No. 04-6432

IN THE

# Supreme Court of the United States

Aurelio O. Gonzalez,

*Petitioner*,

v.

James V. Crosby.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

## BRIEF OF *AMICUS CURIAE* ABU-ALI ABDUR'RAHMAN IN SUPPORT OF PETITIONER


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## QUESTION PRESENTED

Whether the court of appeals erred in holding that, on habeas corpus, every Rule 60(b) motion (other than for fraud) constitutes a prohibited "second or successive" petition as a matter of law.

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* Abu-Ali Abdur'Rahman ("Abdur'Rahman") has a substantial interest in the outcome of this case, which will determine whether all motions under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"), including those that involve flaws in the habeas proceeding itself, are automatically barred.[2] The case may thus determine whether *amicus* lives or dies. Abdur'Rahman challenged his death sentence in a habeas petition that presented compelling evidence of gross prosecutorial misconduct during his trial. The district court never reached the merits of the bulk of those claims, however, because it misinterpreted a key provision of Tennessee law. As a result of this misinterpretation, the district court dismissed those claims for failure to exhaust state remedies. See *Abdur'Rahman* v. *Bell*, 999 F. Supp. 1073, 1080 (M.D. Tenn. 1998). Shortly thereafter, when the Tennessee Supreme Court issued a clarifying rule that made manifest the district

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[1] The parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part. Counsel for *amicus* were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Michael J. Mongan, C. Lee Reeves, and David B. Sapp. Clinic members Michael P. Abate, Eric J. Feigin, Nathaniel Garrett, Lauren Kofke, Rachel P. Kovner, and Julia M. Lipez also participated. The Stanford Law School Supreme Court Litigation Clinic has covered the costs connected with the brief.

[2] This Court previously considered Abdur'Rahman's case, which presented the almost identical question as the instant case. See *Abdur'Rahman* v. *Bell*, cert. granted, 535 U.S. 1016 (2002) (No. 01-9094). The Court later dismissed Abdur'Rahman's case as improvidently granted, presumably because of a perceived jurisdictional problem. See *Abdur'Rahman* v. *Bell*, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from dismissal as improvidently granted).

court's error, Abdur'Rahman, relying on Rule 60(b), timely moved to vacate the district court's judgment. *Id*. at 177-78. The en banc Sixth Circuit held that Abdur'Rahman's motion to reopen the judgment represented a proper use of Rule 60(b), and ordered the district court to consider Abdur'Rahman's claim on the merits. But should this Court adopt the Eleventh Circuit's essentially categorical ban on the use of Rule 60(b) in habeas proceedings, the review that the Sixth Circuit ordered in Abdur'Rahman's case might well be foreclosed, even though the sole reason the district court failed originally to address his claims on the merits was its own legal error in applying the procedural requirements of habeas law.

## SUMMARY OF THE ARGUMENT

The courts of appeals are split on how to address Rule 60(b) motions in the habeas corpus context. The Eleventh and Tenth Circuits deem virtually all Rule 60(b) motions second or successive habeas petitions prohibited by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Contrary to the text and structure of Rule 60(b), which treats the listed reasons for reopening a judgment equally (with the one carefully delineated exception of setting a time limit with respect to three potential bases for relief), the Eleventh Circuit – perhaps recognizing the fundamental injustices a per se rule would cause – carves out one narrow exception, allowing habeas petitioners to proceed under Rule 60(b)(3) when they allege fraud on the court during the habeas proceeding itself. By contrast, the overwhelming majority of circuits have adopted and applied without difficulty a functional approach, which prohibits all Rule 60(b) motions that attack the underlying constitutionality of a conviction or sentence, but permits those that target an irregularity in the habeas

proceeding itself that fits within one of Rule 60(b)'s enumerated grounds.[3]

In his brief on the merits, petitioner Gonzalez explains persuasively why the Eleventh Circuit's holding that AEDPA prohibits almost all Rule 60(b) motions in the habeas context is erroneous. In this brief, *amicus* Abdur'Rahman offers another reason why Rule 60(b) motions should not be categorically precluded in the habeas context: in a very small but vitally important subset of cases, Rule 60(b) is the only avenue available to prevent a miscarriage of justice that Congress could not have intended *sub silentio* to render unremedied by AEDPA.

A thorough survey of all available habeas corpus cases decided since AEDPA's enactment revealed that habeas petitioners rarely file Rule 60(b) motions, and that courts have effectively policed those motions to ensure that they are not successive collateral attacks on convictions. Moreover, courts have only granted a handful of Rule 60(b) motions, usually when an error by the habeas court itself or a logistical snafu beyond the petitioner's control results in denial or dismissal of the habeas petition without any consideration of the merits of the underlying claim. The Eleventh Circuit's per se rule would indisputably prevent courts from granting relief in these meritorious cases.

The functional rule adopted by the majority of circuits is the best approach for evaluating Rule 60(b) motions in the post-AEDPA world. It furthers AEDPA's determination to strictly limit successive attacks on underlying criminal convictions, while allowing courts to reach the very small subset of meritorious cases in which the Rule 60(b) motion

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[3] The Second Circuit has arguably adopted a more permissive rule, see *Rodriguez* v. *Mitchell*, 252 F.3d 191 (2001), but has more recently followed the functional approach, see *Harris* v. *United States*, 367 F.3d 74 (2004).

does not attack the underlying conviction and is the only avenue available to prevent a grave miscarriage of justice.

## ARGUMENT

### I. Rule 60(b) Offers An Appropriate Safety Valve For Correcting A Narrow Class Of Errors That Might Otherwise Undermine The Integrity Of Habeas Proceedings.

