19-5799 ORIGINAL

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Jesse Lee Coddington — PETITIONER
(Your Name)

vs.

Martin Makel, Warden, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jesse Lee Coddington
(Your Name)

R.A. Handlon Correctional Facility
(Address)
1728 W. Bluewater HWY.
Ionia, Michigan 48846
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

1. According to **Cone** V. **Bell**, 556 U.S. 449, can Michigan's Court Rule 6.508 (D)(2) be used to procedurally default a Petitioner's claims from federal habeas adjdication ?

2, Does federal Rule of civil procedure 60(b) 1 through 6 apply equally to federal habeas corpus?

3.Can a State create a court rule that shall abridge the privileges or immunities of citizens of the United States?

4. Does the Fourteenth Amendment, Sec. 1. of the United States Constitution apply equally to all citizens of the United States?

5. When collateral review is the first opportunity in Michigan for Petitioner to raise a claim of ineffective assistance of appellate counsel, can MCR 6.508 (D)(3) be used to procedurally bar this issue?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

OTHER

INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 24, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The instant Petition for a Writ of Certiorari, involves both federal constitutional proisions, i.e., U.S. Const. Am. XIV, Substantive Due Process Clause; U.S. Const. Am VI § 1254 (1), jurisdictional predicate for Supreme Court exercise of certiorari jurisdiction; Tittle 28 U.S.C. § 2254 State Prisoner habeas corpus statutory provision; and, Michigan Court Rule -- MCR 6. 508 (D) (1 through 3), state procedural default rule.

UNITED STATES CONSTITUTION, 14TH AMENDMENT, Sec. 1.

FOURTEENTH AMENDMENT

§ 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without **due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The complete history of the case is long and intensive. The Petitioner has diligenently pursued relief and to get his claims and issues heard and adjudicated on the merits in the federal courts.

Petitioner was convicted for first-degree murder on March 15, 1988. In October of 1989, the State of Michigan adopted a series of rules governing motions for relief from judgment. One such court rule, MCR 6.508(D)(3), severely limits the claims that can be raised in a collateral attack if the claims could have been raised on direct appeal. On June 24, 1996, the district Court denied the Petition for Writ of Habeas Corpus in this matter, relying on MCR 6.50 (D) as a basis for a finding that the claims presented were procedurally defaulted. The Court of Appeals affirmed the judgment in an unpublished opinion on May 13, 1998, en banc rehearing was denied on June 26, 1998; and the Supreme Court denied Certiorari in this matter on February 22, 1999, rehearing was denied on March 19, 1999. All of these decisions were based on whether or not MCR 6.508(D) was being improperly retroactively applied to up hold Michigan's procedurally default rule to deny Petitioner's Writ of Habeas Corpus. And if not weather or not the Michigan Court of Appeal's order was a bifurcated or mixed order.

Petitioner's **original** appellate counsel, (Atty. Gerald

Lorence), failed to submit, on direct appeal, the dispositive issues, vis-a-vis, sufficiency of the evidence on 'first degree murder.' e.g., lack of premeditation/deliberation/felony; and the clearly erroneous trial court admission, of a taped, inculpatory, extra-judicial police/witness' prior "inconsistent statement" (NOT GIVEN UNDER OATH) as 'substantive evidence,' inter alia, and further, said counsel failed to cite any federal cases or the constitution in most of the issues that he did raised on direct appeal. **He did however, cite state cases, that relied on federal cases and the constitutional claims, in the issues that he did raise on direct appeal,** thus fairly presenting to the state courts the constitutional nature of the claims under the **Picard** v **Connor**, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L.Ed. 2d 438 (1971) standard. However consequently, on November 2, 1993, Petitioner, acting pro se, moved the trial court, via, **motion for Relief from Judgment,** pursuant to MCR 6.500 et. seq.. Therein, asserting both state and federal constitutional claims, with the intention to provide said court with a **[s]econd** opportunity to properly adjudicate such constitutional claims, incurred during Petitioner's state-court trial. And exhaust all state remedies before bring his claims in a federal habeas corpus proceeding. See 28 U.S.C. § 2254 (b)(1)(4) (permitting issuance of a writ of habeas corpus only after "the applicant has exhausted the remedies available in the courts of the state").

Where the trial court's January 12, 1994 judgment on the post-conviction **Motion for Relief from Judgment,** [s]olely and

specifically addressed the **[m]erits** presented; (Appendix hereto attached), where the Michigan Court of Appeals' May 2, 1994 judgment, claimed a procedural default; (MCR 6.508 (D)), said order did not cite which part of the procedural default bar it was claiming, (D)(1), (2) or (3) however, the court did go further in its order and stated: "Furthermore, defendant raises issues previously presented to this Court, and defendant has not shown his original appellate counsel to be ineffective. **People** v **Reed**, 198 Mich App 639 (1993)," (Appendix hereto Attached), and where the Michigan Supreme Court November 30. 1994 summary denial, on post-conviction relief (MCR 6.500 et seq.) made no indication, whatsoever, on sanctioning any claimed procedural default. (Appendix hereto attached). Thus in error, based on these rulings from the state courts the District Court ruled that petitioner had to establish "**cause and prejudice**" to overcome a procedural default to have his issues heard in the Federal Court.

