**CAPITAL CASE – EXECUTION DATE: 4/10/02 1:00 a.m.**

**No. 01-9094**

IN THE

# Supreme Court of the United States

Abu-Ali Abdur'Rahman,
*Petitioner*,

v.

Ricky Bell, Warden,
*Respondent.*

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

## REPLY BRIEF FOR PETITIONER


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

## REPLY BRIEF FOR THE PETITIONER

This is a capital case in which the State all but admits a square circuit split on an important and recurring question of federal law, and in which the State's contention that the decision below can be reconciled with this Court's precedents rests on a two-Justice *dissent*. Specifically, there is no question either (i) that (as Respondent *admitted* below) this case would be decided differently under the firm holding of *Rodriguez* v. *Mitchell*, 252 F.3d 191, 194 (CA2 2001), that "a motion under Rule 60(b) to vacate a judgment denying habeas is not the equivalent of a second or successive habeas petition subject to the standards of § 2244(b)," or (ii) that the proper treatment of Rule 60(b) motions can arise in almost *any* habeas proceeding and thus merits review in this Court. In addition, Respondent's reliance on the dissenting views of Justices Scalia and Thomas in *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 645 (1998), boldly ignores the seven-Justice majority's contrary holding that a habeas petitioner's request to "receive an adjudication of his claim" presented in a prior application but never decided "on the merits" does *not* constitute a "second or successive" application. Certiorari accordingly should be granted.

## JURISDICTION

There is no merit to Respondent's contention that that this Court is powerless to consider the circuit split over whether and when a Rule 60(b) motion constitutes a "second or successive" habeas application. The AEDPA provision Respondent invokes (Cert. Opp. 4) applies only when a petitioner seeks to make a "prima facie showing" that he is entitled to "an order authorizing the district court to consider" a second or successive application. 28 U.S.C. 2244(b)(3)(A), (C). In that circumstance, the court of appeals' "gatekeeping" determination is unreviewable on certiorari, for the statute provides that "[t]he grant or denial of an authorization

by a court of appeals to file a second or successive application * * * shall not be the subject of a petition * * * for a writ of certiorari." *Id.* § 2244(b)(3)(E).

Respondent simply refuses to recognize that Petitioner is not seeking, in the terms of the statute, "authorization by a court of appeals to file a second or successive application." He has never requested any such relief.[1] Rather, he is challenging the district court's predicate determination, subsequently adopted by the Sixth Circuit when the case was transferred, that his Rule 60(b) Motion *is* a "second or successive" application. See Pet. App. A2 ("The district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas petition, *see McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir 1996), so it transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gate[keeping] criteria of 28 U.S.C. § 2244(b).."). The characterization of a habeas application as "second or successive" is thus made in the first instance by a district court rather than the court of appeals, which has no gatekeeping role to play.

Nor, of course, is there any merit to Respondent's contention (Cert. Opp. 5) that "the restrictions set forth in 28 U.S.C. § 2244(b)" will be "eviscerate[d]" if this Court is not stripped of the power to grant certiorari to decide whether an application is "second or successive." If this Court determines on certiorari than an application is properly characterized as "second or successive," the Petitioner may not proceed to challenge the court of appeals' determination that the application may not be filed because it fails to make out a prima facie showing under the gatekeeping criteria.

It is instead Respondent's reading that would deprive Section 2244(b)(3) of any rhyme or reason. Assume that a court of appeals finds that a habeas petitioner has made out the necessary

prima facie showing of an entitlement to file a "second or successive" application, but that the district court nonetheless dismisses the application for failure to satisfy the gatekeeping criteria (see 28 U.S.C. 2244(b)(4)). If the court of appeals affirms, the entire case could be brought here on certiorari because the jurisdictional bar applies only to the court of appeals' "prima facie" gatekeeping determination, not any subsequent ruling. See 28 U.S.C. 2244(b)(3)(A), (C). Respondent would have to agree that, in that circumstance, the habeas petitioner could seek certiorari to review whether the application was, in fact, "second or successive." Respondent nonetheless contends that this Court is forbidden from reviewing the *identical* issue when (as in this case) the case never gets past the "prima facie" stage because the petitioner contends he does not present a "second or successive" application and admits he cannot satisfy the gatekeeping criteria. That makes no sense, and there is no reason to believe Congress would have intended such a bizarre result.