Federal Rule of Civil Procedure 60(b) authorizes district courts to set aside a final judgment and reopen proceedings under a carefully delineated set of circumstances. Rule 60(b) thus serves as a "safety valve," *Balark* v. *City of Chicago*, 81 F.3d 658, 663 (CA7 1996), that strikes a judicially proposed and congressionally ratified balance between finality and justice.

Although district courts seldom grant relief from a final judgment under Rule 60(b),[4] the cases in which relief is granted reflect a variety of compelling circumstances. This is particularly true for Rule 60(b) motions filed in the context of habeas proceedings.[5] In the nearly nine years since AEDPA's

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[4] See John L. Costello, *Summary Denials of Relief Under Procedural Rules of Preclusion Are Deprivations of Due Process of Law*, 2 GEO. MASON U. CIV. RTS. L.J. 215, 233-34 (1992) (noting that less than fourteen percent of Rule 60(b) motions between 1955 and 1990 were granted).

[5] As an initial matter, AEDPA does not categorically foreclose the application of Rule 60(b) in habeas cases. Although the court below acknowledged that AEDPA's "second or successive petition restrictions are 'grounded in respect for the *finality of criminal judgments*,'" *Gonzalez* v. *Secretary for the Department of Corrections*, 366 F.3d 1253, 1271 (CA11 2004) (citing *Calderon* v. *Thompson*, 523 U.S. 538 (1998)) (emphasis added), it critically failed to recognize that Rule 60(b) motions do *not*, and *cannot*, attack the finality of criminal convictions. "Granting a second or successive habeas petition invalidates a prisoner's conviction and/or sentence. Granting a [true] Rule 60(b) motion has no such effect." *Abdur'Rahman* v. *Bell*, 392 F.3d 174, 180 (CA6 2004) (en

effective date, roughly 330 such motions have been filed.[6] They thus involve only a minuscule fraction of all habeas cases.[7] But the twenty-seven[8] Rule 60(b) motions that have been granted, as well as the motion filed by *amicus* (which in the wake of the en banc court of appeals' ruling in his favor will now be the subject of ongoing proceedings in the district

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banc). Because true Rule 60(b) motions merely attack a habeas judgment that "rests on a defective foundation," *id*. at 179, and cannot vacate an underlying criminal conviction, AEDPA does not foreclose all Rule 60(b) motions. Rather, as courts adopting the functional rule have discerned, AEDPA categorically precludes only Rule 60(b) motions that *attack the underlying conviction*.

[6] *Amicus* derived this figure from a survey of all published or unpublished decisions available through either Westlaw or Lexis in all circuit and district courts since AEDPA's effective date. This survey also captures references in the available opinions to Rule 60(b) motions disposed of in orders or opinions that are not themselves available through Westlaw or Lexis. Although *amicus*'s survey could not capture every Rule 60(b) motion filed since AEDPA's enactment (because some rulings are no doubt not available even electronically), *amicus* believes that his survey is the most comprehensive collection to date of Rule 60(b) motions filed in post-AEDPA habeas cases. Any references throughout this brief to data drawn from "available cases" refer to the results of this survey.

[7] The annual Federal Judicial Caseload statistics show that more than 20,000 habeas petitions are filed annually. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, Mar. 31, 2004, Table C-2, *available at* http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf.

[8] One case not included in this count is *Mickens* v. *United States*, 333 F. Supp. 2d 44 (E.D.N.Y. 2004), in which the habeas petitioner alleged that fraud had been committed on the habeas court – a scenario in which Rule 60(b) relief would be appropriate even under the Eleventh Circuit rule. The district court "grant[ed] Mickens' motion to the extent of an evidentiary hearing to develop what appear to be some of the missing facts" about whether his Rule 60(b) motion was time-barred. *Id*. at 49.

court), offer powerful examples of why the availability of Rule 60(b) relief is critical. Rule 60(b) does not permit challenges to the underlying conviction on the basis of mistake, excusable neglect, or changes in intervening law;[9] rather, it provides a mechanism for correcting egregious errors *only within the habeas process itself*. In the remainder of this section, *amicus* will describe both his case and the cases in which courts have reopened judgments pursuant to

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[9] So, for example, courts have consistently denied motions for Rule 60(b) relief asserting that this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), represent a change in governing law that would justify vacating already-entered judgments, and have treated such filings as successive collateral attacks instead. See, *e.g.*, *United States* v. *Lightfoot*, 2004 WL 2360373 (W.D. Wis. Oct. 13, 2004) (denying Rule 60(b) motion based on *Blakely* because it did not apply retroactively, and suggesting that at most such defendants might, if this Court were to hold its decision retroactive, be entitled to apply to the court of appeals for certification of a second post-conviction motion); *United States* v. *Madrigal-Trujillo*, 2004 WL 1908210 (N.D. Tex. Aug. 24, 2004) (treating Rule 60(b)(6) motion on *Blakely* grounds as a successive habeas petition); *Perez* v. *United States*, 2003 WL 1845457, at *3 (N.D. Ill. Apr. 3, 2003) (dismissing Rule 60(b) motion on *Apprendi* grounds, in part because the claim was "a successive collateral attack"); *Rollen* v. *United States*, 125 F. Supp. 2d 877, 878 (C.D. Ill. 2000) (denying Rule 60(b) motion on *Apprendi* grounds, both because it was untimely and because it represented "nothing more than an end run around the second or successive filing prohibition imposed by [AEDPA]"); *Frederick* v. *United States*, 2000 U.S. Dist. LEXIS 20423, at *5 (N.D.N.Y. Dec. 18, 2000) (denying Rule 60(b) motion on *Apprendi* grounds because "[t]his argument * * * does not challenge the propriety of the denial of his prior § 2255 claim * * * but rather alleges a new basis for collateral attack" and is therefore successive). Courts will no doubt follow the same approach in disposing of Rule 60(b) motions relying on this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005).

