No. 08-514

IN THE

Supreme Court of the United States

JOE CLARK MITCHELL,

Petitioner,

v.

JOHN REES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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There is no dispute that the question presented merits this Court's review. The petition demonstrated (i) that the courts of appeals are divided over whether a claim of legal error is cognizable under Rule 60(b)(6) in a case presenting extraordinary circumstances (Pet. 12-18), (ii) that the decisions of several circuits which reject the application of Rule 60(b)(6) in those circumstances are irreconcilable with this Court's precedents (Pet. 21-24), and (iii) that the issue is of recurring importance to the administration of justice (Pet. 19-21). Respondent disputes none of those points.

Unable to contest the certworthiness of the question presented in any respect, respondent is reduced to arguing that this case is not an appropriate vehicle in which to decide the question. The State argues that petitioner's case does not, in fact, present extraordinary circumstances. That assertion is demonstrably wrong: if this case does not present facts sufficiently extreme to justify relief under Rule 60(b)(6), no case will. Respondent's remaining assertion that the Sixth Circuit in early cases indicated its willingness to award relief in cases presenting extraordinary circumstances is belied by the uniform line of recent precedent of that court, including the unambiguous decision in this very case. Moreover, the State's argument at most suggests the existence of an intra-circuit conflict within the Sixth Circuit. But that is no basis for denying review because, as noted, there is indisputably a clear conflict among other circuits with respect to the question presented. This case is an ideal vehicle to

resolve that circuit split and to bring the lower courts into conformity with this Court's precedent.

1. The State contends that petitioner's case does not present extraordinary circumstances and that the Sixth Circuit "impliedly" so held. BIO 9-10. But both of these premises are flawed.

a. Petitioner's case presents extraordinary circumstances; indeed, if his case does not present extraordinary circumstances, it is difficult to imagine what case *would* present them. Petitioner has consistently pursued his federal habeas claim at every turn, but has been repeatedly thwarted through no fault of his own by two holdings of the Sixth Circuit that the court of appeals itself recognizes were completely erroneous. First, petitioner timely sought federal habeas corpus, and the district court granted petitioner relief, holding – as the Sixth Circuit avowedly "has never rejected" (Pet. App. 7a) – that petitioner's state trial was tainted by a *Batson* violation, Pet. App. 98a-99a. But the Sixth Circuit reversed in *Mitchell I*, holding that the district court lacked authority to hold an evidentiary hearing. Pet. App. 80a-81a. The Sixth Circuit has since acknowledged that its holding was flatly erroneous, as it failed to recognize the district court's inherent authority to conduct an evidentiary hearing.[1]

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[1] Although the State contends that "petitioner could have reasserted the hearing issue in the Sixth Circuit" on appeal, *see* BIO 11, it does not cite any cases to rebut the district court's express holding to the contrary, *see* Pet. App. 27a.

When the error became apparent, petitioner was powerless to correct it because of yet another error by the Sixth Circuit. That court in *McQueen v. Scroggy*, 99 F.3d 1302 (1996), had deemed all Rule 60(b) motions by habeas petitioners to be prohibited second or successive habeas petitions.

This Court unanimously rejected that position in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). Petitioner then promptly sought relief under Rule 60(b).

As the district court explained, *see* Pet. App. 25a-29a, the circumstances of petitioner's case are precisely the kind of extraordinary circumstances justifying relief pursuant to Rule 60(b)(6): petitioner was denied habeas relief solely because of the Sixth Circuit's acknowledged error in *Mitchell I*, and the Sixth Circuit's erroneous holding in *McQueen* subsequently prevented him from correcting that error until this Court's decision in *Gonzalez*. Agreeing with petitioner that the Sixth Circuit's prior decision denying him an evidentiary hearing was erroneous and that, as a result, its "current final judgment permits a life sentence based upon the verdict of a racially tainted jury and is contrary to Supreme Court and Sixth Circuit precedents," Pet. App. 24a, the district court held that petitioner had established "'extraordinary circumstances' for the purposes of Rule 60(b)(6)," Pet. App. 25a. The district court thus granted the evidentiary hearing and, based on the transcript of the original hearing, granted habeas relief based on the *Batson* violation. Pet. App. 33a. As a result of those errors by the Sixth Circuit, and unless this Court grants certiorari, petitioner will spend the rest of his life in prison

notwithstanding the undisputed *Batson* violation at his state trial.

b. The State's suggestion that the Sixth Circuit nonetheless "impliedly" held that petitioner's case did not present extraordinary circumstances is implausible. The district court's extraordinary circumstances finding was acknowledged by the court of appeals (Pet. App. 5a) and hotly litigated below. Nothing in the Sixth Circuit's opinion indicates that the panel resolved that central issue by "impliedly" reversing the critical finding of the district court. The court of appeals instead flatly held that "a motion may not be brought under Rule 60(b)(6) if it is premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." Pet. App. 9a. Thus, the Sixth Circuit concluded, "[a]s it is clear that Mitchell's Rule 60(b) motion alleges a mistake made by this court in *Mitchell I* . . . his motion is properly made pursuant to Rule 60(b)(1)" and "the district court abused its discretion by granting relief under Rule 60(b)(6)." Pet. App. 10a. Although (as the State points out, *see* BIO 9) the panel states that "Rule 60(b)(6) is interpreted narrowly, permitting relief only in 'extraordinary circumstances,'" the relevant point is that the court of appeals held that a claim of legal error does not give rise to such extraordinary circumstances. It defies credulity for respondent to contend that the Sixth Circuit applied Rule 60(b)(6)'s "extraordinary circumstances" test when it unequivocally held Rule 60(b)(6) to be inapplicable in the first place.

