

No.

**IN THE
SUPREME COURT OF THE UNITED STATES**

JAMES RAHEEM RAINS #850456
Petitioner-Appellant

Vs.

WILLIE O. SMITH, Warden
Respondent-Appellee

**ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
PETITION FOR WRIT OF CERTIORARI**

**JAMES RAHEEM RAINS #850456
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BARAGA, MICHIGAN 49908-9204**

QUESTIONS PRESENTED FOR REVIEW

The questions before this court regards (1) Motions to Stay and Hold in Abeyance a Petitioner's Habeas Petition (2) Whether a Federal District Court Abuses its Discretion pursuant to FRCP 59(e) to Reconsideration a Petitioner's Motions to Stay and Hold a Habeas Proceeding in Abeyance and (3) Whether a Petitioner's Motion pursuant to FRCP 60(b) is the proper vehicle to relieve a Petitioner from a final judgment or order for any reason that justifies relief including a Federal Court's denial to Stay and Hold in Abeyance a Petitioner's Habeas Petition to exhaust state remedies?

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List of Parties Involved Pursuant to USSC Rule 12.6

1. James Raheem Rains #850456: The Petitioner.
2. Michigan Attorney General Bill Schutte: The Respondent for the State.
3. The Solicitor General: The Respondent for The United States.

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CITATION OF OPINION BELOW

The Sixth Circuit Court of Appeals issued an order and opinion in James Rains v Willie O. Smith, Warden Originating Case #1:15-cv-14072 on July 28, 2017. The Court order denied Petitioner Rains's Certification of Appealability on his application and his motion to hold his appeal in abeyance and moot. See Attached Order and Opinion.

JURISDICTION

A petition for a Writ of Certiorari to reviewed a judgment of a United States Court of Appeals is timely sought when filed with the Clerk of the USSC within 90-days after entry of the judgment. See USSC R. 13.1. While Sixth Circuit Court of Appeals issued an order and opinion on July 28, 2017 within the time for seeking a Writ of Certiorari the Petitioner file for an extension of time pursuant to USSC R. 30.3 to Honorable Justice Elena Kagan around October 17, 2017. This Writ is being filed prior to that ruling.

FEDERAL COURT RULES INVOLVED

FRAP R.4(a)(4)(A)(vi) Effect of a motion on a Notice of Appeal:

If a party files in the District court any of the following motions under the federal Rules of Civil Procedure and does so within the time allowed by those rules the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: (v) to Alter or Amend the Judgment under Rule 59 or (vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

FRCP 59(e) Altering or Amending the Judgment:

A motion to alter or amend the judgment must be filed no later than 28-days after the entry of the judgment.

FRCP 60(b) Relief from a Judgment or Order:

On motion and just terms the court may relieve a party or its legal representation from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect or (6) any other reason that justifies relief.

STATEMENT OF FACTS

The Petitioner James Raheem Rains filed his Petition for Writ of Habeas Corpus in United States District Court for the Eastern District of Michigan Southern Division on or about November 2015. Mr. Rain's raises the issue of whether the state trial court violated his due process rights to a knowingly, voluntarily, and intelligently made on his plea-based conviction for second-degree murder. Rains claims that he should be permitted to withdraw his guilty plea because his plea was involuntary and because there was an insufficient factual basis for his plea. In his motion for a stay, Rains indicates that he wishes to raise his current claims as constitutional issues in state court and to present the state court with two new claims regarding his trial and appellate attorneys. On January 23, 2017 the Federal Court denied Rains' motion for a stay and his application for the writ of habeas corpus.

PROCEDURAL BACKGROUND

Petitioner initially was charged in Wayne County, Michigan with two counts of first-degree murder, although there was only one victim, the prosecutor's theory was that Rains was guilty of both premeditated murder and felony murder (murder committed during the commission of a home invasion). On August 13, 2012, Rains pleaded guilty in Wayne County Circuit Court to the lesser charge of second degree murder. MCL 750.317. In return for his plea, the prosecutor agreed to dismiss the first degree murder charges, and the parties agreed to a sentence of twenty-five to fifty years in prison.

On August 28, 2012, the trial court sentenced Rains, as agreed, to imprisonment for twenty-five to fifty years. Rains subsequently moved to withdraw his guilty plea on grounds that his plea was not voluntary, intelligent, and knowing and that there was an inadequate factual basis for the plea because the element of intent was missing. The trial court's successor determined that an evidentiary hearing was necessary before the court could issue a decision on Rains' motion. At the evidentiary hearing Rains' plea attorney testified that the majority of his legal work was criminal defense and that he had been practicing law since 1996. He stated that he thought he informed Rains of the charges and the elements