Rule 60(b) to show that, while such cases are indeed rare, they reflect circumstances in which such relief is absolutely essential to protect the integrity of the habeas process.

### A. *Amicus* Abdur'Rahman's Case Shows Why Rule 60(b) Relief Is Necessary to Remedy Legal Errors That Otherwise Deny Individuals Any Access to the Habeas Process.

*Amicus* Abdur'Rahman's case offers a textbook example of a circumstance in which the availability of Rule 60(b) relief is critical: cases in which a district court's legal error will otherwise foreclose a habeas petitioner from ever receiving a hearing on the merits of his underlying claim.

In 1987, Abdur'Rahman was tried in Tennessee state court for first-degree murder, assault with intent to murder, and armed robbery in connection with the stabbing death of Patrick Daniels, a Nashville drug dealer, and an assault on Daniels's girlfriend.[10] The prosecutor in his case was John Zimmermann, an assistant district attorney with a lengthy record of prosecutorial misconduct in other cases – including two public censures.[11] See, *e.g.*, *In re Zimmermann*, No. 24039-5-CH (Tenn. S. Ct. Disciplinary Bd. of Prof. Resp. May 28, 2002) (public censure of Zimmermann for misconduct in suppressing a detective's report that undermined his argument to the jury).

In *amicus*'s case, Zimmermann engaged in "the knowing suppression of favorable evidence" and the "knowing misrepresentation of evidence" on key issues. Br. *Amici*

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[10] Both the facts of *amicus*'s case and a detailed description of his prosecutorial misconduct claims are laid out in greater detail in Brief of Petitioner, *Abdur'Rahman* v. *Bell* (No. 01-9094).

[11] For a more complete description of Zimmermann's extensive history of prosecutorial misconduct, including other findings by courts and disciplinary officials that Zimmermann's actions violated basic ethical standards and constitutional norms, see Brief *Amici Curiae* of Former Prosecutors James F. Neal et al. 13-14, *Abdur'Rahman* v. *Bell* (No. 01-9094).

*Curiae* of Former Prosecutors James F. Neal et al. 6-7, *Abdur'Rahman* v. *Bell* (No. 01-9094). His prejudicial suppression and misrepresentation of evidence affected virtually every major aspect of the case, including "the identity of the person who did the stabbing; the circumstances of a prior homicide used as an aggravating circumstance in support of the death penalty; and Petitioner's mental condition, a condition that should have been presented to the jury in mitigation of the death sentence." *Id.* 4.

The evidence of Zimmermann's misconduct is substantial. It includes, for example, evidence that he withheld relevant statements by the victim's brother, laboratory reports of cocaine in the victim's blood, and records regarding the victim's bank account. He withheld information regarding *amicus*'s mental state from, and misrepresented that information to, *amicus*'s court-ordered evaluators, his counsel, the court, and the jury. He also misled and withheld information from Abdur'Rahman's evaluators, counsel, and the jury regarding his 1972 murder conviction. He improperly manipulated the trial testimony of both Norma Norman, the surviving witness, and *amicus*'s co-defendant, Devalle Miller. And he made material misrepresentations to the jury, regarding information that he knew to be untrue, in his closing argument. See *Abdur'Rahman* v. *Bell*, 999 F. Supp. 1073, 1082-84, 1088-90 (M.D. Tenn. 1998) (noting illustrative claims); see also Br. of Petitioner, *Abdur'Rahman* v. *Bell* 18-20 (No. 01-9094) (describing some claims).

After discovering this and other troubling evidence of Zimmermann's misbehavior, Abdur'Rahman pursued his prosecutorial misconduct claims in precise conformity with state and federal law. He first sought state post-conviction relief in the trial court, which rejected all of his claims. He appealed as of right to the Tennessee Court of Criminal Appeals, which affirmed. *Jones* v. *State*, 1995 Tenn. Crim. App. LEXIS 140, at *7 (Tenn. Crim. App. Feb. 23, 1995). Then, *following the dictates of Tennessee law*, he sought permission to appeal to the Tennessee Supreme Court on

some of his claims, but not on the bulk of his prosecutorial misconduct claims, because those claims did not satisfy the narrow screening criteria imposed by Tennessee Rule of Appellate Procedure ("TRAP") 11.[12] The Tennessee Supreme Court denied Abdur'Rahman leave to appeal on the remaining claims. *State* v. *Jones*, 789 S.W.2d 545 (Tenn. 1990).

Having exhausted his state court options, Abdur'Rahman next presented his federal constitutional claims in an application for a writ of habeas corpus. See *Abdur'Rahman* v. *Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998). Although the district court vacated Abdur'Rahman's death sentence on the grounds of ineffective assistance of counsel, it declined to consider most of his prosecutorial misconduct claims as an additional ground for sentencing relief. *Id*. at 1077. The district court found that these claims were procedurally barred. It reasoned that, despite the language of TRAP 11, "a petitioner must seek discretionary review of a claim from a state's highest court in order to satisfy the exhaustion requirement." *Id*. at 1080.

On appeal, the Sixth Circuit sua sponte reversed the district court's finding that *amicus* had been prejudiced by the ineffective assistance of his counsel, reinstated *amicus*'s death sentence, and rejected all of his other claims. See *Abdur'Rahman* v. *Bell*, 226 F.3d 696 (2000).