However, the United States Supreme Court held in **Ylst** v **Nuuemaker**, 501 U.S. 797; 111 S.Ct. 2590, that when a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted, thus MCR 6.508 (D)(2) can not be used to procedurally bar these issues. The United States Supreme Court has upheld its earlier holding made in passing in the **Ylst** case. See **Cone** v **Bell**, 556 U.S. 449 the United States Supreme stated: "When a state court declines to review the merits of a petitioner's claim on the ground that it

has done so already, it creates no bar to federal habeas review." The Court has given precedent holding to the former decision made in passing in **Ylst**. Thus, the petitioner never had to establish "cause and prejudice" to overcome any procedural default. the District Courts finding of procedural default is not valid. Furthermore, the Sixth Circuit Court of Appeals Stated: In **Whiting** v **Burt**, 395 F.3d 602, footnote #7: As this Court said in **Hicks** v **Straub**, 377 F.3d 538, 558 n.17 (6th Cir. 2004), with reference to a petitioner's claim of ineffective assistance of appellate counsel and denial of the petition by the Michigan Courts under 6.508(D): Petitioner did not procedurally default his claim of ineffective assistance of appellate counsel. State collateral review was the first opportunity that petitioner had to raise the claim. In denying petitioner's motion for relief from judgment, the state trial court and the court of appeal's decided petitioner's ineffective-assistance-of-counsel claim against petitioner - - albeit without any reasoning. Collateral review was the proper proceeding for ineffective assistance by prior appellate counsel, thus MCR 6.508(D)(3) can not be used to procedurally bar this issue. Furthermore, because of the rulings in **YLST** V. **NUUEMAKER**, 501 U.S. 797; 111 S.Ct. 2590, and **CONE** V. **BELL**, 556 U.S. 449 (2009) the petitioner's Writ of Habeas Corpus should have never been procedurally barred in Federal Court under the standard of failure to establish cause and prejudice for a procedural default that doesn't apply to Federal Court abstention.

REASONS FOR GRANTING THE PETITION

STANDARD OF REVIEW FOR RULE 60(b)(5) MOTION

IN **Rufo** v **Inmates of Suffolk County Jail**, 502 U,S. 367, 388, 112 S.CT. 748, 762, 116 L.Ed.2d 867, at 112 S.CT. 760, rule 60(b)(5)--which states that, "upon such terms as are just, the court may relieve a party ... from a final judgment ... [when] it is no longer equitable that the judgment should have prospective application" --authorizes relief from an injunction if the moving party shows a significant change either in factual conditions or in law. Thus, petitioner's ability to satisfy Rule 60(b)(5)'s prerequisites hinge on whether the Court's later cases have so undermined the ruling in petitioner's case that it is no longer good law. The Court's more recent cases have clearly undermined the assumptions upon which the District Court relied on at the time it ruled on petitioner's case.

When a decision of the Sixth Circuit Court of Appeals departs in some pivotal aspects from a decision of the District Courts, recall and amendment of the judgment may be warranted to the extent necessary to protect the integrity of the District Court's prior judgment.See **AMERICAN Iron And Steel Institute** v **EPA**, 560 F.2d 589, 596 (3d Cir. 1977), **cert. denied** 435 U.S. 914, 98 S.Ct. 1467, 55 L.Ed.2d 505 (1978). Modification of a prior judgment also promotes uniformity in judicial decision making and in the treatment of litigants. **Id**. at 597-98. See also **Bryent** v **Ford Motor Co.**, 886 F.2d 1526, 1530 (9th Cir. 1989); **McGeshick** v **Choucair**, 72 f.2d 62, 63 (7th Cir. 1995); **Davis** v **Lawrence-**

Cedarhurst Bank, 206 F.2d 388, 389 (2d Cir.) **cert denied**, 346 U.S. 877, 74 S.Ct 130, 98 L.Ed. 384 (1953).

The primary countervailing consideration is the importance of finality in the judicial proceedings. **McGeshick**, supra. However, this is not a staled case, "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." **United States** v **Ohio Power Co.**, 353 U.S. 98, 99, 77 S.CT. 652, 653, 1 L.Ed.2d 683 (1957).

RETROACTIVITY

The District Court's application of MCR 6.508 (D)(2) to this case is contrary to the United States Supreme Court's decisions in **Picard** v **Connor**, 404 U.S. 207, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); **Ylst** v **Nuuemaker**, 501 U.S. 797; 111 S.Ct. 2590 (1991); **MURRAY** v **CARRIER**, 477 U.S. 478, 490-492, 106 S.CT. 2639, 91 L.Ed.2d 397 (1986); **Cone** v **Bell**, 556 U.S. 449 (2009), which specifically ruled, relying on **Ylst**, supra, as their authority. See also, **WELLONS** v **Hall**, 558 U.S. 220, 222 (2010). And **Strickland** v **Washington**, 466 U.S. 298 (1984) and the 6th Circuit Court of Appeals decisions in **Carpenter** v **Mohr**, 163 F.2d 938 (6th Cir. 1998); **Magana** v **Hofbauer**, 263 F.2d 542 (6th Cir. 2001); **Whiting** v **Burt**, 395 F.3d 602; **Hicks** v **Straub**, 377 F.3d 538, 558 n.17 (6th Cir. 2004); and **Guilmette** v. **Howes**, 624 F.3d 286 (6th Cir. 2010). Thus, the district Court's finding of procedural

default is not valid.