of the crime when he first met with Rains and that he probably went over the elements of second degree murder with him as well. Counsel also testified that, before the day set for trial, he discussed the prosecution's plea offer with Rains and that he would have explained the nature of second degree murder with Rains at that time. Rains testified at the hearing that he did not remember his plea attorney discussing the elements of first or second degree murder with him. Medical records submitted during the hearing indicated that Rains incurred a small subdural hematoma in 2011. Rains testified that the injury occurred when he was hit by a car in April of 2011 and that the symptoms of his injury were headaches, sensitivity to light, and memory loss. The circuit court opined that referring to the hematoma as a brain injury was a stretch. Rains also claimed that he had been diagnosed with ADHD and anxiety. He explained that he had wanted to go to trial but that he did not think his attorney was prepared for trial and that he changed his mind about going to trial because he was scared. Rains' mother, Mena Riser, testified that Rains suffered some bruising of the brain during a car accident and that, as a result, he was a bit forgetful and his balance was not quite right. Ms. Riser claimed that, on the day set for trial, Rains' plea attorney told her that, if her son went to trial, he would get life imprisonment without the possibility of parole. She subsequently begged Rains to plead guilty because she was afraid that she would not see him again if he refused the plea offer. At the conclusion of the evidentiary hearing, the circuit court ruled that Rains could withdraw his plea. The court's reasons for its ruling were that (1) defense counsel had questioned Rains about the factual basis for his plea and (2) Rains had not expressed his intent on the record.

SUMMARY OF LEGAL PROCEEDINGS

The prosecutor appealed the circuit court's order. The Michigan Court of Appeals denied leave to appeal in the *People v Rains* COA #317723 (Nov. 4, 2013) but the Michigan Supreme Court in lieu of granting leave to appeal remanded the case back to the Michigan Court of Appeals for consideration as on leave granted. See *People v Rains* 843 NW2d 749 (Mich. 2014). On remand the Court of Appeals

adjudicated Rains' claims on the merits and held that the circuit court abused its discretion when it granted Rains' motion to withdraw his guilty plea. The Court of Appeals reversed the circuit court's decision and remanded the case for reinstatement of Rains' plea based conviction and sentence. See *People v Rains* COA #317723; 2014 WL 3613077 (July 22, 2014). Rains appealed the Court of Appeals decision to the Michigan Supreme Court arguing that the circuit court did not abuse its discretion in granting his motion to withdraw his guilty plea. On March 3, 2015 the Michigan Supreme Court denied Rains' leave to appeal because it was not persuaded that the questions presented to it should be reviewed by their. See *People v Rains* 859 NW2d 516 (Mich. 2015).

On May 11, 2015 Rains challenged his conviction for second degree murder in a federal habeas corpus petition. See *Rains v Smith* No. 15-11686 (ED Mich. 2015). On May 14, 2015 the Magistrate Judge ordered Rains to pay the filing fee or to apply for leave to proceed in forma pauperis within twenty-one days of the date of the order by June 4, 2015. On August 14, 2015, Rains applied for leave to proceed without prepayment of the fees or costs for this action, but on August 18, 2015, the court dismissed the petition without prejudice for failure to comply with the Magistrate Judge's deficiency order. On November 19, 2015, Rains filed the habeas corpus petition currently before the Court. He alleged, as he did in state court, that the state circuit court did not abuse its discretion in granting his motion to withdraw his plea after concluding that (1) his plea was not voluntary, knowing, and intelligent and (2) the factual basis for his plea was insufficient. On May 25, 2016, the State filed an answer to the habeas petition through counsel. The State argued that Rains' claims are not cognizable on federal habeas review because they deal with issues of state law and that the Michigan Court of Appeals reasonably adjudicated his claims. Rains subsequently moved for a stay so that he could return to state court and pursue additional remedies there.

CLEARLY ESTABLISHED FEDERAL LAW

The Federal Court held that a guilty or no-contest plea involves a waiver of many substantial constitutional rights, *Fautenberry v Mitchell* 515 F3d 614, 636 (6th Cir 2008), and an involuntary plea is an impairment of a defendant's substantial rights, *Martin* 668 F3d at 792. **Noteworthy are the facts where the court stated and did not apply to the Petitioner's case that a guilty plea must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.** *Brady v United States* 397 US 742, 748; 90 SC 1463 (1970). For a guilty plea to be valid the court noted that a defendant must appreciate the consequences of his waiver of constitutional rights, waive his rights without being coerced to do so, and understand the rights that he is surrendering by pleading guilty. *Ruelas v Wolfenbarger* 580 F3d 403, 408 (6th Cir 2009). **Additionally the court noted, a defendant must understand the essential elements of the offense to which he pleads guilty and be aware of the maximum sentence to which he is exposed.** *Id.* at 408-09. Where a defendant pleads guilty to a crime without having been informed of the crime's elements, [the Brady] standard is not met and the plea is invalid. *Bradshaw v Stumpf* 545 US 175, 183; 125 SC 2398 (2005). In this case, the courts did not consider all the relevant circumstances when determining whether the Petitioner's plea was voluntary or involuntary made. *Brady* 397 US at 749.

