**No. 04-6432**

IN THE

# Supreme Court of the United States

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AURELIO O. GONZALEZ,
*Petitioner*,

v.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,
*Respondent*.

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

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## BRIEF OF PETITIONER

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## QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that every Rule 60(b) motion (other than for fraud under (b)(3)) constitutes a prohibited "second or successive" petition as a matter of law, in square conflict with decisions of this Court and of other circuits.

## INTERESTED PARTIES

There are no parties to this proceeding other than those named in the caption of the case. For the *en banc* proceedings in the Court of Appeals, however, that court consolidated two otherwise unrelated cases with Mr. Gonzalez's appeal, *Stephen A. Mobley vs. Derrick Schofield*, and *Emil Lazo vs. United States of America. See Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253 (11th Cir. 2004) (*en banc*), JA-24. This Court denied Mr. Mobley's separate petition for writ of certiorari. *Mobley v. Schofield*, 125 S. Ct. 965 (2005). Mr. Lazo did not seek certiorari review.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CITED AUTHORITIES

CASES: Page

TABLE OF CITED AUTHORITIES—Continued

TABLE OF CITED AUTHORITIES

TABLE OF CITED AUTHORITIES

TABLE OF CITED AUTHORITIES

TABLE OF CITED AUTHORITIES

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## BRIEF OF PETITIONER

## OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit are published, *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253 (11th Cir. 2004) (en banc), JA-22; *Gonzalez v. Sec'y for Dep't of Corr.*, 326 F.3d 1175 (11th Cir. 2003) (order granting rehearing *en banc*); *Gonzalez v. Sec'y for Dep't of Corr.*, 317 F.3d 1308 (11th Cir. 2003) (vacated panel order). The district court's Order Denying Motion to Amend and Closing Case is unpublished, but is set forth in the Joint Appendix, JA-21.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 26, 2004. Mr. Gonzalez filed his petition for writ of certiorari on

July 24, 2004, and this Court granted the petition on January 14, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

This case involves U.S. Const. art. I sec. 9 (Suspension Clause); U.S. Const. amend. V (Due Process Clause); Federal Rule of Civil Procedure 60(b); Rule 11, Rules Governing Section 2254 Cases; the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996); and 28 U.S.C. § 2244. All are set forth in the Joint Appendix, JA-126-133.

## STATEMENT OF THE CASE

Aurelio Gonzalez is a Florida state prisoner serving a 99-year prison sentence for robbery with a firearm. He pleaded guilty to that offense and was sentenced in 1982. *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1261 (11th Cir. 2004) (*en banc*), JA-32[1]; R1:1. He did not file a direct appeal, but in November, 1996, he filed in state court a collateral motion attacking his conviction on grounds of newly discovered evidence which he claimed showed that his guilty plea was unintelligent, unknowing and involuntary. He claimed his guilty plea was induced by false information, a promise he would only serve 13 years of a 99-year sentence. R1:1. The state trial court denied relief in December, 1996. He appealed, but the state appellate court affirmed, *Gonzalez v. State*, 692 So.2d 900 (Fla. 3d DCA 1997) (table); *Gonzalez*, 366 F.3d at 1261, JA-32, denying rehearing on May 8, 1997. R1:5 Ex. L.

[1] The *Gonzalez* decision misstates the year of conviction and sentence as 1992. 366 F.3d at 1261, JA-32.

On June 17, 1997, Mr. Gonzalez filed a *pro se* federal petition for writ of habeas corpus, R1:1, raising the same grounds he asserted in the state court. 366 F.3d at 1261, JA-32. With the federal court's permission, R1:8, and absent objection by the state, he amended his petition on November 12, 1997. R1:9. As amended, the petition sets forth two claims: (1) Mr. Gonzalez's state guilty plea was involuntary because it was induced by untrue information about the relatively short time he would likely serve (13 years) on a 99-year sentence; and (2) Mr. Gonzalez was sentenced based upon an inaccurate criminal history, which included convictions of other persons mistakenly thought to be him. *Id*. Without addressing the merits of these claims, the district court dismissed the petition on September 9, 1998, as untimely and time barred under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d)(1). 366 F.3d at 1261, JA-32.