To determine whether a decision establishes a new rule of criminal procedure, federal courts apply the analysis of **Teague** v **Lane**, 489 U.S. 288, 109 S.Ct. 1060; 103 L. 2d 334 (1989). Retroactivity is required unless the rule is new. Id. at 301. A rule is not considered new unless it "breaks new ground" imposes a new obligation on the [***4] State or Federal Government,' or was not' dictated by precedent existing at the time the defendant's conviction became final. **Graham** v **Collins**, 506 U.S. 467, 113 S.Ct. 892; 122 L. Ed. 2d 260 (1993), quoting Teague, supra at 301 (emphasis omitted). In **Whiting** v **Burt**, 395 F.3d 602, HN. 7, the court stated: The federal law governing ineffective assistance of appellate counsel is not only **firmly established**, but it has been applied by the Michigan courts as "**cause**" to excuse a procedural default under Mich. Ct. R. 6.508(D)(3)(a). The ineffective assistance of counsel standard articulated by **Strickland** v **Washington**, 466 U.S. 668 (1984), has been adopted by the Michigan Supreme Court in **People** v **Pickens**, 446 Mich. 298 (1994).

Admittedly, Michigan's Law did not allow for ineffective assistance of appellate counsel to be used for cause to excuse a procedural default under Mich. Ct.R. 6.508(D)(3)(A) at the time of petitioner's appeal. However, Michigan law did not then and does not now exist in a vacuum. The unequivocal language of Strickland supra. leaves no doubt that the federal law governing

ineffective assistance of appellate counsel is not only firmly established, but it has been applied as "cause" to excuse a procedural default.

Furthermore, when the United States Supreme Court upheld it's earlier holding made in passing in the case of **Ylst** v **Nunnemaker**, 501 U.S. 797, 804, n. 3, 111 S.Ct. 2590, 115 L.Ed. 2d 706 (1991), the Court settled any confusion about the application of MCR 6.508 (D)(2) concerning procedural bars to federal habeas review See **Cone** v **Bell**, 556 U.S. 449 where it stated at Led HN8, "When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review. In **Ylst** supra., we observed in passing that when a state court declines to revisit a claim it has already adjudicated, the effect of the later decision upon the availability of federal habeas is "nil" because "a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing [*467] procedural default." FN. #12, When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is ripe for federal adjudication. See 28 U.S.C. § 2254 (b)(1)(4) (permitting issuance of a writ of habeas corpus only after "the applicant has exhausted the remedies available in the courts of the state").

In Cone supra. Foot Note #12, "With the exception of the Sixth Circuit, all Courts of Appeals to have directly confronted the question both before and after Ylst, 501 U.S. 797, 111 S.Ct. 2590, 115 L. Ed. 2d 706, have agreed that a state court's successive rejection of a federal claim does not bar federal habeas review. See, e.g., Page v Frank 343 F.3d 901, 907 (CA7 2003); Brecheen v Reynolde, 41 F.3d 1343, 1358 (CA10 1994); Bennett v Whitley, 41 F.3d 1581, 1582 (CA5 1994); Silverstein v Henderson, 706 F.2d 361, 368 (CA2 1983) See also Lambreght v Stewart, 241 F.3d 1201, 1206 (CA9 2001)."

In PHILLIPS v HOUK, 587 Fed. Appx 868 (2014) the court wrote: "State procedural rules sounding in res judicata generally do not constitute procedural defaults. Res judicata is not a **bar** to consideration of **claims** in a **federal habeas** action. A **state-court** ruling denying a **claim** as already adjudicated, far from being a procedural default, provides strong evidence that the **claim** has already been given full consideration by the **state court** and thus is rip for federal adjudication. Where a **state court** denies a **claim** as waived, the **claim** is procedurally defaulted and the federal court may not **review** the **claim** absent a showing of cause and prejudice; but where a **state court** denies a **claim** as already litigated, whether or not correct, the **claim** is not procedurally defaulted.

Accordingly, it would be inaccurate to say that the Supreme Court's decision in Cone supra, was "unexpected" and "indefensible" when made in 2010. Nor would it be accurate to assert that Cone announced a new federal rule.

