgment. 486 U.S. at 587. Likewise, this Court found no independent and adequate state ground barring its review in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), because the procedural rule purportedly precluding review was not "strictly or regularly" followed. *Id.* at 264. And in *Dugger v. Adams*, 489 U.S. 401 (1989), this Court held that the petitioner had procedurally defaulted his claim, but only after engaging in an extended analysis to determine that the state procedural rule had been consistently and regularly applied. *Id.* at 410 n.6.

Even when a state procedural rule is firmly established and consistently applied, this Court will look to ensure that the rule does not "force resort to an arid ritual of meaningless form" (*Staub*, 355 U.S. at 320) and that in the particular case it is not "exorbitantly appl[ied]" (*Lee v. Kemna*, 534 U.S. 362, 376 (2002)). In addition, this Court will look behind the application of a procedural bar to determine if the petitioner has substantially complied with the procedural rule's "essential elements," and "nothing would [] be[] gained by requiring" perfect adherence to it. *Id.* at 385 & n.15. It was on this basis that this Court concluded, in *Lee v. Kemna*, a federal habeas case, that the state courts' assertion of failure to comply with a state procedural rule regulating

continuance motions was "inadequate to block adjudication of [the] federal claim." *Id.* at 381.

Certainly nothing in the federal habeas corpus statute hamstrings the federal courts' ability to determine whether the state courts erred in refusing to adjudicate petitioner's federal *Brady* claim. Congress has provided that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). That is no barrier here. First, even if that "presumption" applied in this context, it is just that – a presumption – and one that is readily overcome by the record in this case (underscored by respondent's failure to even defend the state courts' rulings). *See supra* at 29-30.

Second, that presumption does not arise here because the question whether a claim was "previously determined" is a legal issue, not a "factual issue," and does not even glancingly implicate factual matters that Congress left to the judgment of state courts, such as the weight to be given various evidence. *See, e.g.*, 28 U.S.C. § 2254(d)(2) (stating that writ of habeas corpus may be granted if state court's ruling "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings"); *id.* § 2254(f) (stating that on challenge to "the State court's determination of a factual issue," federal court must be provided with "that part of the record pertinent to a determination of the sufficiency of the evidence").

Moreover, independent federal review of the adequacy of state court judgments serves two crucial functions. First, it protects the fundamental right of individuals who properly preserve their

constitutional claims to have those claims considered on the merits by a federal habeas court at least once. When an individual alleges a violation of his constitutional rights, those rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." *Lawrence*, 286 U.S. at 282. State courts may not evade their obligation to decide constitutional questions simply by citing an unsubstantiated state law basis for their judgment. *See id.*

Second, independent review is essential to preserve this Court's established and constitutionally vital role as the final arbiter of questions of federal law. If a state court's assertion of a "plainly untenable" state procedural ground automatically removed a case from this Court's jurisdiction, this Court's "power to review easily may be avoided" and enforcement of the Federal Constitution frustrated. *Staub*, 355 U.S. at 319; *see also Wolfe*, 364 U.S. at 185 ("[A] state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support.").

Both of those rationales are fully implicated here. Had the Sixth Circuit conducted even a cursory examination of the accuracy of the state courts' finding that the *Brady* claim was previously determined, the erroneousness of that decision would have been laid bare and, even under the most deferential standard of review, would have opened the door to federal consideration of petitioner's claim. The state courts simply could not have previously decided a *Brady* claim that did not exist until years

after the state courts' prior rulings, when petitioner first was permitted access to the district attorney's files. The state courts' conclusion is, in fact, so demonstrably wrong – so clearly lacking a "fair or substantial basis" (*Wolfe*, 364 U.S. at 193), and the state rule so "exorbitantly appl[ied]" (*Kemna*, 534 U.S. at 376) – that the State itself does not even attempt to articulate a defense of it. Nothing in federal habeas law requires federal courts to turn their backs on errors in invocations of state procedural law that are so profound that the State declines to defend them. Furthermore, a holding that even facially erroneous applications of a state procedural rule can preclude federal habeas review would abdicate the federal court's responsibility to serve as the ultimate interpreter and enforcer of the Federal Constitution. Under the Sixth Circuit's holding, any state court wishing to head off this Court's scrutiny of a death sentence or conviction need do nothing more than invoke an insubstantial procedural default claim to close the federal courthouse door and to preempt this Court's role. In short, the Sixth Circuit fundamentally erred in holding that the federal constitutional rights of a prisoner facing death can be effectively nullified by reckless application of a state procedural rule that, even when properly applied, does not constitute a bar to federal review. The judgment accordingly should be reversed.[7]