Mr. Gonzalez filed a timely *pro se* notice of appeal, JA-[] (Docket Entry 20, dated Sept. 23, 1998), R1:20, but he was denied a certificate of appealability and the appeal was dismissed on April 6, 2000. 366 F.3d at 1261, JA-32.[2]

On November 7, 2000, the United States Supreme Court decided *Artuz v. Bennett*, 531 U.S. 4 (2000), which corrected lower court interpretations of how AEDPA's one-year limitations period is tolled. On April 6, 2001, the Eleventh Circuit Court of Appeals decided *Delancy v. Fla. Dep't of Corr*., 246 F.3d 1328, 1330 n.2 (11th Cir. 2001), ac-

[2] The district court initially granted a certificate of appealability, R1:23, without setting forth an issue, but the deficient COA was remanded to the district court. R1:25. The district court then denied a COA on December 14, 1999. R1:27. Mr. Gonzalez filed a timely *pro se* notice of appeal on January 12, 2000, R1:28, and on February 11, 2000, the district court granted his motion to proceed on appeal *in forma pauperis*. R1:31. The Court of Appeals then declined to issue a COA and the appeal was dismissed on April 6, 2000. R1:32.

knowledging that *Artuz* changed the Eleventh Circuit law relating to the tolling of AEDPA's limitations period.

On July 30, 2001, Mr. Gonzalez filed a *pro se* Rule 60(b) Motion to Amend or Alter Judgment, seeking relief on the grounds of an intervening change in law, which established that his original habeas corpus petition was erroneously dismissed as time barred. The two intervening decisions cited in the motion are *Artuz v. Bennett*, 531 U.S. 4 (2000) and *Delancy v. Fla. Dep't of Corr.*, 246 F.3d 1328 (11th Cir. 2001). JA-13; R1:33. Without response from the state, the district court entered an Order Denying Motion to Amend and Closing Case, because, "Petitioner has already taken an appeal to the Eleventh Circuit. Accordingly, this Court no longer has jurisdiction over his claims." JA-21, R1:34.

Mr. Gonzalez perfected a timely *pro se* appeal. R1:36. A certificate of appealability was eventually granted.[3]

At the time the *en banc* Court of Appeals ordered the appeal reheard, it also appointed counsel to represent Mr. Gonzalez and consolidated his case with two otherwise unrelated habeas cases—the case of Stephen A. Mobley, who filed a Rule 60(b)(3) motion following a § 2254 proceeding,

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[3] The COA took a very circuitous route. The district court denied a COA, R1:38, but a judge of the Court of Appeals granted one as to the following issue: "Whether the district court erred in dismissing appellant's habeas petition, 28 U.S.C. § 2254, as barred by the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996?" JA-9 (dated Aug. 15, 2002). The COA was vacated by a panel order dated January 10, 2003, and the appeal was then dismissed. *Gonzalez v. Sec'y for Dep't of Corr.*, 317 F.3d 1308 (11th Cir. 2004) (vacated panel order). The panel decision was vacated by the full court, however, in a ruling that also vacated the original circuit judge's COA. *Gonzalez v. Sec'y for Dep't of Corr.*, 326 F.3d 1175 (11th Cir. 2003) (*en banc* order). Finally, in its en banc decision the Court of Appeals granted a certificate of appealability. Gonzalez v. Sec'y for Dep't of Corr., 366 F.3d at 1261 (*en banc*), JA-45-46.

and the case of Emil Lazo, who filed a Rule 60(b)(6) motion following a § 2255 proceeding—for the parties to brief and argue four specific questions common to each of the cases: (1) Is a certificate of appealability required before an appeal may be taken from the denial of a Rule 60(b) motion involving an order or judgment in a § 2254 proceeding? (2) If so, should one issue in this case? (3) What standards or rules should govern Rule 60(b) motions involving an order or judgment in a 28 U.S.C. § 2254 proceeding, i.e., under what circumstances, if any, should such a motion be granted? (4) Was it an abuse of discretion for the district court to deny the Rule 60(b) motion in this case? *Id*. at 1256.[4]

Later, the *en banc* Court of Appeals directed the parties to brief two additional issues that would signal the eventual decision below: (1) Should the general principles of habeas cases and AEDPA "inform" the decision whether Rule 60(b) relief is available post-AEDPA?; and (2) Except in cases of fraud on the federal habeas court, is Rule 60(b) relief available only "to avoid miscarriage of justice as defined by our habeas corpus jurisprudence?" JA-11 (dated June 27, 2003).