In any event, Respondent concedes (Cert. Opp. 14 n.9) that his jurisdictional objection is irrelevant because this Court may grant Petitioner relief pursuant to his request for an Original Writ of Habeas Corpus, No. 01-9095, *In re Abdur'Rahman*.[2]

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[1] Thus, Respondent's assertion (Cert. Opp. 4) that the Sixth Circuit "denied all of petitioner's pending motions, including his application for leave to file a second habeas corpus petition" is totally misleading, as no such application was ever filed.

[2] Two further points raised briefly by Respondent have nothing to do with the questions presented and are easily disposed of. *First*, Respondent's argument (Cert. Opp. 13) that Petitioner would not be entitled to relief under TN Rule 39 is both wrong and also irrelevant for present purposes because that issue would be addressed in the first instance by the lower courts on remand. See Original Pet. Reply 3-8. *Second*, Respondent's suggestion (Cert. Opp. 14) that Petitioner's habeas claims are not "substantial" because he did not appeal their dismissal mixes apples and oranges. The relevant point is that Respondent does *not* dispute that the TN Rule 39 Claims raise very serious allegations of prosecutorial misconduct supported by a strong factual record. See Cert. Pet. 28-29; Pet. App. I1-I34. It is furthermore not disputed that Petitioner did not appeal because he *prevailed* in the district court and because the district court's procedural default holding was then unassailable under Sixth Circuit precedent subsequently adopted by this Court during the appellate briefing (see *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999)). Most important for purposes of both of Respondent's arguments, he cannot and does not contend that anything about the procedural history of this case precludes him from invoking TN Rule 39 in a Rule 60(b) Motion if the decision below is reversed.

## ARGUMENT

### I. Even Accepting Respondent's Mischaracterization Of The Sixth Circuit's Holding, This Case Directly Presents An Important And Intractable Circuit Conflict.

1. According to Respondent (Cert. Opp. 7-8), the Sixth Circuit did not "state that *every* Rule 60(b) motion constitutes a second or successive habeas petition, as petitioner alleges" (emphasis in original), but rather held "that a post-judgment motion seeking to relitigate claims that were dismissed as procedurally defaulted, and thus barred from federal habeas corpus review, constitutes a successive habeas petition." That is simply wrong, and Respondent is baldly contradicting his unambiguous position in the lower courts. Neither Respondent, nor the district court, nor the court of appeals articulated any such rule. Instead, as the Cert. Petition explained (at 8) and Respondent does not dispute, Respondent argued below for a categorical rule that all Rule 60(b) motions are "successive" applications, which the district court adopted, and which the Sixth Circuit in turn expressly embraced.[3] It was *Petitioner* who attempted to argue – in the district court, before the panel, and in a petition for *en banc* review – that Sixth Circuit precedent could be interpreted not to apply a categorical rule, but he was rebuffed at Respondent's urging, at every stage.

Respondent seeks to support his newfound reading of Sixth Circuit precedent with two points, both meritless. *First*, he notes (Cert. Opp. 6-7) that the Sixth Circuit has cited with approval decisions of other circuits that do not apply a categorical rule. But, as Respondent argued below, the actual *decision* of the Sixth Circuit (*McQueen* v. *Scroggy*, 99 F.3d 1302, 1335

[3] See Resp. Dist. Ct. Br. 3 ("Petitioner cites to *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001), as authority for this Court to entertain a Rule 60(b) motion in a federal habeas proceeding brought by a state prisoner. However, the Sixth Circuit has stated that '[w]e agree with those Circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition.'"); Pet. App. C3 (district court: "In the Sixth Circuit, when a petitioner raises new matters in a Rule 60(b) Motion challenging the previous denial of a § 2254 habeas corpus petition, the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition."); *id.* A2 (court of appeals: "The district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas petition, *see McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir 1996), so it

(1996)) announces a categorical standard that all Rule 60(b) motions are second or successive applications, and *McQueen* (erroneously) interprets other circuits as employing the same rule: "We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition and therefore is subject to a cause and prejudice analysis." If the Sixth Circuit in fact did *not* apply a categorical rule, it would have ruled for Petitioner in this case, where the Rule 60(b) motion relies only on claims that were presented in the initial habeas application but were not decided on the merits for procedural reasons. See also *infra* at 7-8 (explaining conflict with decisions of Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits).