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[7] The withholding of this exculpatory evidence until the second post-conviction proceeding also establishes ample "cause" for any alleged default (*Banks v. Dretke*, 540 U.S. 668, 692-93 (2004)), and given the "prejudice" flowing from this suppressed

II. Petitioner's *Brady* Claim Is Meritorious.

No court has ever fully considered, let alone ruled upon, the merits of petitioner's *Brady* claim. The state trial and federal district courts summarily dismissed the claim without holding an evidentiary hearing based on a series of procedurally undefended and indefensible rulings. *See supra* Part I. The Sixth Circuit, for its part, offered in dicta its view that the claim lacked merit (Pet. App. 25a, 59a-60a), but that was articulated only as an afterthought to that court's fundamentally flawed conception of the role of federal habeas courts and without the benefit of any evidentiary record being developed in the district court. Given the extraordinary procedural odyssey through which this case has wended, the many years that this case has ping-ponged between this Court and the Sixth Circuit, the State's constantly shifting

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evidence, petitioner cannot be denied federal review. Federal review is also not prohibited when the state courts have not "strictly or regularly" refused to address *Brady* claims based on withheld evidence first disclosed once the state courts construed state law to grant access to district attorneys' files. *See supra* at 33. To the contrary, the state courts have consistently addressed such claims on the merits. *See, e.g.*, *Workman v. State*, 868 S.W.2d 705 (Tenn. Crim. App. 1993) (addressing *Brady* claims in capital case decided on the merits following disclosure of district attorney files); *State v. Johnson*, No. 01C01-9610-CR-00442, 1997 WL 738586, at *3 (Tenn. Crim. App. Nov. 25, 1997) (deciding *Brady* claims on merits when capital petitioner "filed his second post-conviction petition in February 1995 after receiving information in 1992 pursuant to a request under the Tennessee Open Records Act"); *O'Guinn v. State*, No. 02C01-9510-CC-00302, 1997 WL 210890 (Tenn. Crim. App. Apr. 29, 1997) (remanding for hearing on the merits of *Brady* claim in capital case).

and constantly misguided arguments, and the facial substantiality of petitioner's *Brady* claim, basic principles of constitutional fairness, procedural efficiency, and the credibility of the judicial review process in capital cases require, at a minimum, that the case be remanded to the district court to conduct an evidentiary hearing into petitioner's *Brady* claim.

In *Brady v. Maryland*, this Court held that "the suppression 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, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). In *Strickler v. Greene*, 527 U.S. 263 (1999), this Court outlined the "three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.* at 281-82.

In this case, the first two components of the *Brady* inquiry – that (i) evidence favorable to petitioner was (ii) suppressed by the state – are not disputed. The only question is whether the evidence was material or, at a minimum, whether petitioner has sufficiently alleged that the evidence was material either to his conviction or his sentencing, and thus its suppression prejudicial, as to warrant the conduct of an evidentiary hearing. In that regard, the question in determining the materiality of the evidence "is not whether the defendant would more likely than not have received a different verdict . . . but whether in its absence he received a fair trial,

understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Petitioner satisfies the *Brady* standard. His sole defense at trial and sentencing was that he lacked the mental state required for conviction of first-degree murder because he committed the crimes while suffering from a drug-induced psychosis, rooted in the post-traumatic stress disorder arising from his heroic military service in Vietnam. The State, for its part, tried the case and sought a death sentence under the theory that petitioner was a premeditated murderer and was not under the influence of drugs at the time of the killings. Because (i) the suppressed evidence bore directly on the critical dispute in the case and at sentencing, (ii) the evidence also directly undermined the State's theory of the case and the credibility of its witnesses, and (iii) one of the other aggravating circumstances on which the death sentence rests has already been ruled unconstitutional (665 S.W.2d at 95), the trial verdict is not worthy of confidence and, indeed, there is a substantial basis for concluding that the evidence would have swayed at least one juror to conclude either that petitioner lacked the required mens rea for first-degree murder or at the very least should not have been sentenced to death. Tenn. Code Ann. § 39-13-204 (1979) (requiring unanimity for death sentence).