On April 26, 2004, the *en banc* Court of Appeals issued its decision. It first determined that a certificate of appealability was required before proceeding on the petitioners' appeals, 366 F.3d at 1263, JA-38, and then granted a certificate of appealability in Gonzalez's appeal on the question, "What standards are applicable to Rule 60(b) in § 2254 cases, and in light of those standards was it an abuse of discretion for the district court to deny the motion?" 366 F.3d at 1268, JA-45-46. The *en banc* Court of Appeals ultimately determined that Gonzalez's Rule 60(b) motion was properly denied because the district court lacked jurisdiction to hear a true Rule

[4] As to Emil Lazo, the questions were couched in terms of § 2255 proceedings.

60(b)(6) motion based on intervening change in law. *Id*. at 1281-82, JA-69-70.

Mr. Gonzalez filed a timely Petition for Writ of Certiorari on July 22, 2004, which the Court granted on January 14, 2005, on the following issue: "Whether the Court of Appeals erred in holding that every rule 60(b) motion (other than for fraud under (b)(3)) constitutes a prohibited "second or successive" petition as a matter of law, in square conflict with decisions of this Court and of other circuits." *Gonzalez v. Crosby*, 125 S. Ct. 961 (2005).

## SUMMARY OF ARGUMENT

Rule 60(b) manifests the ideal that injustice should not persist due to a mistaken final judgment. Historically, that Rule has been applied to habeas corpus proceedings, but its application was foreclosed by the Eleventh Circuit Court of Appeals based on a perceived inconsistency between the Rule and provisions of the Antiterrorism and Effective Death Penalty Act of 1996. The categorical decision of the Eleventh Circuit Court of Appeals is contrary to this Court's analytical framework and precedents interpreting AEDPA. It is also in direct conflict with the functional approach to deciding Rule 60(b) claims that has been adopted in the vast majority of circuits.

Decisions of the Court have followed three guiding principles in interpreting AEDPA's procedural requirements. First, Congress will not be deemed to have repealed prior habeas jurisprudence absent a specific statement on the subject. Second, provisions of AEDPA should be interpreted to avoid raising grave constitutional questions. Third, courts should not unilaterally recharacterize a *pro se* motion to be one that is jurisdictionally barred.

The Eleventh Circuit's decision, an outlier by any standard, fails to honor these principles and, as a result, raises grave questions about the suspension of the Great Writ and due process of law in this case and others. Its categorical approach

is rejected by nearly all of the other circuits, which adhere instead to a functional approach to Rule 60(b) motions, examining the substance of each motion to determine if it truly fits the grounds of Rule 60(b), or is instead a disguised successive petition. Although the cases show some 60(b) motions were functionally successive petitions, the cases also reveal 60(b) motions that do fit within the parameters of Rule 60(b) relief. The other circuits and lower courts have sorted these motions with relative ease, dismissing those that are improper and addressing the merits of those that are true.

Remarkably, a side-by-side analysis of Rule 60(b) and key provisions of AEDPA reveals that they complement each other and coexist well. All sections address a common concern, exceptions to the *res judicata* rule in habeas corpus cases, exceptions that Congress has specifically legislated. Indeed, without Rule 60(b), at least one provision of AEDPA would be of questionable constitutionality, so the Rule actually serves to ensure the constitutional validity of the overall statutory scheme. The present case highlights this.

Under the categorical formulation of the Eleventh Circuit, habeas petitioners have no recourse to have their habeas claims reopened, even if those claims were improperly dismissed based upon a mistaken application of a procedural bar. Mr. Gonzalez's case provides a microcosm of erroneous court rulings that together become extraordinary circumstances appropriate for Rule 60(b) relief. He filed a timely federal petition for writ of certiorari, raising grounds of facial merit, challenging his 99-year sentence for robbery. The petition was erroneously dismissed as time barred under the AEDPA, so none of his claims were addressed, considered, or decided on the merits. He perfected an appeal, but his appeal was dismissed because he was erroneously denied a certificate of appealability. Intervening corrective changes in law then occurred, on which Mr. Gonzalez relied in filing a Rule 60(b) motion to reopen the erroneous final judgment.

But the district court refused to consider the motion in the mistaken belief that a prior appeal deprived it of jurisdiction over the claims.