Abdur'Rahman filed a timely petition for a writ of certiorari from this Court, seeking review of the Sixth Circuit's decision. While that petition was pending, the Tennessee Supreme Court adopted its Rule 39,[13] which

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[12] These circumstances include: "(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for exercise of the Supreme Court's supervisory authority." TRAP 11(a).

[13] As the Advisory Committee Note to TRAP 11 indicates, Rule 39 was a direct response to this Court's decision in *O'Sullivan*

explicitly "clarif[ied]" Tennessee's then-existing law regarding the obligation of litigants to seek discretionary review in the Tennessee Supreme Court to satisfy the requirement of exhausting state remedies. Rule 39 expressly applied to "all appeals from criminal convictions or post-conviction matters from and after July 1, 1967." And it provided, in relevant part, that after an adverse decision from the Tennessee Court of Criminal Appeals, litigants "shall not be required to * * * file an application for permission to appeal" to the Tennessee Supreme Court "in order to be deemed to have exhausted all available state remedies." Instead, the rule explains, as long as "the claim has been presented to the Court of Criminal Appeals, * * * the litigant shall be deemed to have exhausted all state remedies available for that claim."

Rule 39's clarification of Tennessee law of course completely undermined the federal district court's assertion that Abdur'Rahman's prosecutorial misconduct claims were procedurally defaulted. Abdur'Rahman had squarely presented those claims to the Tennessee Court of Criminal Appeals, which had decided them on the merits.

Less than forty-eight hours after this Court denied his petition for certiorari seeking review of the Sixth Circuit's decision reinstating his death sentence, *Abdur'Rahman* v. *Bell*, 534 U.S. 970 (2001), Abdur'Rahman returned to the district court and advised the court that he would file a motion for relief under Rule 60(b), on the ground that, in light of Tennessee Supreme Court Rule 39, his prosecutorial misconduct claims should have been considered on the merits. He filed the motion shortly thereafter.

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v. *Boerckel*, 526 U.S. 838 (1999), holding that 28 U.S.C. 2254(c) requires "state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State," but that "nothing * * * requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable." 526 U.S. at 847.

The district court responded that it could not consider Abdur'Rahman's motion because, under extant Sixth Circuit precedent, a "Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive [habeas] petition." *Abdur'Rahman* v. *Bell*, 2001 WL 1782874, at *1 (M.D. Tenn. Nov. 27, 2001). The Sixth Circuit agreed with the district court and affirmed. *Abdur'Rahman* v. *Bell*, slip op. (CA6 Jan. 18, 2002) (Nos. 98-6568/6569, 01-6504). This Court granted certiorari to consider, inter alia, a question nearly identical to the one presented by this case. But after briefing and oral argument, it dismissed the writ as improvidently granted. See *Abdur'Rahman* v. *Bell*, 537 U.S. 88, 89 (2002).

After this Court's dismissal order (apparently because it was concerned that no final appealable judgment existed in the case), *amicus* remedied that perceived procedural defect by reinstituting his request for Rule 60(b) relief. He refiled his Rule 60(b) motion in the district court, which again deemed the motion a "second or successive" habeas petition that it was powerless to consider. In what it described as a "final Order in all respects," the district court transferred the motion to the Sixth Circuit. See *Abdur'Rahman* v. *Bell*, slip op. (M.D. Tenn. Dec. 17, 2002) (No. 96-CV-380). The Sixth Circuit denied *amicus*'s application for a Certificate of Probable Cause or, alternatively, Certificate of Appealability, as well as his motion to re-transfer the matter back to the district court. *Abdur'Rahman* v. *Bell*, slip op. (CA6 Mar. 5, 2003) (Nos. 02-6547/6548).

On rehearing en banc, the Sixth Circuit rejected its earlier per se position on Rule 60(b) motions. Instead, it adopted the functional approach, which it regarded as better "preserv[ing] the independent goals of both Rule 60(b) and AEDPA." *Abdur'Rahman* v. *Bell*, 392 F.3d 174, 182 (2004). It added that "we should be 'confident that * * * [district courts will] be able to sift wheat from chaff without undue difficulty.'" *Id*. (quoting *Rodwell* v. *Pepe*, 324 F.3d 66, 71 (CA1 2003)).

Applying the functional rule to Abdur'Rahman's case, the court found that his Rule 60(b) motion was not a second or successive habeas petition because it "relat[ed] to the integrity of the federal habeas judgment and specifically, the basis for the district judge's procedural default ruling." 392 F.3d at 182. Moreover, because the district judge's ruling rested on "faulty ground" – "because Abdur'Rahman was never required to seek discretionary review of his prosecutorial misconduct claims in the Tennessee Supreme Court" – Abdur'Rahman's motion presented the kind of "extraordinary circumstances" necessary to justify Rule 60(b) relief. *Id*. at 186. Accordingly, the en banc panel reversed and remanded for the district court to consider the Rule 60(b) motion on the merits. *Id*. at 187.

If this Court adopts the "functional" approach employed by the majority of circuits, Abdur'Rahman's substantial evidence of prosecutorial misconduct – which other former prosecutors have deemed "a gross deviation from the standards of the legal profession," see Br. *Amici Curiae* of Former Prosecutors James F. Neal et al. 6 – can finally be reviewed on the merits by a federal habeas court. By contrast, if this Court were to adopt the Eleventh Circuit's rule, Abdur'Rahman's claims of grave prosecutorial misconduct may not receive even an instant of federal habeas scrutiny because the federal district court erroneously construed Tennessee post-conviction law. Nothing in either Rule 60(b) or AEDPA compels such an illogical, unnecessary, and unjust result.