THE MOTION FOR A STAY

The petitioner sought a stay of his Habeas proceedings pursuant to *Rhines v Weber* 544 US 269, 278-79; 125 SC 1528 (2005) so that he can file a motion for relief from judgment in state circuit court. He wants to federalize his current claims and to raise two new claims regarding his trial and appellate attorneys. In his Habeas proceedings the court stated that the Supreme Court has held that before a federal court may grant habeas relief to a state prisoner the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition. *O'Sullivan v Boerckel* 526 US 838, 842; 119 SC 1728 (1999). Federal district courts have authority to issue stays and in appropriate cases a

federal district court may hold a habeas corpus petition in abeyance while an inmate returns to state court to exhaust state remedies for previously unexhausted claims. Rhines 544 US at 276. In denying the Petitioner's habeas petition the court stated that his petition contains only his two exhausted claims regarding the voluntariness of his guilty plea and the factual basis for the plea whereas Rhines concerned the availability of a stay for so-called mixed petitions in which some claims had been exhausted in state courts and some had not citing *Carter v Mitchell* 829 F3d 455 (6th Cir Ohio 2016). The court then incorrectly denied the Petitioner's motion to Stay on the grounds that his petition is not a mixed petition of exhausted and unexhausted claims under Rhines therefore it is not applicable and a stay is not appropriate. The court then proceeded to address the Petitioner's exhausted habeas claims for the following reasons.

CLAIM ONE: Involuntary Guilty Plea.

The Petitioner alleges that his guilty plea was not voluntary, knowing, and intelligent because (1) no one mentioned the elements of second-degree murder on the record at the plea proceeding, (2) the trial court did not confirm that his attorney discussed the elements of the crime with him, and (3) it was not established at the evidentiary hearing that defense counsel had discussed the elements of second degree murder with him. According to the Petitioner, the state circuit court did not abuse its discretion when it permitted him to withdraw his guilty plea on the ground that the plea was involuntary. The Michigan Court of Appeals disagreed with the Petitioner and ruled that the trial court abused its discretion by granting his motion to withdraw his guilty plea.

On federal review the court begins its analysis by noting that the Petitioner had no absolute right to withdraw his guilty plea citing *United States v Martin* 668 F3d 787, 794 (6th Cir 2012); *Shanks v Wolfenbarger* 387 F Supp2d 740, 748 (ED Mich 2005) unless the plea violated a clearly-established constitutional right and that the decision whether to allow a defendant to withdraw a plea is discretionary

with the state trial court. Shanks 387 F Supp.2d at 748. For the following reasons, moreover, the record indicates that Rains' guilty plea was voluntary, knowing, and intelligent.

The court **first stated** at his plea proceeding the Petitioner had read and signed the plea agreement and that he understood it. He also stated that he had talked with his attorney about the decision to enter the plea. He indicated that he understood the rights he was waiving by pleading guilty and that he had no questions about his rights. He then stated that it was his choice to plead guilty and that no one had threatened him to make him plead guilty or promised him anything, other than what was stated in the plea agreement. He assured the trial court that he was pleading guilty freely and voluntarily. With these comments the court stated that the Petitioner's solemn declarations in open court carry a strong presumption of verity. The court then **secondly noted** that the Petitioner nevertheless asserts that his plea was involuntary, unknowing, and unintelligent because no one explained the nature of the offense and the elements of second degree murder to him. The Petitioner relied on *Henderson v Morgan* 426 U.S. 637 (1976) in which the Supreme Court stated that a plea cannot be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process. Id. at 645 (quoting *Smith v O'Grady* 312 US 329, 334 (1941)). The Supreme Court also stated that intent is such a critical element of the offense of second degree murder that notice of that element is required. Id. at 647 n. 18. In regards to this Supreme Court quote the court went on to say that the Supreme Court stated further that it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. Id. at 647. In other words, in other words, the court denied the Petitioner Habeas Corpus where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurances that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty. Citing Stump 545 U.S. at 183. Stating that even absent a clear

showing on the record Circuit Courts of Appeals will presume that counsel did in fact explain the nature of the offense to the defendant. Citing *Williams v Wolfenbarger* 513 F Appx 466, 470 (6th Cir 2013). In conclusion the court closed by stating that the Petitioner's attorney stated at a pretrial conference six days before Rains pleaded guilty that he had explained the ramifications of the prosecution's plea offer to Mr. Rains and his attorney testified at the evidentiary hearing in state court that he informed Mr. Rains of the charges first degree murder at their first meeting and that he would have discussed the second degree murder with him as well. Although the Petitioner testified that his plea attorney did not tell him what the prosecution would have to show at trial this court may presume that counsel did inform Mr. Rains of the elements of the crime. The court then stated that the record of Mr. Rains' plea was voluntary, knowing, and intelligent, and therefore, the decision of the Michigan Court of Appeals on remand was valid, was objectively reasonable, and the petitioner was not entitled to habeas relief on the basis of his first claim.