A. The Suppressed Evidence Is Material Because It Bore Directly On Petitioner's Sole Defense And The Central Premise Of The Prosecution's Case Both At Trial And Sentencing.

1. The suppressed evidence bore directly on the central issue in the case both at trial and sentencing. Petitioner's only defense and argument in mitigation of the death penalty was that he lacked the required mental state for the charged crimes as a result of the combination of post-traumatic stress disorder and a drug-induced psychosis. His counsel explained to the jury that "there is only one issue in this entire lawsuit, and that issue is whether or not the acts of Gary Cone were the clear and deliberate and premeditated acts of an individual, whether that individual was sane under the law as His Honor will give it to you." Tr. 2040. And, the prosecution agreed that "[t]he question really is down to [whether Cone] was . . . criminally responsible for those actions." J.A. 110.

In support of this single defense, petitioner put on the testimony of two experts, who testified that post-traumatic stress disorder and a resulting extraordinary drug addiction had rendered petitioner psychotic and incapable of understanding the consequences of his actions. *See* J.A. 79-113; *see also infra* at 46. The State did not dispute that the drug use petitioners' experts attributed to him would have induced a psychotic condition. Nor did any witness for the prosecution directly testify as to whether petitioner was on drugs at the time he committed the crimes.

Instead, the prosecution's approach to defeating petitioner's defense was to attack the defense's central premise that petitioner was a drug user at all, describing that contention as "balon[e]y." J.A. 108. The prosecution used cross-examination to show that each defense expert's conclusion that petitioner had suffered from a psychosis rested on petitioner's description of his own drug use. *See, e.g.*, J.A. 106 (cross-examination of Lipman) ("Q. . . . . [I]s all of what you're saying based on what he told you? A. Yes, sir. Q. It's based on his statements to you, is it not? A. It is, yes."); Tr. 1689 (cross-examination of Jaremko) ("Q. This extent of drug usage that you have based your opinion on, then, is based on information from Mr. Cone and Dr. Lipman. . . . What someone else has told you. Isn't that about it? A. That's correct."). The prosecution also introduced the testimony of three fact witnesses which generally supported the State's position that petitioner was not a drug addict. Tr. 1872-83, 1955-57, 1981-83.

On that basis, the prosecution argued to the jury that petitioner was not, in fact, a drug addict, and thus that there was no foundation for his experts' conclusions that he was suffering from a psychosis at the time of the crimes. The experts, the prosecutor explained, "[j]ust took [petitioner's] word for it." J.A. 111. "I'm not trying to be absurd, but he says he's a drug addict. I say balon[e]y. He's a drug seller." J.A. 107. And as a drug dealer, rather than an addict, "[h]e wasn't drug crazy. He is a robber and a killer. Simple as that. Nothing complicated about this." J.A. 108. "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." J.A. 113. The Tennessee Supreme Court thus characterized petitioner's defense as "tenuous . . . at best," in light of the testimony of the State's witnesses and the limited evidence assembled by petitioner. *State v. Cone*, 665 S.W.2d 87, 90 (Tenn. 1984). The jury accepted the prosecution's argument, convicting petitioner of first-degree murder and sentencing him to death.

2. The suppressed evidence that is the subject of petitioner's *Brady* claim would have substantially corroborated petitioner's defense and defeated the foundation of the State's argument that petitioner was not a drug addict. For example, the police suppressed a statement taken from Robert McKinney, who witnessed petitioner rob a market the day before the jewelry store robbery. When asked whether petitioner "appear[ed] to be drunk or high on anything," McKinney responded: "Well, he did, he acted real weird; that is the reason I watched him." J.A. 49.

The State also suppressed a report documenting that Charles and Debbie Slaughter, who observed petitioner immediately after the jewelry store robbery, said petitioner "looked wild eyed." J.A. 50. And the prosecution withheld a report received from the Police Chief of petitioner's hometown informing the investigating officers that petitioner was "believed [to be] a heavy drug user" (J.A. 26), and a report from Sergeant Grieco, a Pompano Beach, Florida police officer involved in petitioner's arrest soon after the murders, describing petitioner as "agitated" and "looking about in a frenzied manner" (J.A. 53).