### B. The Other Cases in Which Courts Have Granted Rule 60(b) Motions Offer Equally Compelling Justifications for Reopening Judgments.

The remaining habeas cases in which Rule 60(b) relief has been granted in the wake of AEDPA fall essentially into three discrete categories. Each involves errors by the district court that go to an error in the federal habeas process because they

result in the district court dismissing a prisoner's petition without addressing the merits of his claim. One category reflects substantive mistakes of law, like the one that led the district court in Abdur'Rahman's case to mistakenly conclude that his claims were procedurally defaulted. A second category involves cases in which logistical snafus result in the unjustifiable dismissal of a prisoner's petition. And a third group of cases involves petitioners who *did* procedurally default on their claims but whose defaults were essentially induced by representations made by the habeas court. Indeed, even though the government itself sometimes concedes that the "safety valve" provided by Rule 60(b) is necessary,[14] the rule adopted by the Eleventh Circuit would deny relief in all of these compelling situations because none involved a "fraud" upon the court within the meaning of Rule 60(b)(3).[15]

**1. Erroneous dismissal of a petition based on the habeas court's misreading of habeas law**

The law governing a prisoner's ability to seek federal habeas relief is complex, particularly as it applies to such issues as procedural default, exhaustion, and the presence of

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[14] See, *e.g.*, *Leuthavone* v. *State*, 2003 U.S. Dist. LEXIS 24710, at *7-*8 (D.R.I. Feb. 24, 2004) (noting that government did not oppose petitioner's Rule 60(b) motion to reopen the district court judgment to determine whether the original petition had been incorrectly dismissed as untimely); see also *Banks* v. *United States*, 167 F.3d 1082 (CA7 1999) (per curiam) (noting that the government did not oppose petitioner's Rule 60(b) motion because the integrity of the habeas proceeding may have been undermined).

[15] Nothing in AEDPA suggests that it was intended to overrule Rule 60(b) entirely. See *supra* n.5. Moreover, the Eleventh Circuit's rule would lead to the perverse result that states could rely on Rule 60(b) to reopen judgments favorable to habeas petitioners, see, *e.g.*, *Garcia* v. *Portuondo*, 104 Fed. Appx. 776 (CA2 2004) (ordering district court to grant state's Rule 60(b) motion, vacate its order for a new trial, and hold evidentiary hearing on whether new trial is necessary), while habeas petitioners with meritorious claims would be precluded from even seeking such relief.

adequate and independent state grounds for rejection of a defendant's federal constitutional claims. The passage of AEDPA added some additional intricacies. Thus, it is hardly surprising that district courts occasionally misconstrue these various requirements and dismiss habeas petitions as being procedurally barred even when they should have addressed them on the merits.

In addition to the cases of petitioner Gonzalez and *amicus* Abdur'Rahman, other habeas petitioners have been denied relief because courts have misconstrued the procedural requirements for obtaining review on the merits.[16] Roughly one quarter of all of the successful Rule 60(b) motions over the last nine years involve a particular error of this sort: an error concerning the statute of limitations to be applied to habeas petitions filed by prisoners convicted before the enactment of AEDPA. AEDPA introduced, for the first time, a statute of limitations in habeas cases, requiring that petitions be filed within one year of when the petitioner's conviction becomes final. See 28 U.S.C. 2244(d). Relying on AEDPA, several district courts within the Second Circuit dismissed habeas petitions filed by prisoners with convictions that antedated AEDPA because those petitions were filed more than a year after the convictions had become final. In *Ross* v. *Artuz*, 150 F.3d 97 (1998), however, the Second Circuit held that this approach misconstrued AEDPA and risked violating prisoners' rights to due process. And so the court decided that "prisoners whose convictions became final prior to the effective date of [AEDPA's] statute-of-limitations provision should have been allowed a period of one year after that effective date in which to file petitions." *Id*. at 98. In light of the decision in *Ross*, district courts within the circuit granted seven Rule 60(b) motions to reopen cases that had erroneously been dismissed as time-barred. See *Rashid* v. *Kuhlman*, 2000 U.S. Dist. LEXIS 18212 (S.D.N.Y. Dec. 18, 2000); *Robles* v. *Senkowski*, 1999 U.S. Dist. LEXIS 11565

[16] These cases likely fall under Rule 60(b)(1) or (6).

(S.D.N.Y. July 30, 1999); *Reinoso* v. *Ortiz*, 1999 U.S. Dist. LEXIS 7768 (S.D.N.Y. May 25, 1999); *Tal* v. *Miller*, 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan. 25, 1999); *Matos* v. *Portuondo*, 33 F. Supp. 2d 317 (S.D.N.Y. 1999); *Panaro* v. *Kelly*, 32 F. Supp. 2d 105 (W.D.N.Y. 1998); *Liberatore* v. *McGuiness*, 1998 U.S. Dist. LEXIS 22842 (S.D.N.Y. Oct. 7, 1998); see also *Velasquez* v. *United States*, 1998 U.S. Dist. LEXIS 12220 (S.D.N.Y Aug. 10, 1998) (granting Rule 60(b) motion because court had erroneously applied statute of limitations). One other successful Rule 60(b) motion also reopened a case wrongly dismissed on statute of limitations grounds. See *Leuthavone* v. *State*, 2003 U.S. Dist. LEXIS 24710 (D.R.I. Feb. 24, 2004) (granting Rule 60(b) motion because court erred in calculating the statute of limitations when pending state proceeding should have tolled the time limit).