Claim Two: Insufficient Factual Basis for the Plea

The Petitioner contends that the factual basis for his guilty plea was insufficient because the intent element for second degree murder (**malice**) was not established at the plea proceeding. The Michigan Court of Appeals concluded on review of this claim that a sufficient factual basis was established at Mr. Rains' plea and that the circuit court abused its discretion by finding otherwise and by granting Rains' motion to withdraw his plea. The Federal Court found no merit in this claim because an express admission of guilt is not a constitutional requisite to the imposition of criminal penalty. The held that an individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime citing *North Carolina v Alford* 400 US 25, 37; 91 SC 160 (1970). The court stated the requirement that a sentencing court must satisfy itself that a sufficient factual basis supports the guilty plea is not a requirement of the Constitution but rather a requirement created by rules and statutes citing *United States v Tunning* 69 F3d 107, 111 (6th Cir 1995) and that the Petitioner's claim was not

cognizable on habeas review citing *Bonior v Conefly* 416 F Appx 475, 478 (6th Cir 2010). The court then stated that even if the Petitioner's claim were cognizable, it lacks merit for the following reasons. In Michigan, the elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse citing *People v Bailey* 451 Mich 657, 669 (1996). In Michigan, Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. The court stated that factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts admitted by the defendant even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference. The court then held that the first two elements of second degree murder were satisfied when the Petitioner admitted at the plea proceeding that the victim died because he hit her, therefore, a reasonable jury could infer that the third and fourth elements were satisfied when the Petitioner admitted that he hit the victim in the back of the head with a hammer. The court stated that this admission satisfied the malice element because a jury could reasonably conclude from Mr. Rains' admission that he had the intent to do great bodily harm, or at a minimum, a reasonable jury could infer from Mr. Rains' admission that he acted in wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. The court then summarized that the Petitioner did testify that after the killing that the victim had held a gun to his head when he admitted at the plea proceeding that he hit the victim in the back of the head, and then stated, that a jury could reasonably conclude from Mr. Rains' admission that he did not act in self-defense and that there was no justification or excuse for the murder. The court denied this claim as not being a cognizable claim on habeas review and then stated, even if it were, the Michigan Court of Appeals reasonably concluded that there was a sufficient factual basis for Mr. Rains' plea.

The Petitioner's synopsis of the Federal Court Order and Opinion is that the court ignored critical facts regarding his plea withdrawal. In this case, the trial court held a hearing where Mr. Rains' trial

counsel testified that he met with him and confirmed on the record that the Petitioner had a medical history and a verified brain injury. The Petitioner's trial court granted Mr. Rains' motion to withdraw his plea because the court was concerned that it was the (**defense counsel**) rather than (**the court**) itself who had questioned the Petitioner at his plea hearing to establish a factual basis for second degree murder including his intent. The trial court was also concerned that the Petitioner's intent to kill was not expressed on the record. These facts alone establish requirements of the Constitution rather than requirements created by state rules and statutes as not being a cognizable claim on habeas review.

On February 21, 2017 the Petitioner filed in the Federal District Court's regarding its Order and Opinion a Rule 59(e) motion for reconsideration informing the court that he had filed in the state court a second or successive motion for relief from judgment pursuant to MCR 6.502 and asked the Federal Court to hold his case in abeyance until the state court resolved the issues presented in this motion. On March 03, 2017 the Sixth Circuit Court of Appeals sent the Petitioner a letter advising him that his appeal will be held in abeyance until after the Federal District Court rules on his motion for reconsideration and to stay and hold his Habeas Proceedings in abeyance. On April 20, 2017 the Federal Court denied the Petitioner's motion for reconsideration for the following reasons:

The district court noted Mr. Rains motion raises issues regarding the voluntariness of his guilty plea and the factual basis for his plea. The district court declined to reconsider these claims because it claimed it adjudication and rejected the claims on the merits.

The district court noted that the other basis for Mr. Rains motion was his desire to pursue state remedies for two new claims about his trial and appellate attorneys. Noting that Mr. Rains requested a stay of his case so that he may exhaust state remedies of the new claims and afford him the opportunity to amend his habeas petition adding the new claims once they were exhausted in the Michigan courts. However, the district court stated that there was no pending case because the case was closed

The district court concluded that Mr. Rains had not convinced the court that his unexhausted claims about trial and appellate counsel were potentially meritorious. That Mr. Rains asserts that the trial counsel failed to investigate his claim of self-defense, his head injury, and his mental disorders(Attention Deficit Hyperactivity Disorder and Anxiety). However, a defense theory that Mr. Rains acted in self-defense likely would been unsuccessful, because there was evidence that he hit the victim in the back of the head with a hammer. Defense counsel moreover testified at a post-conviction hearing that he did not think Mr. Rains had a valid claim of self-defense.

The district concluded regarding Mr. Rains' head injury noting that the trial court opined that referring to Mr. Rains' small subdural hematoma as a brain injury would be a stretch and that Mr. Rains' mental disorder would not have been a defense to the murder charge.