On October 21, 2010, the United States Court of Appeals for the Sixth Circuit decided the published opinion in GUILMETTE v. HOWES, 624 F.3d 286 (6th

Cir. 2010), which specifically held, The Court determined that brief orders citing Mich. Ct. R. 6.508(D) were not explained orders invoking a procedural bar because holdings from Michigan Courts indicated that the language used by such summary orders could refer to the petitioner's failure to establish entitlement to relief either on the merits or procedurally, and such ambiguity demanded a determination that the orders were not explained. Thus, because the state supreme court's order was unexplained (the text of the order failed to disclose the reason for the judgment), The Michigan Court of Appeals claimed a procedural default; (MCR 6.508 (D)), however, said order did not cite which part of the procedural default bar it was claiming, (D)(1), (2) or (3), however, the court did go further in its order and stated: "Furthermore, defendant raises issues previously presented to this Court, and defendant has not shown his original appellate counsel to be ineffective. **People** v **Reed**, 198 Mich App 639 (1993)." And the last reasoned trial court decision was on the merits, the state courts never enforced a procedural bar to petitioner's claim. The Federal District Court found that petitioner's claims were procedurally defaulted and that he did not establish "cause and prejudice" to overcome the default. However, it is clear that based on the holdings in the United States Supreme Court cases **Picard** supra.; **Ylst** supra.; **Cone's** supra., and the 6th Circuit Court's subsequent decision in **Guilmette**, supra. that determination was never correct; as MCR 6.508(D)(2) is not a procedural default to federal Court writ of habeas corpus. Defendant never had to establish "cause and prejudice" to overcome a procedural default.

EXHAUSTION

According to the doctrine of exhaustion, a state prisoner must exhaust

his state remedies before bringing his claim in a federal habeas corpus proceeding. 28 U.S.C. §2254 (b), (c); see Rose v Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L. Ed. 2d 379 (1982). Exhaustion is fulfilled once a convicted defendant seeks review of his or her claims on the merits from a state supreme court. O'Sullivan v Boerckel, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L. Ed. 2d 1 (1999). A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on the claim. Rust v Zent, 17 F.3d 155, 160 (6th Cir. 1994). (citing Manning v Alexander, 912 F.2d 878, 881 [*663] (6th Cir, 1990)). If, under state law, there remains a remedy that a petitioner has not yet pursued, exhaustion has not occurred, and the federal habeas court cannot entertain the merits of the claim. See Id, 6.

In Lyons v Crawford, 232 F.3d 666, 670 n.3 (9th Cir. 2000), as modified by 247 F.3d 904 (9th Cir. 2001), we left open the question whether citation of state cases analyzing federal constitutional claims fairly presents those claims to the state courts for purposes of exhaustion. Five of our sister circuits have held that it does. See McCandless v Vaughn,172 F.3d 255 (3d Cir. 1999) (relying on state cases employing constitutional claim); Barrett v Acevedo, 169 F.3d 1155, 1161-62 (8th Cir. 1999) (citing state case raising a pertinent federal constitutional issue' fairly presents the federal claim); Hannah v Conley, 49 F.3d 1193, 1196 (6th Cir. 1995) (citing 'state decisions employing constitutional analysis in similar fact patterns' fairly presents the federal claim); Verdins v O'Leary, 972 F.2d 1467, 1480 (7th Cir. 1992) (citing 'state cases applying constitutional analysis or making reference to the constitution' fairly presents the federal claim); Daye v Attorney Gen. of N.Y., 696 F.2d 186, 194 (2d Cir. 1982) (en banc) (holding that "reliance on state cases employing

constitutional analysis in like fact situations' fairly presents the federal claim)," Barrett at 1157-58; "A central tenet of our federal system is that state and federal courts are jointly responsible for the enforcement of federal constitutional guarantees. The Constitution binds state and federal judges alike. U.S. Const. Art. VI. To hold that citation to a state case analyzing a federal constitutional issue is insufficient to alert a state court to the federal nature of a petitioner's claim, when citation of a comparable federal case would be sufficient for that purpose, would be to conclude that the state courts are not genuine partners in the enforcement of federal constitutional law. Such a conclusion is inconsistent with the responsibility and dignity of the state courts in our federal system . . We therefore join our sister circuits and hold that, for purposes of exhaustion, a citation to a state case analyzing a federal constitutional issue serves the same purpose as a citation to a federal case analyzing such an issue," Barrett at 1158).

In **Jackson** v **Edwards**, 404 F.3d 612 (2d Cir. 2005) the court wrote: ("the question Baldwin left open is now before us: When state and federal claims share the same legal standard, has a federal claim been 'fairly presented' when the state court necessarily rejects the federal claim in ruling on the state claim? In his brief to the [New York] Appellate Division, Jackson relied on state law to argue that the trial court erred in refusing to instruct the jury on the defense of justification because, on a reasonable view of the evidence, the fact-finder might have decided his actions were justified.. The Appellate Division, in turn, held that '[c]ontrary to the defendant's contention, no reasonable view of the evidence supports a justification charge and, thus, the trial court properly declined to give it,' " at 620 (footnote and citations omitted); "Had Jackson instead argued that the trial court's failure to charge