Another example of a case in which Rule 60(b) was used to provide relief from a district court's legal error that resulted in the mistaken dismissal of a habeas petition on procedural grounds is *Whitmore* v. *Avery*, 179 F.R.D. 252 (D. Neb. 1998). In that case, the district court concluded that in a prior ruling, it had wrongly dismissed Whitmore's habeas petition without reaching the merits because the court had misconstrued the nature of his claim. See *id*. at 259 n.4 ("The petitioner's case should not have been dismissed at all, since his claim was not of the type that either had to be exhausted or could be exhausted."). Thus, it construed Whitmore's second filing (he was proceeding pro se) not as a successive habeas petition seeking review of its earlier, legally erroneous ruling, but as a Rule 60(b) motion seeking relief from the court's "error." *Ibid*. And it upheld the magistrate's recommendation that it grant the Rule 60(b) motion so that Whitmore could obtain a ruling on the merits of his claim that his representation at trial had been adversely affected by his lawyer's conflict of interest.

**2. Erroneous dismissal based on logistical snafus**

A second category of cases in which courts have reopened habeas proceedings involves prisoners whose habeas claims became procedurally defaulted – through no fault of their own – because of logistical snafus. These cases are contemplated by Rule 60(b)(1), which allows a court to set aside a decision because of "mistake" or "excusable neglect." In these cases, courts scrutinize motions for Rule 60(b) relief carefully but, if satisfied that the petitioner is truly without fault, they use Rule 60(b) to vacate the judgment dismissing a habeas petition, thereby permitting the petitioner to pursue his claim for relief.

For example, as described in *Mitchell* v. *Smith*, 115 Fed. Appx. 642 (CA4 2004) (per curiam), Mitchell's habeas petition was denied because he failed to file a timely objection to the magistrate's recommendation. Mitchell sought reconsideration under Rule 60(b), which the court subsequently granted because Mitchell had never received the magistrate judge's report. *Id*. at 643. For other cases granting Rule 60(b) relief to petitioners who never received notice, see *Barrett* v. *Yearwood*, 83 Fed. Appx. 160 (CA9 2003) (excusing petitioner's failure to timely respond to district court's order in light of multiple errors by clerk's office); *Mason* v. *Johnson*, 2001 U.S. Dist. LEXIS 20825 (N.D. Tex. Dec. 13, 2001) (granting Rule 60(b) motion to allow petitioner to file objections to magistrate's report when he had never received the report through prison mail system); *United States* v. *Brown*, 179 F.R.D. 323 (D. Kan. 1998) (granting Rule 60(b) motion to change date of denial of habeas petition to allow petitioner to appeal when he had never received notice of denial). Cf. *Howard* v. *McAdory*, 2004 U.S. Dist. LEXIS 18527 (N.D. Ill. Sept. 13, 2004) (granting Rule 60(b) motion because prison improperly refused to mail prisoner's habeas petition, thereby rendering petition untimely).

The Eleventh Circuit's per se rule would prohibit relief in this class of cases, even though the procedural bar to

reviewing the habeas petition on its merits arises only because of circumstances outside the petitioner's control. Although the Eleventh Circuit contemplated the availability of relief for "clerical errors in the judgment itself," pursuant to Rule 60(a), *Gonzalez*, 366 F.3d at 1278, the Eleventh Circuit rule would almost certainly preclude relief for cases in this category.[17] Again, nothing in either AEDPA or Rule 60(b) suggests that courts cannot reopen their judgments under these circumstances.

**3. Procedural default produced by petitioner's reasonable reliance on a habeas court's representations regarding the law**

A third category of cases in which Rule 60(b) has been used to reopen a judgment involves situations in which a district court's erroneous representation of the law leads a habeas petitioner to take actions that result in his claims being dismissed.[18] In such cases, courts have found that the petitioner's good faith reliance on the advice constitutes an exceptional circumstance that warrants reopening the case to prevent a miscarriage of justice.

*Johnson* v. *Lehman*, 2004 WL 1368815 (E.D. Pa. June 15, 2004), is illustrative. Johnson voluntarily dismissed his habeas petition without prejudice "at the court's urging" to exhaust his state remedies on all claims. *Id*. at *3. The dismissal was "explicitly premised on the concession by the

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[17] *Amicus* has not located any case in which a court has construed such logistical snafus as "clerical errors" of the sort that would fall under Rule 60(a). Rather, courts considering Rule 60(a) motions construe the term "clerical error" much more narrowly – as covering, for example, mistakes in transcription, copying, and calculation in final decisions or orders. See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2854, at 240 (2d ed. 1995).

[18] These cases fall under either Rule 60(b)(1) (court's mistake) or Rule 60(b)(6), as an extraordinary circumstance that would lead to injustice.

[government] that after exhausting state remedies, [p]etitioner could re-file the habeas petition, and it would not be treated as a successive petition under AEDPA." *Id*. at *2. Johnson subsequently filed a Rule 60(b) motion to reopen the dismissal order dismissing his petition, which the court granted. Rejecting the state's contention that Rule 60(b) motions are "unavailable to vacate a final judgment in a [habeas] action," *id.* at *1, it reasoned that relief was appropriate in light of Johnson's "reliance on the express instructions of the court" and subsequent circuit precedent holding that a stay – rather than dismissal – was the "appropriate course of action" in cases such as Johnson's. *Id*. at *10-*11.

Other cases presenting similar circumstances are *Shortt* v. *Roe*, 2003 WL 21259795 (CA9 May 28, 2003) (granting Rule 60(b) motion because petitioner sought remedy which was subsequently foreclosed by intervening authority); *Devino* v. *Duncan*, 215 F. Supp. 2d 414 (S.D.N.Y. 2002) (granting Rule 60(b) motion because the court had suggested that petitioner would retain the ability to refile his petition, but he was later barred from doing so); and *Funderbird-Day* v. *Artuz*, 2002 U.S. Dist. LEXIS 20839 (S.D.N.Y. Aug. 28, 2002) (presenting situation similar to *Devino*).