The suppressed evidence does not stop there. The prosecution also withheld other evidence that would have both bolstered petitioner's defense and permitted a blistering cross-examination of the prosecution's own witness, who sought to suggest that petitioner was neither a drug user nor under the influence at the time of the killings. This evidence, in turn, would have seriously undercut the testimony of prosecution expert, John Hutson, whose own testimony relied critically on statements from these prosecution witnesses (Tr. 1982) to opine that petitioner did not suffer mental illness at the time of the crimes or otherwise lack criminal culpability (Tr. 1983).

More specifically, while Memphis Police Sergeant Ralph Roby testified for the prosecution that petitioner did not appear to have needle marks on his body (Tr. 1939), the prosecution suppressed evidence that would have destroyed the impression left by his testimony that petitioner was not a drug addict, such as Roby's personal authorization of multiple official teletypes to other law enforcement agencies describing petitioner not only as a "DRUG USER" (J.A. 56-57) but a "HEAVY DRUG USER" (J.A. 55). The prosecution also withheld a statement Roby took from petitioner's sister, Sue Cone, who told Roby that petitioner had "severe psychological problems" and "need[ed] to work on the drugs" which were a "severe" problem. J.A. 59-60. Moreover, Roby himself had taken the statement of Robert McKinney, which, as noted above, described petitioner as being drunk or high when he robbed the store. J.A. 49.

Similarly, FBI Agent Flynn testified for the prosecution that, in an interview after petitioner's arrest, petitioner appeared to be under control, suggesting that he was not suffering from extreme drug withdrawal. Tr. 1923-24, 1937. Although the FBI participated actively in the investigation and prosecution of petitioner, the defense was not provided numerous FBI documents that would have seriously undercut Flynn's testimony. *See Kyles v. Whitley*, 514 U.S. 419, 428-29, 437 (1995) (stating that *Brady* applies to materials possessed by law enforcement agencies involved in investigation and prosecution). These documents reveal the FBI's own working understanding that petitioner was a drug addict. Like Roby, the FBI distributed seven official teletypes describing petitioner as a "BELIEVED HEAVY DRUG USER" and "DRUG USER." J.A. 62-68. At least one of the teletypes was entered into the National Crime Information Center, the official computerized index used by federal and state law enforcement agencies nationwide. J.A. 69. Various other suppressed FBI documents describe petitioner as a "DRUG USER." J.A. 71 (FBI statistics letter); C.A. J.A. 53 (FBI file coding).[8]

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[8] The FBI documents were not included in the district attorney's files, but instead were disclosed only at the district court's direction when petitioner filed his federal habeas petition. *See supra* at 13 n. 3. The district court and court of appeals correctly recognized that the FBI files are properly considered in evaluating petitioner's *Brady* claim if petitioner has demonstrated "cause and prejudice" for not raising them in the state courts. Because petitioner did not have access to the documents in state court and had no basis for surmising their existence, the relevant question is whether petitioner suffered

Finally, an acquaintance of petitioner, Ilene Blankman, testified for the prosecution that she did not believe that petitioner was on drugs when he was in her presence, and that once when she had seen petitioner disrobe, she did not see needle track marks on his body. Tr. 1875. Petitioner's counsel sought to impeach Blankman's testimony on the grounds that her employment by a sheriff's office gave her a strong incentive to cooperate with the prosecution (Tr. 1902), and that she had received unusual attention and treatment by being escorted from Florida to Tennessee for trial by a law enforcement agent (Tr. 1888).

Discovered in the prosecution's case file was additional evidence that would have more thoroughly undermined Blankman's credibility. For example, notes from a pre-trial interview with Blankman made no mention of the claim she made at trial that she had seen petitioner without clothes and noticed no track marks. J.A. 72-73. An FBI report also tellingly recounted that Blankman had been accused of lying at petitioner's trial, but had not responded to defend the truth of her testimony. J.A. 75. Additional correspondence in the district attorney's files suggested that the prosecution had been unusually solicitous of her testimony. J.A. 76-78.

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prejudice from the state court's failure to evaluate the materiality of that evidence. For the reasons given in the text, the evidence suppressed by the prosecution was material. Hence, petitioner was prejudiced. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004) (in evaluating *Brady* claim, "prejudice" and "materiality" inquiries are identical).