justification denied him due process under the Fourteenth Amendment, the Appellate Division's inquiry would have been the same," at 621; "In a case such as this, where the failure to instruct the jury on justification was so harmful as to deny the defendant due process, Jackson necessarily presented his due process claim when he asked the Appellate Division to find that the justification instruction should have been given. .. [T]he failure to charge the jury on justification was nothing less than 'catastrophic' for Jackson. Jackson was deprived of a 'highly credible defense' that might well have allowed the jury to acquit him not only of second degree murder, but also of second degree weapon possession. On these facts, the trial court's denial of the justification charge rendered Jackson's conviction unfair. Thus, even if his brief to the Appellate Division did not explicitly invoke due process, it unavoidable raised the entirety of his federal claim," at 621 (citations omitted); "We are confronted, therefore, with a situation for which the Supreme Court's application of the 'fairly present' standard invites further refinement. In contrast with other situations, Jackson did not explicitly have to tell the state court that he was presenting a federal due process claim because, by raising his state law claim, he necessarily gave the Appellate Division a fair 'opportunity to pass upon and correct alleged violations of [his] federal rights.' [**Picard** v **Connor**, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971) (internal quotation marks and citation omitted). Where the absence of the required justification defense so clearly deprived Jackson of due process, his state law claim was not merely 'somewhat similar' to that of his federal claim; it was 'virtually identical.' [**Duncon** v **Henry**, 513 U.S. 364, 366, 115 S.Ct 887, 130 L. ED. 2d 965 (1995)," Accordingly, we hold that Jackson exhausted his federal claim because, in this case, the legal standard for his federal and state claim were so similar that by presenting his state claim he also presented

his federal claim," at 621).12345

A state court's **ruling** that the claim is now and forever barred from state courts on state **procedural** grounds clearly exhausts it. Petitioner went through one **full** round of state postconviction proceeding with these issues and exhausted them in the state courts.

JURISDICTION

In **United States** v **Swift**, 286 U.S. 106, 76 L.Ed 999, 52 S.CT. 460 (1932), the Court wrote: "HN1 A court of equity has the power to modify an injunction in adaptation to changed conditions though it was entered by consent. A continuing degree of injunction directed to events to come is subject always to adaptation as events may shape the need. The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. The result is all one whether the degree has been entered after litigation."

This Court, through exercise of both appellate and subject matter jurisdiction, is competent to determine the appropriate [s]cope of federal court abstention, respecting § 2254 habeas corpus, and further where, Petitioner has, in fact, demonstrated a "substantial showing on the denial of federal right," then, such § 2254 habeas petition, alleging substantive, federal constitutional violations, "are adequate to deserve encouragement to proceed further. "**Barefoot** v **Estelle**, 463 US 880, 893, n.4, 103 S CT 3383, 3394, n. 4, 77 L Ed 2d 1090

(1983).

ARGUMENT I

This is not a case in which the Petitioner is trying to get a second bite at the apple, this is a case were the petitioner is asking for his one constitutionally gueranteed bit at the apple. Petitioner prays the Court does not underestimates the significance of the fact that petitioner was effectively shut out of federal court-without any adjudication of the merits of his claims-because of a procedural ruling that was later shown to be completely erroneous. As the United States Supreme Court has stressed, in **Gonzalez v Crosby**, 125 S.Ct. 2641 (2005), dismissal of a first federal habeas petition is a particularly serious matter, for the dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." **Lonchar v Thomas**, 517 U.S. 314, 324, 116 S.Ct. 1293 134 L.Ed.2d 440 (1996); see also **Slack v McDaniel**, 529 U.S. 473, 483, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)("The writ of habeas corpus plays a vital role in protecting constitutional rights"). When habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment. Indeed, the State has experienced a windfall, while the state prisoner has been deprived-contrary to congressional intent-of his valuable right to one full round of federal habeas review.

In **Whiting v Burt**, 395 F.3d 602, HN. 7, the Court stated: The federal law governing ineffective assistance of appellate counsel is not only **firmly established**, but it has been applied by the Michigan courts as "**cause**" to excuse a procedural default under Mich. Ct. R. 6.508(D)(3)(a). The ineffective

assistance of counsel standard articulated by **Strickland** v **Washington**, 466 U.S. 668 (1984), has been adopted by the Michigan Supreme Court in **People** v **Pickens**, 446 Mich. 298 (1994).

Further where, the trial court's January 12, 1994 denial was on the merits presented (Appendix A hereto attached) and, where the Court of Appeals's May 2, 1994 judgment claimed a procedural default; (MCR 6.508(D)), then went on to state:"Furthermore, defendant raises issues previously presented to this Court." and then went on further and ruled on the **merits** of petitioners ineffective assistance of counsel claim against petitioner - - albeit without any reasoning, then, the Michigan Supreme Court's November 30, 1994 summary denial, on post-conviction relief, (MCR 6.500 et seq.) made no indication, whatsoever, on sanctioning any claimed [p]rocedural default, (Appendix C, hereto attached) then, such circumstances, considered as a whole, represent, at best, a bi-furcated or mixed state-court disposition on post-conviction relief and thus, may not **[r]eesonably** serve as an '[a]dequate and independent state-court basis' upon which [f]ederal court abstention, vis-a-vis, § 2254 habeas corpus could be justifiable. Further more, the Sixth Circuit has declined to adopt a bright line rule for determining when Mich. Ct. R. 6.508(D) became a "firmly established" procedural rule such that a state court's dismissal for failure to comply is based on an "adequate and independent" procedural rule barring federal habeas review. **Luberda** v **Trippett**, 211 F.3d 1004 (CA6, 2000); **Gonzales** v **Elo**, 233 F.3d 348 (CA6, 2000); **Rogers** v **Howes**, 144 F.3d 990 (CA6, 1998).