* * *

Thus, as far as *amicus* is aware from this survey of available cases, with only one exception,[19] all of the cases in

[19] The facts of that case are so unique, and compelling, that they militate strongly in favor of this Court preserving Rule 60(b) as a safety valve for exceptional cases. *Montalvo* v. *Portuondo*, 2001 U.S. Dist. LEXIS 10686 (S.D.N.Y. July 30, 2001), involved a petitioner who had been convicted of murder and sentenced to fifteen years to life. After Montalvo's habeas petition had been denied and he had been barred from appealing, see *Montalvo* v. *Portuondo*, 1998 U.S. Dist. LEXIS 19137, at *29 (S.D.N.Y. Dec. 9, 1998), he filed a Rule 60(b) motion to reopen his habeas proceeding to present evidence developed at a co-defendant's

which courts have granted Rule 60(b) motions involve flaws that infected the habeas proceeding itself, rather than problems in the underlying criminal case. Thus, *amicus*'s survey of Rule 60(b) motions highlights the shortcomings of the Eleventh Circuit's per se rule. The three principal categories outlined above are clearly covered by the plain language of Rule 60(b) and involve errors by the district court in the *process* – as opposed to the *substance* – of resolving the case. Nonetheless, the Eleventh Circuit's rule would categorically prevent Rule 60(b) relief in these meritorious cases.

## II. Only The Functional Approach Strikes The Appropriate Balance Between Finality And Preventing Injustice.

### A. Rule 60(b) Embodies Congress's Determination of How to Balance Finality and the Need to Prevent Injustice.

In holding that AEDPA precludes habeas petitioners from seeking Rule 60(b) relief except in the limited cases of fraud on the court, the Eleventh Circuit focused on what it regarded as AEDPA's "central purpose" of "ensur[ing] greater finality of state and federal court judgments in criminal cases." *Gonzalez*, 366 F.3d at 1269. But that myopic focus ignores

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hearing. 2001 U.S. Dist. LEXIS 10686, at *3. At that hearing, a priest disclosed – and an attorney corroborated – that a deceased third person had confessed to committing the crime, and the court subsequently granted the co-defendant's writ of habeas corpus. See *Morales* v. *Portuondo*, 154 F. Supp. 2d 706 (S.D.N.Y. 2001). Because the priest and lawyer had not decided to come forward until after Montalvo's habeas proceeding, the district court granted his Rule 60(b) motion based on the "extraordinary circumstances" of the case. *Montalvo*, 2001 U.S. Dist. LEXIS 10686, at *3-*5 (S.D.N.Y. July 30, 2001). The court later granted Montalvo's writ of habeas corpus, ordered his immediate release, and barred the prosecutor from retrying him for the offense. *Morales* v. *Portuondo*, 165 F. Supp. 2d 601, 614-15 (S.D.N.Y. 2001).

the role of the other provision of federal law at issue in this case: Rule 60(b).

Rule 60(b) represents Congress's attempt to strike a delicate balance between preserving the finality of judicial outcomes and the desire to ensure justice in individual cases, even when that justice can only be obtained by revisiting an otherwise settled decision. See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2851, at 227 (2d ed. 1995). As the text of Rule 60(b) reflects, Congress struck the balance strongly in favor of finality – making relief from judgment available only in certain limited, clearly defined circumstances and within a fairly short time period – but it did not deem finality absolute. And Congress declined to draw the distinction, grafted onto Rule 60(b) by the Eleventh Circuit, between judgments based on mistake or excusable neglect and judgments based on clerical errors or fraud.

Consistent with this legislative intent, courts have employed Rule 60(b) as a narrow "safety valve" to prevent manifest injustice. *Balark* v. *City of Chicago*, 81 F.3d 658, 663 (CA7 1996); see *In re Dennis*, 209 B.R. 20, 28 (Bankr. S.D. Ga. 1996) ("Rule 60(b) provides a safety valve to ensure fairness in proceedings, but subject to time limits which are in place to assure some finality"). Contrary to both the text and intent of the Rule, the Eleventh Circuit's rule would close off this "safety valve."

**B. The Functional Approach Provides the Balance Sought By Congress in Rule 60(b).**

Only the functional approach attains the appropriate balance between finality and the need for individual justice that Congress intended in enacting Rule 60(b). The functional approach imposes two criteria that filter out all but the most deserving cases.

First, consistent with AEDPA, the functional approach screens out all claims except those attacking the integrity of habeas process, with – as discussed *supra* at 18 & n.18 – the

possible exception of the most compelling cases. When a Rule 60(b) motion is simply a collateral attack on the underlying criminal conviction, it will be treated as a second or successive habeas petition. Any fears that successive attacks on the underlying criminal conviction will be mistaken for true Rule 60(b) motions that attack *errors in the habeas proceeding itself* are misplaced.