Indeed, the final paragraph of the Sixth Circuit's opinion indicates that the court did not seriously dispute the district court's holding that

petitioner's case presents extraordinary circumstances. The panel acknowledged petitioner's argument that he could not have filed his Rule 60(b) motion until this Court's holding in *Gonzalez* – which the district court had agreed was an essential component of the extraordinary circumstances justifying relief under Rule 60(b)(6). But instead of indicating that this obstacle, taken within the context of petitioner's case, did not rise to the level of extraordinary circumstances, the panel merely dismissed the denial of relief as an unfortunate by-product of "a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." Pet. App. 11a (citation omitted).

2. The State relies on a handful of cases that, in its view, establish the rule "impliedly" applied by the Sixth Circuit in petitioner's case – viz., that legal error is cognizable under Rule 60(b)(6) when accompanied by extraordinary circumstances. BIO 6-7 (citing *Pierce v. United Mine Workers of America Welfare & Retirement Fund for 1950 & 1954*, 770 F.2d 449 (1985); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291 (1989); and *Cincinnati Insurance Co. v. Byers*, 151 F.3d 574 (1998)). At most, however, the State succeeds in establishing an intra-circuit conflict on the question presented.

The State fails to persuasively distinguish the cases cited in the petition, much less this case itself. As the petition explains, more recent cases in the Sixth Circuit hold – as the court did in petitioner's

case – that "relief is available under [Rule 60](b)(6) only in the event that none of the grounds set forth in clauses (b)(1) through (b)(5) are applicable."[2] *McCurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 596 (2002); *see also McDowell v. Dynamics Corp. of America*, 931 F.2d 380, 384 (1991) ("[B]ecause the appellee could have brought its motion for relief from judgment under Rule 60(b)(1), appellee's motion is precluded from being brought under Rule 60(b)(6)."); Pet. App. 9a ("[A] motion may not be brought under Rule 60(b)(6) if it is premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)."). And most directly on point is *Harbison v. Bell*, 503 F.3d 566, 569 (2007), *cert. denied*, 128 S. Ct. 1479 (2008), in which the Sixth Circuit explained that "[a] movant's claims can be brought under Rule 60(b)(6) only if they cannot be brought under another clause of Rule 60(b)."[3] Such a statement cannot be reconciled with the State's assertion that, in the Sixth Circuit, legal error is cognizable under Rule 60(b)(6) when combined with

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[2] The State attempts to diminish the significance of *McCurry* and *McDowell* by noting that "neither . . . involved allegations of legal error." BIO 7. But the specific grounds for bringing a particular Rule 60(b) motion are irrelevant; the salient point is that, as both cases make clear, relief is not available under Rule 60(b)(6) when the motion could have been brought under Rule 60(b)(1) through (5).

[3] In light of this clear statement of Sixth Circuit law, the Sixth Circuit's subsequent discussion of whether Harbison had made the necessary showing to obtain a certificate of appealability if his motion were "construed as filed under Rule 60(b)(6)" is merely dicta.

extraordinary circumstances; because a claim based on legal error could of course be brought under Rule 60(b)(1), claims based on legal error and extraordinary circumstances would be precluded under the Sixth Circuit's rule. The panel thus explained that "*Harbison*'s argument is more properly brought under Rule 60(b)(1), which provides for relief on the basis of mistake, inadvertence, or excusable neglect."

By contrast, two of the three cases on which the State relies – *Pierce* and *Hopper* – are twenty-four and twenty years old, respectively, and the Sixth Circuit's suggestion that claims of strictly legal error might be cognizable under Rule 60(b)(6) when accompanied by exceptional circumstances is all but absent from Sixth Circuit caselaw after the decision in *Hopper*.[4] This absence likely follows from this Court's opinion in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988), decided just a few months before *Hopper*, in which this Court in a footnote "suggest[ed] that clause [60(b)](6) and clauses [60(b)](1) through (5) are mutually exclusive" – which, as the Petition explained (at 23), meant merely that "extraordinary

[4] The Sixth Circuit's decision in *Byers* is itself an outlier, as it further indicated that "a Rule 60(b)(6) motion that claims legal error as justification for the relief sought must be brought within the time permitted to appeal from the judgment in question," 151 F.3d at 578. Such a rule would effectively deprive Rule 60(b)(6) of any role at all in cases involving legal error, as virtually any motion based on legal error that would satisfy the timeliness requirement could also be brought under Rule 60(b)(1).

circumstances are required to bring the motion within the 'other reason' language and to prevent clause (6) from being used to circumvent the 1-year limitations period that applies to clause (1)."[5]

Even if there were in fact an intra-circuit conflict on the question presented, such a conflict would not undermine the suitability of the question presented for this Court's review: the State does not dispute that there is a conflict, that the question presented is an important one, or that the circuits which hold that legal error may be cognizable under Rule 60(b)(6) when accompanied by extraordinary circumstances are erroneous.

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[5] In emphasizing that "Rule 60(b)(6) is interpreted narrowly, permitting relief only in 'extraordinary circumstances,'" BIO 9a, the Sixth Circuit cited *Liljeberg* and *Abdur'Rahman v. Bell*, 493 F.3d 738, 741 (6th Cir.), *vacated by* 2007 U.S. App. LEXIS 25116(6th Cir. Oct. 19, 2007). In the now-vacated *Abdur'Rahman* decision, the Sixth Circuit relied on *Liljeberg* to deny Rule 60(b)(6) relief, construing this Court's decision in that case as indicating "that relief under Rule 60(b)(6) is precluded if the reason offered for relief can be considered under the specific clauses of Rule 60(b)." 493 F.3d at 741. After the en banc Sixth Circuit vacated the panel's decision in *Abdur'Rahman*, the cite to *Abdur'Rahman* was removed from the opinion in petitioner's case, *see* Pet. App. 100a.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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