Where as here, Petitioner stands convicted of the highest possible offense, under either state or federal law, i.e. 'first degree murder,' but where, such conviction is obtained through an egregious violation of

[f]undamental fairness, and further where, the state-court has **[n]ot**, under the instant fact scenario, **unequivocally [r]elied** upon (bi-furcated, mixed state-court disposition) the claimed [p]rocedural default, (MCR 6.508 (D)) then, federal court abstention/dismessal of Petitioner's § 2254 habeas petition, is tantamount to an abuse of discretion.

As an [e]quitable decision, the state-court, under the instant facts, must not, be permitted to [v]icariously circumvent the [b]latant, federal constitutional violations suffered by Petitioner herein, through merely purporting procedural default, devoid of facts sufficient to [r]ealistically [d]emonstrate same.

ARGUMENT II

EQUAL PROTECTION OF THE LAW

The constitutional guarantee of "equal protection of the law" means that no person or class of person shall be denied the same protection of the law which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property, and in their pursuit of happiness, **People** v **Jacobs**, 27 Cal. App. 3d 246, 103 Cal. Rptr. 536, 543; 14th Amend., U.S. Const. This doctrine simply means that similarly situated persons must receive similar treatment under the law. **Dorsey** v **Solomon**, D.C. Md., 435 F. Supp. 725, 733. When they are liable to no other or greater burdens and charges than such as are upon others; and when no different or greater punishment is enforced against them for a violation of the laws. **Richardson** 251 C.A.2d 222, 59 Cal. Rptr. 323, 334.

This is not a decree entered by consent where petitioner has voluntarily

and consciously agreed not to contest the legal and factual elements of this case! The district court found that petitioner's claims on direct appeal were raised under state law only, and were procedurally defaulted and that petitioner did not establish cause and prejudice to overcome the default. However, the decisions on these issue reached by the United States Supreme Court in **Picard**, supra.; **YLST**, supra.; **Cone**, supra. **Strickland**, supra. **Carrier**, supra and the 6th Circuit Court of Appeals decisions in **Whiting**, supra.; **Hicks**, supra. and **Guilmette**, supra. all show that the previous interpretations on these issue were wrong. These were not issues that were clear at the time of petitioner's petition. There were many deferent interpretations of this Michigan procedural default rule at the time of Petitioner's petition. In **Andrews** v **Rapelje**, 2011 U.S. Dist. Lexis 69567, the Court stated: The Michigan Court of Appeals and Michigan Supreme Court both rejected petitioner's appeal based on his "failure to meet the burden of establishing entitlement to relief under MCR 6.508 (D)." In **Simpson** v **Jones**, 238 F.3d 399 (6th. Cir. 2000), the court held that this identical language constitutes an invocation of the procedural aspects of Rule 6.508 (D), and thus bars federal habeas review. See **Simpson** v **Jones**, 238 F.3d 399, 408 (6th. Cir. 2000). However, the en banc Sixth Circuit has recently rejected this rule, holding that the form orders used by the Michigan courts constitute unexplained [*10] orders which are ambiguous as to whether a procedural bar is being invoked and thus a federal habeas court must "look through" these orders to the last reasoned state court judgment to determine if the claims are barred. See **Guilmette** V **Howes**, 624 F.3d 286, 291-92 (6th. Cir. 2010)(en banc). Clearly, these issues were not settled among the courts until the United States Supreme Court and the 6th Circuit Court of Appeal clarified these issues.

"Only a 'firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent review... of a federal constitutional claim See **Ford** V **Georgia**, 498 U.S. 411, 423-24, 11 S.Ct. 850, 112 L.Ed. 2d 935 (1991) (quoting **James** V **Kentucky**, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 80 L. Ed. 346 (1984); See also **Calderon** V **United States Dist. Ct.**, for the E. Dist. of Cal., 96 F.3d 1126 (9th Cir. 1996)(internal quotation omitted) ("For the procedural default doctrine to apply a state rule must be clear, consistently applied, and well-established at the time of petitioner's purported default.") See Also **People** V. **Reed**, 535 N.W.2d 496 (1995).