Second, even when Rule 60(b) motions attack only the integrity of the habeas proceeding and thus clear the functional approach's first limiting principle, such motions will only be granted if they meet very strict standards imposed by Rule 60(b) itself. Thus, courts have repeatedly denied motions that run afoul of Rule 60(b)'s stringent time limits, even when they acknowledge that the motions might otherwise have been granted. See, *e.g.*, *Gaskins* v. *Duval*, 336 F. Supp. 2d 66, 69 n.1, 70 (D. Mass. 2004) (describing motion as "a true Rule 60(b) motion" before denying it as untimely); *Sanders* v. *McCaughtry*, 333 F. Supp. 2d 797, 799-800 (E.D. Wis. 2004) (finding that petitioner's "Rule 60(b) motion is not an attempt to circumvent AEDPA's restrictions on second or successive petitions," but denying it as untimely); *United States* v. *Bailey*, 2002 WL 31779911, at *1 (N.D. Ill. Dec. 11, 2002) ("Bailey's characterization [of his motion as a Rule 60(b) motion] should be accepted by this Court, rather than viewing his effort as a mislabeled Section 2255 motion[, but] any attempted Rule 60(b) motion would be far out of time.").

Courts adhering to the functional approach have also faithfully applied this Court's directive that Rule 60(b)(6), which allows relief for "any other reason justifying relief from the operation of the judgment," "should only be applied in 'extraordinary circumstances[.]'" *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 864 & n.10 (1988) (internal quotations and citation omitted). See, *e.g.*, *Hamilton* v. *Newland*, 374 F.3d 822, 823 (CA9 2004) (concluding that motion "should have been treated solely as a Rule 60(b)(6) motion," but "denying relief because * * * Hamilton could

not show any 'extraordinary circumstance' necessary to qualify for 60(b)(6) relief"); *Meserve* v. *United States*, 2005 WL 217041, at *1 n.2 & *5 (D. Me. Jan. 24, 2005) (describing Rule 60(b)(6) motion as a true 60(b) motion but denying it because "[t]his case is simply not one that involves exceptional or extraordinary circumstances"); *Telesford* v. *United States*, 2004 WL 724959, at *1 & *2 (D. Del. Mar. 31, 2004) (determining that Rule 60(b)(6) motion urging court to toll the habeas limitations period due to ineffective assistance of counsel was a "true Rule 60(b) motion," but denying it because a mistake by petitioner's attorney "regarding the one-year filing period does not constitute * * * 'extraordinary' actions").

**C. The Functional Rule Is Eminently Manageable.**

The functional approach is also administratively workable. As an initial matter, there is no reason to believe that a decision from this Court adopting the functional approach to Rule 60(b) motions in habeas cases will result in an influx of additional filings. In the circuits currently employing this approach, the incremental burden imposed by Rule 60(b) motions is negligible: a few hundred post-AEDPA cases involving Rule 60(b), see *supra* at 4, compared with more than 20,000 petitions for habeas corpus filed in 2004 alone, see ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, March 31, 2004, Table C-2, *available at* http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf.

Even in the Second Circuit – which at least nominally permits *all* Rule 60(b) motions (see *supra* n.3) – there is no indication that habeas prisoners have filed a significant number of such motions. *Amicus*'s review of the available Second Circuit cases revealed that courts within the Second Circuit had considered fewer than ninety Rule 60(b) motions in the entire eight-year period since AEDPA's enactment – a tiny fraction of the approximately 15,000 habeas petitions

filed in that circuit during the same period.[20] And if one removes the unusual line of cases arising out of *Ross* v. *Artuz*, described *supra* at 14-15, the Second Circuit has not granted materially more Rule 60(b) motions than the other circuits. To the contrary, like their counterparts in other circuits, the courts in the Second Circuit have exercised their authority under Rule 60(b) with extraordinary responsibility. See *supra* at 20-22.

Furthermore, cutting off the availability of Rule 60(b) for meritorious filings will not prevent frivolous claims. Rather, habeas petitioners will simply style their cause of action differently. See Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 213-22 (2003) (raising the prospect that prisoners could seek relief through a number of other avenues). In all events, under the Eleventh Circuit's rule, courts must still scrutinize each petition to sort out true claims of fraud from claims that more properly belong under other subheadings of the Rule.

Finally, experience has demonstrated that courts can apply the functional rule with ease in individual cases. That rule has a long-standing pedigree – indeed, several circuits adopted it prior to AEDPA's enactment[21] – and no problems with administrability have been reported by the courts that apply it. Courts are attentive to the fact that petitioners may not cloak a second or successive habeas petition in the

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[20] See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, March 31, 2004, Table C-3; March 31, 2003, Table C-3; March 31, 2002, Table C-3; March 31, 2001, Table C-3; January 31, 2000, Table C-3; January 31, 1999, Table C-3; March 31, 1998, Table C-3.

[21] See, *e.g.*, *Hunt* v. *Nuth*, 57 F.3d 1327, 1339 (CA4 1995); *Guinan* v. *Delo*, 5 F.3d 313, 316 (CA8 1993); *Clark* v. *Lewis*, 1 F.3d 814, 825 (CA9 1993); *Williams* v. *Whitley*, 994 F.2d 226, 230 n.2 (CA5 1993) (all embracing a functional approach to second or successive habeas petitions pre-AEDPA).

language of Rule 60(b) and are well prepared to quickly reject such motions. When courts conclude that the Rule 60(b) motion is in fact a collateral attack on the underlying conviction, they generally dispose of the cases in summary fashion. For example, the Fourth Circuit has made available numerous per curiam opinions dismissing appeals from district court denials of Rule 60(b) motions as successive. The text of these opinions varies scarcely at all, and the length of a typical decision is less than ten sentences. See, *e.g.*, *Logan* v. *United States*, 2005 WL 273118 (CA4 Feb. 4, 2005) (per curiam).

In sum, the functional approach has proved eminently workable, while at the same time allowing relief from fatally flawed dismissals of habeas petitions in a narrow class of cases. Thus, there is no reason in the text of AEDPA or Rule 60(b) to adopt the Eleventh Circuit's draconian rule.

## CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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