Thereafter the Petitioner filed a Motion for Relief From Judgment pursuant to FRAP 60(b) on the grounds that the court may relieve a party or its legal representation from a final judgment, order, or proceedings for any reasons that justifies relief in the Sixth Circuit Court of Appeals. The Sixth Circuit issued an Order and Opinion on July 28, 2017 in James Rains v Willie Smith Case #17-1229 denying his claims on the grounds that reasonable jurist would not disagree as counsel indicated that he explained the elements of second degree murder to Mr. Rains. Turning to the Petitioner's motion to stay his Habeas proceedings so that the Petitioner could raise his unexhausted claims of ineffective assistance of counsel and to present the claims that were denied as federal constitutional claims. The Sixth Circuit held that a stay is only appropriate when the district court determines that there was good cause for the petitioner failure to exhaust his claims first in the state courts citing *Rhines v Weber* 544 US 269, 278-79; 125 SC 1528 (2005). The Sixth Circuit determined that the Petitioner had failed to show good cause for not raising his ineffective assistance claims in state court or presenting his habeas claims in terms of federal law rather than state law. Accordingly, the Sixth Circuit held that the district court's decision to deny the motion to stay was not an abuse of discretion.

The issues before this court regards (1) Motions to Stay and Hold in Abeyance a Petitioner's Habeas Petition (2) Whether a Federal District Court Abuses its Discretion pursuant to FRCP 59(e) to Reconsideration a Petitioner's Motions to Stay and Hold a Habeas Proceeding in Abeyance and (3) Whether a Petitioner's Motion pursuant to FRCP 60(b) is the proper vehicle to relieve a Petitioner from a final judgment or order for any reason that justifies relief including a Federal Court's denial to Stay and Hold in Abeyance a Petitioner's Habeas Petition to exhaust state remedies? Contrary to the Sixth Circuit Order and Opinion. The Federal District Court denied the Petitioner's habeas petition for the following reasons: (A) his petition contains only two exhausted claims regarding the voluntariness of his

guilty plea and the factual basis for the plea and (B) The Supreme Court Case Citation the Petitioner has relied upon for Stay of his Habeas proceedings whereas *Rhines v Weber* 544 US 269, 278-79; 125 SC 1528 (2005) concerned the availability of a stay for a mixed petition in which some claims had been exhausted in state courts and some had not. In this case, the federal lower courts knew that the Petitioner's Motion for a Stay did not concern a mixed petition, therefore, the lower federal courts abuse their discretion in denying a Federal Habeas Petitioner Motion to Stay and hold his Habeas Proceedings in Abeyance while he Exhaust New Claim on raised in his one and only habeas petition.

GROUND FOR GRANTING RELIEF

STANDARD OF REVIEW

The doctrine of exhaustion of state remedies requires state prisoners to fairly present their claims as federal constitutional issues in the state courts before raising those claims in a federal habeas corpus petition. See 28 USC §2254(b)(1)(A)(c); see also *O'Sullivan v Boerckel* 526 US 838, 842; 119 SC 1728 (1999); *McMeans v Brigano* 228 F3d 674, 681 (6th Cir 2000); *Rust v Zent* 17 F3d 155, 160 (6th Cir 1994). Federal law provides that a habeas petitioner is entitled to relief only if he can show that the state court adjudication of his claims 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. See 28 USC §2254(d). State courts must be given a fair opportunity to rule upon all of a petitioner's habeas claims before he can present those claims in federal court, otherwise, the court is unable to apply the standard found at 28 USC §2254. A petitioner satisfies the exhaustion requirement if he invokes one complete round of the state's established appellate review process, including a petition for discretionary review to a state supreme court. *O'Sullivan* 526 US at 845. **A prisoner fairly presents his claims to the state courts by citing a provision of the Constitution, Federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns.** *Levine v Torvik* 986 F2d 1506, 1516

(6th Cir 1993). A Michigan prisoner must present each ground to both Michigan appellate courts before seeking federal habeas corpus relief. See *Mohn v Bock* 208 F Supp 2d 796, 800 (ED Mich 2002); see also *Hafley v Sowders* 902 F2d 480, 483 (6th Cir 1990). A petitioner bears the burden of showing that he has exhausted state court remedies. *Rust* 17 F3d at 160.

LEGAL SYNOPSIS

The Authority to Issue a FRCP 59(e) Motion:

The purpose of a Fed. R. Civ. P. 59(e) motion to alter or amend a judgment is to enable a court to correct manifest errors of law or fact or to consider the importance of newly discovered evidence. See *Helton v ACS Group* 964 F Supp. 1175, 1182 (WD Ky 1997). A party should not file such a motion for the purpose of re-litigating issues already presented before the court. See *id.* at 1182. Fed. R. Civ. P. 59 is not intended to allow a party to rehash old arguments. Thus, Federal Courts will grant relief for said motion under the following circumstances: (1) an intervening change of controlling law; (2) evidence not previously available has become available; or (3) **it is necessary to correct a clear error of law or prevent manifest injustice**. District courts has power under Rule 59 sua sponte to consider altering or amending judgment that would otherwise be final. Consider *Burnam v Amoco Container Co.* 738 F2d 1230, 1259 (11th Cir Ga 1984)(A Judge may enlarge issues to be considered in acting on timely motion under FRCP 59(e)); *EEOC v United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the United States & Canada* 120 235 F3d 244 (6th Cir Ohio 2000)(It is within the court's power to modify findings, conclusions, or judgment in ruling on Rule 59(e) motion, in order to clarify rationale for its decision). Thus, FRCP 59(e) was adopted to clarify district court's power to correct its own mistakes immediately following its entry of a judgment.