However, because of the ruling in Petitioner's case he has been effectively shut out of federal court-without any adjudication of the merits of his claims-because of a procedural ruling that was later shown to be completely erroneous. As the United States Supreme Court has stressed, dismissal of a first federal habeas petition is a particularly serious matter, for the dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. See **Ex parte Yerger**, 75 U.S. 85, 8 **Wall.** 85, 95. 19 L. Ed. 332 (1869) (the writ "has been for centuries esteemed the best and only sufficient defence of personal Freedom"), **Withrow** V **Williams**, 507 U.S. 680, 698, 123 L. Ed. 2d 407, 113 S.Ct. 1745 (1998).

In **Hollway** V **Wooderd**, 655 F. Supp. 1245, the court wrote, "Justice Holmes, sixty-four years ago wrote in **Davis** V **Wechsler**, 263 U.S. 22, 24, 68 L. Ed. 143, 44 S.Ct. 13 (1923), "Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

In Northridge Church V Charter Twp. of Plymouth, 647 F.3d 606, the court wrote concerning a changed legal circumstance:

In Rufo, The Supreme Court expleined that, HN10, "[A] consent decree must be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal Law." 502 U.S. at 388. Alternatively, "modification of consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree is designed to prevent." Id. Also, "[w]hile a ...[***12] clarifi [cation of] the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification [***20] if the parties based their agreement on a misunderstanding of the governing law." Id. at 390.

In this case the district court found that petitioner's claim's were procedurally defaulted and that he had not established cause and prejudice to overcome the default. However, the District Court's application of MCR 6.508 (D) to this case is contrary to the United States Supreme Court's decisions in **Picard** v **Connor**, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); **Ylst** v **Nuuemaker**, 501 U.S. 797; 111 S.Ct. 2590 (1991); **Cone** v **Bell**, 556 U.S. 449 (2009) and **Strickland** v **Washington**, 466 U.S. 668 (1984) and the 6th Circuit Court of Appeals decisions in **Carpenter** v **Mohr**, 163 F.3d 938 (6th Cir. 1998); **Magana** v **Hofbauer**, 263 F.3d 542 (6th Cir. 2001); **Whiting** v **Burt**, 395 F.3d 602; **Hicks** v **Straub**, 377 F.3d 538 558 n.17 (6th Cir. 2004) and **Guilmette** v **Howes**, 624 F.3d 286 (6th Cir. 2010). Thus, the District Court's finding of procedural default is not valid.

In **Loncher** v **Thomas**, 517 U.S. 314, the court worte: "Although the rules

governing 2254 cases provide Federal District Courts with ample discretionary authority to tailor the proceedings to dispose quickly, efficiently, and fairly of prisoners' first federal habeas corpus petitions that lack substantial merit while preserving more extensive proceedings for those petitions raising serious questions, arguments against ad hoc departure from settled rules that guide lower federal courts in the consideration of habeas corpus petitions seem particularly strong when dismissal of a first petition is at issue, since dismissal of a first habeas corpus petition is a particularly serious matter in that such dismissal denies the petitioner the protections of the writ entirely, risking injury to an important interest in human liberty." (the writ "has been for centuries esteemed the best and only sufficient defence of personal Freedom"). **Withrow** v **Williams**,507 U.S. 680, 698, 123 L.Ed.2d 407, 113 S.Ct. 1745 (1993).

STANDARD OF REVIEW FOR RULE 60(b)(6) MOTION

Fed. R. Civ. P. 60(b)(6) permits relief from judgment based on other reasons not articulated by the first five numbered clauses of Rule 60(b).

In **Fackelman** v **Bell**, 564 F. 2d 734, 736 (5th Cir. (1977) the Court of Appeals stated that: "A decision of the Supreme Court of the United States, or a Court of Appeals may provide the extraordinary circumstance for granting a Rule 60 (b)(6) motion,".

That such relief should be applied only in exceptional or extraordinary circumstances and when the Court determines in its sound discretion that substantial justice would be served.

In **United States** v **Tennessee**, 615 F.3d 646, the court stated: "Rule 60(b)(6) provides for relief from judgment for any reason "justifying relief from the operation of the judgment" not otherwise enumerated. The rule invests the Court with discretion which is to be exercised, however, only in exceptional circumstances [*3] or in cases of extreme hardship, **Ackermann** v **United States**, 340 U.S. 193, 199 (1950), **United States** v **Karahalias**, 205 F.2d 331,333 (2d Cir. (1953); **Aghassi** v **Holden ll Co.**, 92 F.R.D. 98, 99 (D. Mass. 1981); **Brook** v **Walker** 82 F.R.D. 95, 96 (D. Mass. 1979); **United States** v **429 S. Main St**,906 F.Supp 1155, 1995 U.S. Dist. Lexis 18023 (D. Ohio, November, 27, 1995).

HN6. As a general rule, Fed. R. Civ. P. 60(b)(6) can be used only in **exceptional circumstances** in cases that are not covered by the first five subsections of Rule 60(b). "**Exceptional circumstances**" under Rule 60(b)(6) means "unusual and extreme situations where principles of equity mandate relief" and the party must show that absent relief, extreme and undue hardship will result. A claim of simple legal error unaccompanied by extraordinary or **exceptional circumstances** is not cognizable under Rule 60(b)(6).