*Second*, Respondent (Cert. Opp. 7-8) erroneously cites two Sixth Circuit decisions as supposedly eschewing a categorical approach. The first decision – *Workman* v. *Bell*, 227 F.3d 331 (2000) (en banc), *cert. denied*, 531 U.S. 1193 (2001) – involved a request to recall the mandate, *not* a Rule 60(b) motion. The relevant point for present purposes is that two members of the panel in this case wrote in *Workman* that "a post-judgment motion under Fed. R. Civ. P. 60(b) in the district court * * * is a 'second or successive' application for purposes of § 2244(b)." 227 F.3d at 339 (opinion of Siler, J., joined by, *inter alia*, Batchelder, J.). They were willing to recognize an exception only for "the *very limited issue* of a fraud upon the court." *Id.* (emphasis added). See also *Workman* v. *Bell*, 245 F.3d 849, 851 (CA6 2001) (adhering to exception "if there was a fraud upon the court").

The second decision Respondent cites – *Lewis* v. *Alexander*, 987 F.2d 392 (CA6 1993) – was the lead case unsuccessfully cited by *Petitioner* in the Sixth Circuit. See Pet. for Rhg. *En Banc* 10. Respondent baldly contradicts himself by now invoking it as representing binding Sixth Circuit precedent. Petitioner's reliance on *Lewis* was rebuffed below, no doubt, because it

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transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gate[keeping] criteria of 28 U.S.C. § 2244(b).").

predates *McQueen* and furthermore does not address the "second or successive" petition question. Instead, it is one of many cases in which the lower courts have decided Rule 60(b) motions both favorably and unfavorably to habeas petitioners while ignoring simply the "second or successive" issue. As the Cert. Petition explained (at 19), this further inconsistency in the law is an important reason to *grant* certiorari, not to deny review.

2. The further failing of the Certiorari Opposition is that, no matter what the precise scope of the Sixth Circuit's rule, there is a square circuit conflict. Other circuits, including particularly the Second Circuit, manifestly do *not* deem a Rule 60(b) motion that seeks an adjudication of claims previously held procedurally defaulted to be a "second or successive" habeas application.

a. The Second Circuit categorically holds that Rule 60(b) motions are not "second or successive" habeas applications. See *Rodriguez* v. *Mitchell*, 252 F.3d 191 (2001). *Both* Respondent and the district court acknowledged the split below. See Cert. Pet. 8-9. Now faced with review in this Court, Respondent (Cert. Opp. 12) half-heartedly claims for the first time that the Second Circuit's articulation of its rule is "dicta." That is preposterous. As the Cert. Petition made clear, Petitioner is not relying on a passing excerpt from *Rodriguez* that could be distinguished in a later case. Rather, the *Rodriguez* opinion (in which the court of appeals appointed Professor Yackle as counsel) is essentially *devoted* to rejecting the view of other circuits that Rule 60(b) motions "must" or "may" be deemed second or successive applications. For example, the Second Circuit discussed at length its view that Rule 60(b) motions not only have "different objectives" than habeas applications (252 F.3d at 198), but also will often (as in Petitioner's case) rest on grounds that "have nothing to do with the alleged violations of federal rights during the state criminal trial that are asserted as a basis for habeas" (*id.* at 199).

Two other points make clear that the Second Circuit's decision is well considered and firmly entrenched, such that only a ruling by this Court can bring needed uniformity to the law. *First*, as Respondent himself emphasizes (Cert. Opp. 12-13), "the Second Circuit itself recognized in *Rodriguez* that it was deviating from 'the majority of the circuit courts that have considered the issue.'" Particularly important for present purposes, the Second Circuit expressly rejected the Sixth Circuit's *McQueen* precedent by name. See 252 F.3d at 200 n.2. *Second*, the Cert. Petition (at 16 nn.8-9) collected *ten* different district court decisions within the Second Circuit (*none* limited to a claim of "fraud") granting relief to habeas petitioners under Rule 60(b) subsequent to the enactment of AEDPA. There cannot be any reasonable dispute that the Second Circuit's approach is settled. [4]

b. This case also presents a square conflict with the holdings of the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits. See Cert. Pet. 17-18. As explained *supra* at 4-5, Respondent's reliance (Cert. Opp. 7-8) on the fact that that the Sixth Circuit in *McQueen* cited the decisions of those courts with approval is misguided because *McQueen* mistakenly cites them as adopting its categorical rule. The conflict ultimately must be measured not merely by citations but by whether other circuits would deem the Rule 60(b) motion in this case to be a "second or successive" application. They unquestionably would not. The Petition (at 17-18) detailed, and Respondent notably *ignores*, that those courts look to whether the motion seeks to evade the bar to successive applications by (i) raising new claims or evidence, or (ii) relitigating claims that have already been decided on their merits. Neither is true of Petitioner's Rule 60(b) Motion.