The Authority to Issue a FRCP 60(b) Motion:

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

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

As an initial matter, the petitioner believes he must fully discuss the primary purpose of a rule 60(b) motion. This Sixth Circuit's history begins with *McQueen v Scroggy* 99 F3d 1302, 1335 (6th Cir 1996) which declared that a rule 60(b) motion is the practical equivalent of a successive habeas petition. However the Sixth Circuit revisited that opinion in *In re Abdur'Rahman v Bell* 392 F3d 174, 179-82 (6th Cir Tenn 2004) where the court overruled *McQueen v Scroggy* and adopted the criteria set forth by the Second Circuit in *Rodriguez v Mitchell* 252 F3d 191, 198 (2nd Cir 2001) that a motion pursuant to 60(b) brought after a district court ruling on a habeas petition is not a second or successive habeas petition and that such motions should always be treated as any other motion pursuant to rule 60(b). In 2004 the Sixth Circuit sitting in en banc concluded that *Abdur'Rahman's* post-conviction motion should be treated as a rule 60(b) motion rather than a second or successive habeas petition. See *In re: Abdur'Rahman* 392 F3d 174, 182 (6th Cir 2004). In 2005, this court granted certiorari in that case and vacated the court's judgment and remanded it for consideration in light of *Gonzalez v Crosby* 545 US 524; 124 SC 264.1 (2005) decided shortly after *Bell v Abdur'Rahman* 545 US 1151; 125 SC 2991 (2005)(declaring that

Abdur'Rahman motion should be treated as a motion pursuant rule 60(b) and not a second or successive habeas petition), which was originally dismissed as untimely. See *In re: Abdur'Rahman v Bell (on rem)* 493 F3d 738 (6th Cir 2007). Thus, under the doctrine of law in this case, this court should agree that Gonzalez v Crosby and In re: Abdur'Rahman and its progenies regarding rule 60(b) motions within all Federal Circuit Courts are controlling authorities in this matter before this court. More pacifically, for the purposes of determining, in a federal habeas corpus case, whether a state prisoner's motion, invoking Rule 60(b) for relief from a judgement, should be treated as a second or successive habeas application, which would be subject to the restrictions on such applications, in 28 USC §2244(b), such a motion does not assert a habeas corpus claim within the meaning of §2244(b) when the motion attacks not the substance of a federal court's prior resolution of a claim on the merits but (1) a previous ruling which precludes a merits determination, for example, a denial for such reasons as failure to exhaust, procedural default, or statute of limitations or (2) some defect in the integrity of the federal habeas corpus proceedings. Therefore, it is legitimate for a state prisoner to use a Rule 60(b) to relieve parties from the effects of a defaulted judgment, mistakenly entered against them. More importantly, a Rule 60(b) motion preserves the opportunity of a party to obtain vacatur of a judgment that is void for lack of subject matter jurisdiction, a consideration just as valid in a federal habeas corpus proceeding, because absence jurisdiction, deprives a federal court of the power to adjudicate the rights of the parties. Likewise, as in the instant case, a rule 60(b)(6) motion permits a Federal Court to reopening a case when the party shows any other reason justifying relief from judgement from the operation of a judgement, i.e. for reconsideration under FRCP 59, which requires a showing, of extraordinary circumstances justifying relief. Accord *Artuz v Bennett* 531 US 4; 121 SC 361 (2002)(where the court held that an application for post-conviction relief can be properly filed even if the state courts dismiss it as procedurally barred). As such, rule 60(b) allows a party to seek relief from a judgment, and request reopening a case, under a limited set of circumstances for any reason that justifies relief under a Rule 60(b) motion which provides:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b); (3) fraud, misrepresentation, or misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. Subsection-(c)(1) provides: The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

In most cases, determining a rule 60(b) motion advances one or more claims will be relatively simple. A motion that seeks to add a new ground for relief, as in *Harris v U.S.* 367 F3d 74, 80-81 (2nd Cir 2004), will of course qualify. A motion can also be said to bring a claim if it attacks the Federal Court's previous resolution of a claim on the merits. However, a rule 60(b) motion attacks not the substance of the federal court's resolution on the merits but some defect in the integrity of the federal proceedings, also qualifies.