The extraordinary circumstance and the undue hardship in this case is the decisions in **Picard** v **Connor**, 404 U.S. 270,275, 92 L. Ed. 2d 438 (1971); In which the District Court held that Petitioner had raised his issues in state court as state issues only. In **Jackson** v **Edwards**, 404 F.3d 612 (2d Cir. 2005) the court wrote: ("the question Baldwin left open is now before us: When state and federal claims share the same legal standard, has a federal claim been 'fairly presented' when the state court necessarily rejects the federal claim in ruling on the state claim?)" Relying on **Jackson** supra, the court ruled,:In

contrast with other situations, Jackson did not explicitly have to tell the state court that he was presenting a federal due process claim because, by raising his state law claim, he necessarily gave the Appellate Division a fair 'opportunity to pass upon and correct alleged violations of [his] federal rights.' **Picard** v **Connor**, 404 U.S. 270,275, 92 L. Ed. 2d 438 (1971); also in **Ylst** v **Nuuemaker**, 501 U.S. 797; 111 S.Ct. 2590 (1991), in which the District Court failed to address and adhere to the most important part of this case pertaining to petitioner petition for writ of habeas corpus before them. The United States Supreme Court stated in its ruling in **Ylst**, supra, that: "When a state court declines to revisit a claim it has already adjudicated, the effect of the later decision upon the availability of federal habees is "nil" because "a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing [*467] procedural default" and the subsequent decision of the United States Supreme Court in **Cone** supra, which cited **Ylst** supra, as it's authority, and made this issue absolutely clear once and for all concerning the application of MCR 6.508 (D)(2) to a habeas corpus petition, it creates no bar to federal habeas review. Foot Note #12, "With the exception of the Sixth Circuit, all Courts of Appeals to have directly confronted the question both before and after **Ylst**, 501 U.S. 797, 111 S.Ct. 2590, 115 L. Ed. 2d 706, have agreed that a state court's successive rejection of a federal claim does not bar federal habeas review. See, e.g., **Page** v **Frank**, 343 F.3d 901, 907 (CA7 2003); **Brecheen** V **Reynolds**, 41 F.3d 1343, 1343, 1358 (CA10 1994); **Bennett** V **Whitley**, 41 F.3d 1581 (CA5 1994); **Silverstein** V **Henderson**, 706 F.2d 361, 368 (CA2 1983) See also **Lambright** V **Stewart**, 241 F.3d 1201, 1206 (CA9 2001)." And the decisions of **Ylst** suprra; **Strickland** supra; **Carrier** supra; **Cone** supra. and the United States Court of Appeals for the Sixth Circuit's decisions in **Carpenter** supra; **Magana** supra; **Whiting** supra; **Hicks**

supra. and **Guilmette** supra. as well as the fact that petitioner is serving a life sentence without parole, and life time imprisonment under a wrongful legal ruling is a quintessential miscarriage of justice.

Substantial justice would be served by granting this motion because it would rectify a wrongful application of the law, and would put petitioner on equal footing as those petitioners who benefited from the applicable law.

In the interest of justice, the United States Supreme Court permitted a judgment that had become final four years earlier to be reopened under Rule 60(b). See **Klapportt** V **United States**, 335 U.S. 601, 613-14, 69 S.Ct. 384 (1949), e.g., **Fackelman** V **Bell**, 564 F.2d 734, 736 (5th Cir. 1977). This Court also allowed a judgment that had become final seventeen years earlier to be reopened under Rule 60 (b). See **Buck** V. **Davis**, 137 S.Ct. 759 (February 22,2017). Petitioner asserts that he has met the standard for this Court to grant the relief he is requesting.

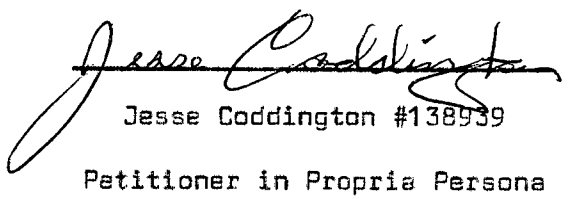
RELIEF

The petitioner inserts that the standard the Supreme Court employed in **Rufo**, supra. applies to his motion and entitles him to a modification/amendment of the denial of his Habeas Corpse Petition. 60(B)(5),(6) accordingly, when confronted with any motion invoking this rule, a district court's task is to determine whether it remains equitable for judgement at issue to apply prospectively and, if not, to relieve the parties of some or all of the burdens of that judgment on "such terms as are just." The constitutional command of U.S. **Const. amend. XIV** is that no state shall deny to any person that equal

protection of the law.

Respectfully, Petitioner requests this Honorable Court to Remand this cause, to the U.S. Court of Appeals, for the Sixth Circuit, Directing entry of an appropriate Order to the U.S. District Court, for the Western District of Michigan, providing for the proper adjudication of Petitioner's colorable, constitutional allegations, under Title 28 U.S.C. § 2254.

Respectfully submitted,



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