That direct and affirmative evidence that petitioner was both a well-known drug addict and under the influence of drugs when he committed the crimes went to the heart of petitioner's defense and resoundingly corroborated the testimony of his two expert witnesses. Dr. Matthew Jaremko, an expert on combat-related mental disorders and the only expert at trial on syndromes relating to the Vietnam War, diagnosed petitioner as suffering from a combination of two disorders: "One is a substance abuse disorder, but that is superimposed upon a post-traumatic stress disorder." J.A. 85. Dr. Jaremko testified that, in his view, petitioner "has continued to use drugs as a self-way [sic] to self-medicate against the stress that he feels from having been a victim of the combat trauma." J.A. 87. *See generally* J.A. 79-91 (expert testimony of Dr. Jaremko).

Dr. Jonathan Lipman, a neuro-pharmacologist and expert on substance abuse disorders, diagnosed petitioner as "suffering from severe symptoms . . . amphetamine psychosis" that would "prevent his knowing the wrongfulness of an act" and render him "substantially incapable of conforming his conduct to the requirements of law." J.A. 103-104; *see also id.* (condition constituted "a mental illness"). Dr. Lipman concluded that petitioner's use of "[f]righteningly large amounts [of drugs] for a long time" (J.A. 106) had produced "formication" hallucinations (J.A. 101-103) and "extreme paranoia" (J.A. 101); *see also* J.A. 97 ("I could not survive one of these amphetamine doses."); Tr. 1851 (petitioner suffered from "[t]he most profound symptoms" of acute amphetamine psychosis). *See generally* J.A. 92-106 (expert testimony of Dr. Lipman).

The suppression of such large amounts of strongly corroborating defense evidence, bearing both on his guilt and the appropriate sentence, was profoundly prejudicial to petitioner's defense. In fact, the prosecution's suppression of the evidence that would have validated petitioner's defense, and the prosecutors' patently false statements to the trial jury about petitioner's drug addiction and drug use, substantially undercut the premise of this Court's prior rulings in this case. The Court has twice sustained the constitutionality of the sentencing phase of petitioner's trial, expressing substantial confidence in the adversarial system of justice and the jury's ability to account for all the relevant facts and circumstances in determining whether to sentence petitioner to death. *See* 535 U.S. 685, 699-700 (2002) (petitioner did not receive constitutionally ineffective assistance of counsel at sentencing because his counsel made reasonable strategic judgments in light of the available evidence); 543 U.S. 447, 456-57 (2005) (per curiam) (petitioner's death sentence was valid because the state courts properly determined that the evidence before the jury satisfied a narrowed construction of an otherwise unconstitutionally vague aggravating circumstance). But petitioner's *Brady* claim demonstrates that, in reality, the jury did *not* have all the relevant facts before it, and the strategic decisions made by petitioner's counsel at sentencing actually rested on a seriously distorted assessment of the facts created by the State's outrageous suppression of all the evidence relevant to petitioner's defense.

The record thus establishes a *Brady* violation in and puts this case on all fours with *Kyles*, in which this Court held that *Brady* was violated when the

State suppressed witness statements that would have contradicted later testimony by eyewitnesses – testimony that was "the essence of the State's case" – and would have called physical evidence into question. *Kyles*, 514 U.S. at 441 (quoting decision below). As this Court explained, failing to provide such contradictory evidence was prejudicial because it would have "substantially reduced or destroyed" the value of the witnesses, (*id.* at 441) and "would have fueled a withering cross-examination" (*id.* at 443). "Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested." *Id.* at 429. The suppressed evidence thus "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" (*id.* at 435), especially when one considers that creating reasonable doubt in just one juror would be sufficient to prevent a conviction or death sentence.[9]

B. The Court Of Appeals' *Brady* Analysis Was Fundamentally Flawed

Having washed its hands of any responsibility to review the state courts' invocation of a procedural

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[9] *See also Banks*, 540 U.S. at 699 (*Brady* violation established where disclosure of suppressed evidence "would have dampened the prosecutor's zeal" in arguments to jury; "the State could not have underscored, as it did three times in the penalty phase," that petitioner planned to use the murder weapon; and the suppressed evidence would have impeached testimony that "was the centerpiece of [the] prosecution's penalty-phase case").

default rule, the Sixth Circuit stated its view that the evidence suppressed by the prosecution was not material. That dictum was as wrong as the court's holding.