In the instant case, the Petitioner initially was charged in Wayne County, Michigan with two counts of first-degree murder, although there was only one victim, the prosecutor's theory was that Rains was guilty of both premeditated murder and felony murder (murder committed during the commission of a home invasion). On August 13, 2012, Rains pleaded guilty in Wayne County Circuit Court to the lesser charge of second degree murder. MCL 750.317. In return for his plea, the prosecutor agreed to dismiss the first degree murder charges, and the parties agreed to a sentence of twenty-five to fifty years in prison.

On August 28, 2012, the trial court sentenced Petitioner, as agreed, to imprisonment for twenty-five to fifty years. The Petitioner subsequently moved to withdraw his guilty plea on grounds that his plea was not voluntary, intelligent, and knowing and that there was an inadequate factual basis for the plea because the element of intent was missing. The trial court's successor determined that an evidentiary hearing was necessary before the court could issue a decision on the Petitioner's motion. At the evidentiary hearing Petitioner's plea his attorney testified that the majority of his legal work was criminal

defense and that he had been practicing law since 1996. He stated that he thought he informed the Petitioner of the charges and the elements of the crime when he first met with him and that he probably went over the elements of second degree murder with him as well. Counsel also testified that, before the day set for trial he discussed the prosecution's plea offer with the Petitioner and that he would have explained the nature of second degree murder with him at that time. The Petitioner testified at the hearing that he did not remember his plea attorney discussing the elements of first or second degree murder with him. Also, Medical records submitted during the hearing indicated that the Petitioner incurred a small subdural hematoma in 2011. The Petitioner testified that the injury occurred when he was hit by a car in April of 2011 and that the symptoms of his injury were headaches, sensitivity to light, and memory loss. The State Circuit Court opined that referring to the hematoma as a brain injury was a stretch. The Petitioner also claimed that he had been diagnosed with ADHD and anxiety. He explained that he had wanted to go to trial but that he did not think his attorney was prepared for trial and that he changed his mind about going to trial because he was scared. The Petitioner's mother, Mena Riser, testified that her son suffered some bruising of the brain during a car accident and that, as a result, he was a bit forgetful and his balance was not quite right. Ms. Riser claimed that, on the day set for trial, her son's plea attorney told her that if her son went to trial he would get life imprisonment without the possibility of parole. She subsequently begged her son to plead guilty because she was afraid that she would not see him again if he refused the plea offer. At the conclusion of the evidentiary hearing the State Circuit Court ruled that the Petitioner could withdraw his plea. The State Court's reasons for its ruling were that (1) it was the defense counsel who had questioned Rains about the factual basis for his plea and not the court, and (2) the Petitioner had not expressed his intent on the record. In sum the lower Federal Courts denied the Petitioner a Stay and Abeyance to exhaust new claims in the state courts on two theories (1) the petitioner failed to federalize his current claims and (2) denied the Petitioner's motion to Stay on the grounds that his petition was not a mixed petition of exhausted and unexhausted claims *Rhines v Weber* 544 US 269,

278-79; 125 SC 1528 (2005) is not an applicable for a stay and abeyance of the Petitioner's Habeas Proceedings. Both of these theories was not applicable nor appropriate for the reasons to deny the Petitioner's motion to Stay and Hold his Federal Habeas petition in Abeyance. **Firstly**, he lower Federal Court knew or should have known that **a state prisoner fairly presents his claims to both state and federal courts by citing a provision of the Constitution, Federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns.** In *Levine v Torvik* 986 F2d 1506, 1516 (6th Cir 1993) the Sixth Circuit stated in a habeas case the federal court inquiry should be whether the state's procedures have passed federal constitutional muster not whether there was an error in the state's applying its own law. In other word, the constitutional issue is whether the state court's application of its constitutionally adequate standard was so erroneous as to raise an independent due process violation. Therefore the lower federal courts knew or should have known that the state procedural clear and convincing standard was not constitutionally mandated in Mr. Rains case, and had a known presumption, that the lower courts were fairly presented with Mr. Rains claims in one area. That his claims either cited a provision of the Constitution, cited federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact pattern. See *Levine v Torvik* 986 F2d 1506, 1516 (6th Cir Ohio 1993) citing *Franklin v Rose* 811 F2d 322, 326 (6th Cir Tenn 1987):

The way in which a state defendant may fairly present to the state courts the constitutional nature of his claim even without citing chapter and verse of the constitution includes (a) reliance on pertinent federal cases employing constitutional analysis (b) reliance on state cases employing constitutional analysis in like fact situations (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the constitution and (d) allegations of a pattern of facts well within the mainstream of constitutional litigation.