[4] The open conflict between the Second Circuit's decision in *Rodriguez* and the Sixth Circuit's published decision in *McQueen* answers Respondent's passing reliance (Cert. Opp. 6) on the fact that the decision below is "unpublished." The fact that the Second Circuit "stands alone" in adopting a categorical rule that Rule 60(b) motions are not "second or successive" applications (*id.* 12) is a reason to *grant* certiorari, not to deny review. If the Second Circuit's rule is erroneous, as Respondent submits, then review should be granted to avoid granting a windfall to prisoners in that circuit.

See, *e.g.*, *United States* v. *Rich*, 141 F.3d 550, 553 (CA5 1998) (inquiry is whether motion is "the functional equivalent of a motion under § 2255); *Mathenia* v. *Delo*, 99 F.3d 1476, 1480 (CA8 1996) (motion is successive if it "raised 'grounds identical to grounds heard and decided on the merits in [the petitioner's] previous petition'" (quoting *Sawyer* v. *Whitley*, 505 U.S. 333, 338 (1992))), *cert. denied*, 521 U.S. 1123 (1997).

3. Certiorari is also warranted in light of the great importance of the question presented, which (as the Cert. Petition explained (at 12)) can arise in essentially any Section 2254 or 2255 proceeding. Respondent only emphasizes the point (Cert. Opp. 11): "a great many claims presented in an original habeas petition are disposed of on the basis of procedural default."

**II. The Decision Below Conflicts With This Court's Precedents.**

Certiorari is also merited because, as the Cert. Petition demonstrated (at 22-24), the decision below is irreconcilable with three of this Court's precedents, which hold that a habeas application is "second or successive" only if it seeks to present new claims or seeks to relitigate claims that have already been decided on the merits. See *Slack* v. *McDaniel*, 529 U.S. 473 (2000); *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998); *Calderon* v. *Thompson*, 523 U.S. 538 (1998). Under those decisions, Petitioner's Rule 60(b) motion is permitted because it only seeks a ruling on claims that were presented in his initial habeas petition but were never decided for procedural reasons.

1. Respondent's principal argument (Cert. Opp. 11) is that, under the "second or successive" application provisions of Section 2244(b)(1), "[t]here is no requirement that such claims have been previously determined or even, for that matter, previously adjudicated." But, in what can only regarded as a back-handed effort at candor, Respondent provides a single citation for his reading of the statute: the *dissent* in *Stewart* v. *Martinez-Villareal*. More relevant, Petitioner submits, is the seven-Justice majority, which explicitly *rejected* the state's

arguments that a habeas petitioner "is entitled to only one merits judgment on his federal habeas claim" and that when a petitioner has "already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive.'" 523 U.S. at 643 (quoting Pet'r Br. 12). The majority instead found dispositive that the claims in question were (as in Petitioner's case) set forth in his initial application. Thus, "there was only one application for habeas relief." *Id.* at 643-44.

Respondent thus ultimately concedes (Cert. Opp. 9-10) that in both *Martinez-Villareal* and *Slack*, "this Court held that where claims contained in a first habeas corpus petition *are not adjudicated*, either because they are not ripe for such adjudication, as in *Martinez-Villareal*, or have not yet been exhausted in state court, as in *Slack*, the reopening or reassertion of such claims at a later time *does not constitute a successive habeas application*" (emphasis added). But Respondent (*id.* at 10) purports to find a "crucial difference" in the fact that Petitioner is "*no longer able to exhaust*" the TN Rule 39 Claims: "As a result, petitioner *did receive* an adjudication of these claims – an adjudication that they were procedurally defaulted" (emphasis in original).