First, the court of appeals improperly evaluated the evidence piecemeal "as four separate *Brady* claims" (Pet. App. 18a), and considered "each category of [withheld] documents separately" (Pet. App. 57a). This Court has commanded exactly the opposite, holding that whether suppressed evidence is material must be determined by considering the evidence "collectively, not item by item." *Kyles*, 514 U.S. at 436. *Cf. id.* at 440 (court of appeals erred where its opinion "contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone" of its ruling). That approach reflects the reality that the prejudicial impact of the suppression of exculpatory evidence, like other trial errors, must be assessed in the context of the trial record as a whole and, by the same token, the constitutional violation as a whole.

Second, the court's analysis of the evidence makes no sense even piece by piece. To begin with, it left out a lot of pieces. In its first opinion, the court discussed only one police report, which it deemed immaterial "because of the overwhelming evidence of Cone's guilt." Pet. App. 59a-60a. And then, even when its review became slightly more encompassing, the court of appeals inexplicably and inconsistently asserted that the jury had before it "persuasive testimony that Cone was *not* under the influence of drugs" when he committed the crimes (Pet. App. 25a (emphasis added)), and "had already heard

substantial evidence that he *was* a drug user" (Pet. App. 26a (emphasis added)).

Third, the court's focus on the "overwhelming evidence of Cone's guilt" (Pet. App. 59a-60a) makes no sense. The evidence of his guilt – in the sense that he committed the killings – was indeed overwhelming because it was uncontested by petitioner. If the court meant, instead, that the evidence at trial that Cone was not a drug user was overwhelming in comparison to the evidence that he was not, then the court simply gave dispositive effect to the very constitutional violations that created the skewed evidentiary record. Beyond that, given the substantial evidence in the prosecution file that, *by the government's own characterization*, petitioner was a drug user, any effort to characterize the record evidence including the suppressed material as overwhelmingly favorable to the prosecution would simply be wrong.

Fourth, any suggestion that the suppressed evidence was cumulative, that is, repetitive, lacks merit. That evidence provided the very direct evidence of petitioner's drug use and drug-induced condition that the prosecution had stated flatly to the jury was absent from his case, and supplied the very corroboration of petitioner's experts that the prosecution had claimed was fatally lacking. Indeed, petitioner's defense was left in tatters when the prosecution established that petitioner had no direct evidence of his drug use and addiction. Further, the trial testimony that the majority below deemed "persuasive" on the point that petitioner was not under the influence of drugs at the time of the crime (Pet. App. 25a) is the very testimony that would have been impeached had the prosecution disclosed the

teletypes issued by Sergeant Roby, the official FBI documents describing petitioner as a drug user, and the memoranda and records undercutting the credibility of Ilene Blankman. *See supra* at 42-45.

At the very least, the Sixth Circuit erred in denying petitioner the opportunity to have an evidentiary hearing in the district court to show that the prosecution's suppression of evidence undermines confidence in the trial verdict and death sentence. The district court erroneously dismissed the *Brady* claim as procedurally defaulted and, for that reason, never held an evidentiary hearing to assess the materiality of the evidence. That was error, and the court of appeals should have remanded the case to the district court rather than opine on the merits of an unexamined claim. When, as here, a state court has not addressed an issue, the State and state courts have demonstrated unprecedented inconsistency in attempting to avoid a claim, and the amount of suppressed evidence is substantial and aimed at the heart of the criminal case, a habeas petitioner is entitled to an evidentiary hearing. *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Teti v. Bender*, 507 F.3d 50, 61 (1st Cir. 2007) (collecting decisions concluding that *Keeney* "only modified *Townsend*'s six categories of mandatory hearings, leaving the rest of *Townsend* intact," and "the Advisory Committee Notes for Rule 8 of the Rules Governing § 2254 Cases, regarding evidentiary hearings, suggest that *Townsend* still applies except to the extent it is specifically superceded by § 2254(e)(2)"), *cert. denied sub nom. Teti v. Clarke*, 128 S. Ct. 1719 (2008). At the very least, the district court should have the opportunity to exercise its

judgment whether to hold a hearing in light of this Court's holding in *Kyles* that the materiality of suppressed evidence is to be determined cumulatively, not item-by-item. *Cf. Schriro v. Landrigan*, 127 S. Ct. 1933, 1940-44 (2007) (addressing circumstances in which district court appropriately exercises its discretion to hold evidentiary hearings). Though there is little question that petitioner's *Brady* claim is meritorious, this case can accordingly be properly resolved more narrowly by remanding the case to the district court for consideration of the merits of that *Brady* claim in the first instance.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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