While the lower court's decision to deny the Petitioner motion to stay and hold his federal Habeas Petition in Abeyance so that he may federalized his claims in the state courts was not totally in error the reason behind the lower courts' reasoning for its denial was an abuse of discretion. The lower federal district court knew or should have known that it had the authority to abate or dismiss a federal habeas action pending resolution of state post-conviction proceedings and to hold a habeas petition in abeyance

there must be exceptional or unusual circumstances. *Sitto v Bock* 207 F Supp 2d 668, 676 (ED Mich 2002). **A federal district court is authorized to stay fully exhausted federal habeas petitions pending the exhaustion of other claims in the state courts.** See *Nowaczyk v Warden New Hampshire State Prison* 299 F3d 69, 79 (1st Cir 2002)(holding that district courts should take seriously any request for a stay); *Bowling v. Haeberline* 246 F Appx 303, 306 (6th Cir 2007)(**explaining that a court may delay a decision on a habeas petition that contains only exhausted claims when considerations of comity and judicial economy would be served**). For the reasons stated herein this court should remand this matter back to the Sixth Circuit Court of Appeals with instructions on Stay and Abeyance proceedings and to reopen the Petitioner Habeas Proceedings with authority to hold his case in abeyance pending resolution of state post-conviction proceedings.

This Court shall also order the lower courts to hold the Petitioner's petition in abeyance to allow Petitioner to initiate post-conviction proceedings in the state courts regarding his trial and appellate attorneys. The lower courts ignored the fact that at the conclusion of the evidentiary hearing the State Circuit Court ruled that the Petitioner could withdraw his plea. The State Court's reasons for its ruling were that (1) it was the defense counsel who had questioned Rains about the factual basis for his plea and not the court, and (2) the Petitioner had not expressed his intent on the record. Thus, both of the Petitioner's trial and appellate attorneys were constitutionally ineffective regarding whether the Petitioner accused of crime voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence and had admit to his participation in the acts constituting the crime. Contrary to the lower courts orders and opinions the requirement that a sentencing court satisfy itself that a sufficient factual basis supports the guilty plea is a requirement of the Constitution and not just a requirement created by state rules and statutes. Thus, the Petitioner's claims for staying and hold his Habeas proceedings in abeyance were cognizable to a fair review of his habeas petition under AEDPA. This stay should have been conditioned upon the Petitioner initiating his state post-conviction remedies within

sixty days of receiving the court's order and returning to federal court within sixty days of completing the exhaustion of state court post-conviction remedies. The Petitioner's method of properly exhausting these claims in the state courts would be through filing a motion for relief from judgment under MCR 6.502. See *Mikko v Davis* 342 F Supp 2d 643, 646 (ED Mich 2004). A trial court is authorized to appoint counsel for the Petitioner, seek a response from the prosecutor, expand the record, permit oral argument, and hold an evidentiary hearing. See MCR 6.505-6.507, 6.508 (B) and (C). The Michigan Court Rules would ordinarily bar the Petitioner from seeking any further state post-conviction because he has already filed one motion for relief from judgment in the state court. See MCR 6.502(G)(1) (permitting a defendant to file only one motion for relief from judgment). However, Michigan Court Rule 6.502(G)(2) permits a defendant to file a successive motion for relief from judgment under certain, limited circumstances. The Petitioner would be then required to appeal the denial of his post-conviction motion to the Michigan Court of Appeals and the Michigan Supreme Court in order to properly exhaust the claims that he would raise in his post-conviction motion. *Mohn v Bock* 208 F Supp 2d 796, 800 (E.D. Mich. 2002). Moreover, Sixth Circuit Courts routinely stay and hold a federal Habeas Petition in Abeyance pursuant to MCR 6.502:

Woods v McKee 2015 US Dist LEXIS 130661 (ED-SD Mich) The Court ordered the case stayed and held in abeyance pending exhaustion of state court remedies. Woods filed a fourth motion for relief from judgment. Woods claimed he was innocent of the murder and presented the state court with materials obtained through Freedom of Information Act (FOIA) requests that he argued were unconstitutionally suppressed by the prosecutor.

Kissner v Berghuis 2013 US Dist LEXIS 116774 (ED-SD Mich) Because there is some likelihood that the Michigan courts might permit Petitioner to file a second post-conviction motion for relief from judgment pursuant to the newly discovered evidence exception contained in Mich. Ct. R. 6.502(G)(2), a procedural bar to Petitioner filing such a second motion is not clearly applicable. Therefore, the Court will grant Petitioner a stay of proceedings to permit him to attempt to exhaust the claims contained in his second motion for relief from judgment with the state courts.

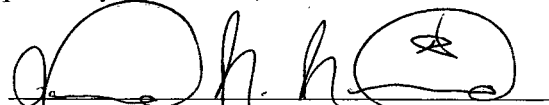
RELIEF SOUGHT

As indicated above, so it should have been applied the Petitioner's case, there was some likelihood that the Michigan courts might have permitted the Petitioner to file a second post-conviction motion for relief from judgment pursuant to the new facts exception contained in Mich. Ct. R. 6.502(G)(2). For the reasons stated herein, this court should grant Certiorari and remand this matter back to the with instruction to allow the Petitioner to stay his Habeas Petition to exhaust his claims or grant such other relief as this court deems just and fair.

Pursuant to 28 U.S.C. § 1746, "I declare (or certify, verify, or state) under the penalty of perjury that the forgoing is true and correct."

Respectfully Submitted,

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