Respondent's purported distinction between the exhaustion and procedural default doctrines is totally illusory. The TN Rule 39 Claims were "adjudicated" in this case only in the same sense that the habeas petitioners' claims in *Martinez-Villareal* and *Slack* were "adjudicated": the district court entered a judgment that disposed of those claims but, for procedural reasons, refused to consider their substance. The relevant point is that the TN Rule 39 Claims were not adjudicated "*on the merits*," and Respondent cannot and does not contend otherwise. As the Petition explained (at 5), and Respondent ignores, the district court in this case

held that "because Petitioner has no remedy currently available in state court, these claims are procedurally defaulted" and refused to consider them.[5]

2. Nor is there any merit to Respondent's contentions (Cert. Opp. 9) that *Calderon* v. *Thompson* stands for the proposition that an application which raises new "matters" is "second or successive," and that Petitioner's Rule 60(b) Motion raises new "matters" because it invokes TN Rule 39, which was "not mentioned in the original habeas petition." *Calderon* holds that "new evidence and claims" (523 U.S. at 548), not "*matters*," would give rise to a "second or successive application." Thus, in *Martinez-Villareal* and *Slack*, this Court found dispositive the fact that the "claims" for relief were set forth in the petitioners' initial habeas applications, notwithstanding that the events establishing ripeness and exhaustion in those cases were subsequent "matters" that, by definition, were not set forth in the initial applications. Indeed, Respondent has it precisely backwards: *Calderon* clearly holds that the motion to recall the mandate in that case was *not* successive despite the Ninth Circuit's "consideration of matters presented in a later filing." *Id.* at 554.

**III. Certiorari Is Warranted As To Question 2.**

Respondent completely fails to appreciate the important reasons for granting certiorari on the second question presented by the Cert. Petition. If this Court agrees with Respondent on Question One that a Rule 60(b) motion is a prohibited "second or successive" application, its decision very likely will turn on the unique "finality" interest that attaches to a judgment in the habeas corpus context. That decision, however, would leave unresolved the proper treatment of

[5] Respondent's failure to acknowledge that the TN Rule 39 Claims were never addressed on the merits pervades the Cert. Opposition. Thus, Respondent contends (Cert. Opp. 11) that "to subject claims that are barred from a federal court's review due to a petitioner's procedural default, to future *relitigation of the merits* of that default judgment would frustrate the very purpose of the AEDPA's enactments" (emphasis added). And Respondent contends (*id.*) that *Calderon* v. *Thompson* bars the Rule 60(b) Motion because it holds that an application is "second or successive" if the petitioner makes an "effort to reassert claims have been previously and finally decided by a federal court and to *relitigate the merits* of that decision" (emphasis added).

cases like this one in which the Petitioner seeks relief *before* finality attaches because the case is pending on appeal. The second question seeks to provide needed guidance on that issue, as well as a complete and fair disposition of this case.[6]

Respondent's sole argument against review (Cert. Opp. 15) is that "petitioner's procedural default of [the TN Rule 39 Claims] was never before the Sixth Circuit because petitioner declined to appeal that ruling of the district court." That argument ignores the context of habeas litigation generally, and this case particularly.[7] In ordinary civil litigation, it often would be entirely unnecessary for a court of appeals to remand in light of an intervening development, because relief under Rule 60(b) is available to reopen the judgment. Here, by contrast, Petitioner is subject to execution because the Sixth Circuit held that there was *no* procedural vehicle available in the district court for Petitioner to secure an adjudication of his claims. Because a remand was the *only* means to have those claims addressed on the merits, the failure to grant that relief manifestly was an "abuse of discretion."

**IV. The Case Should Be Held Pending The Disposition Of *Bell* v. *Cone.***

Contemporaneously, Petitioner is filing a Supplement in light of the oral argument in No. 01-400, *Bell* v. *Cone* (Mar. 25, 2002) to add an additional question presented. As explained in the Supplement, if a remand is warranted in light of *Bell*, an appropriate order should be entered. Otherwise, plenary review should be granted as to the first two questions presented by this Petition.

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[6] In this case, no adverse judgment was entered against Petitioner *at all* until February 11, 2002, when the Sixth Circuit issued its mandate.

[7] Respondent cannot and does not contend that Petitioner, who *prevailed* in the district court, waived the TN Rule 39 Claims by not filing what would have been a frivolous appeal in light of then-binding precedent. See *supra* at 3 n.2. Any such assertion by Respondent of "waiver," moreover, would have been incredible, because the Sixth Circuit in this case reinstated Petitioner's death sentence *sua sponte* and without briefing or argument on an argument that Respondent did not appeal, and Respondent has therefore vigorously argued throughout the case that no waiver may be found when the interests of justice would be furthered by considering an issue. See Cert. Pet. 6.

## CONCLUSION

This Court should grant a stay of execution and hold this Petition pending the disposition of No. 01-400, *Bell* v. *Cone*. If no remand is appropriate in light of *Bell*, the petition for a writ of certiorari should be granted.

Respectfully submitted,


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