In this case, Rule 60(b) provides the final opportunity to vindicate Mr. Gonzalez's right to have his habeas claims heard on the merits. Without the Rule, his claims can never be addressed or determined, raising grave concerns of whether the statutory scheme, as interpreted in this case, suspends the Great Writ and violates due process of law. Judicious case-by-case application of the Rule avoids any constitutional entanglements. The Court should reject the Eleventh Circuit's categorical rule, in favor of the other circuits' functional approach to Rule 60(b).

## ARGUMENT

### THE COURT OF APPEALS ERRED IN HOLDING THAT EVERY RULE 60(b) MOTION (OTHER THAN FOR FRAUD UNDER (b)(3)) CONSTITUTES A PROHIBITED "SECOND OR SUCCESSIVE" PETITION AS A MATTER OF LAW, IN SQUARE CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

#### A. Federal Rule of Civil Procedure 60(b) Codifies Legal Grounds and Procedures to Relieve a Party of the Final Judgment in a Civil Action.

Federal Rule of Civil Procedure 60(b) authorizes the district courts to relieve a party to a civil action from the force of a final judgment. The Rule embodies the federal courts' inherent authority under Article III of the Constitution to exercise "power over [their] own judgments," *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) (per curiam), including the power to correct those judgments. As such, codification of the Rule did "not provide a new remedy at all," but rather the Rule is "simply the recitation of pre-

existing judicial power." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 234-35 (1995).

Adopted under the Rules Enabling Act, Rule 60(b) carries the weight of law and the imprimatur of both the Court and Congress.[5] The Rule specifies six grounds for relief, including a residuary catchall provision:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence [the party] could not have . . . discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other 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.

Fed. R. Civ. P. 60(b).

The Rule derives from a "variety of writs and equitable remedies, 'shrouded in ancient lore and mystery.'" 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2851, at 227 (2d ed. 1995) (quoting Advisory Committee Note to 1948 amendment of Rule 60(b), 5 F.R.D. 433, 479 (1946)). In its final form, after various amendments, Rule 60(b) abolished all of those ancient writs and remedies, replacing them with a single unified motion for relief from a final judgment or order. *Id*. § 2867, at 393-95.

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[5] "Congress allowed Rule 60(b) to be created through the Rules Enabling Act process, *see generally*, 28 U.S.C. §§ 2071-2077, by not exercising its legislative authority to veto or modify that rule, *see* § 2074." *Gonzalez v. Sec'y for Dep't of Corr*., 366 F.3d at 1270, JA-49.

"In simple English," the Rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). It "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity.'" *Plaut*, 514 U.S. at 233-24 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co*., 322 U.S. 238, 244 (1944)); *see also Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 863-64 (1988).

Rule 11, Rules Governing Section 2254 Cases, applies the Federal Rules of Civil Procedure to habeas corpus proceedings, to the extent appropriate and not inconsistent with the codified habeas rules themselves. In accord with Habeas Rule 11, Federal Rule of Civil Procedure Rule 60(b) has been applied to habeas corpus proceedings.[6] *See Browder v. Director*, 434 U.S. 257, 263 n.8, 272-74 (1978) (majority and concurring opinions assume that Rule 60(b) applies in habeas corpus cases). Virtually every circuit has considered application of the Rule to a wide variety of habeas corpus settings, both before and after the adoption of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214.[7] Such application makes good prac-

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[6] Habeas jurisdiction is essentially an equity forum. *See, e.g., Schlup v. Delo*, 513 U.S. 298, 319 (1995); *Gomez v. United States District Court*, 503 U.S. 653, 653-54 (1992).

[7] *See, e.g., Rodwell v. Pepe*, 324 F.3d 66, 70-71 (1st Cir.), *cert. denied* 540 U.S. 873 (2003); *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001); *Pridgen v. Shannon*, 380 F.3d 721, 725 (3d Cir. 2004), *pet. for cert. filed* (U.S. Oct. 29, 2004) (No. 04-7060); *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987) (pre-AEDPA); *Reid v. Angelone*, 369 F.3d 363, 375 (4th Cir. 2004); *United States v. Weinstock*, 340 F.3d 200, 206-07 (4th Cir.), *cert. denied*, 540 U.S. 995 (2003); *Hess v. Cockrell*, 281 F.3d 212, 215 (5th Cir. 2002); *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (*en banc*); *Dunlap v. Litscher*, 301 F.3d 873, 876 (7th Cir.

tical sense since district courts confront a wide variety of circumstances necessitating modifications to their judgments in habeas corpus cases, whether in favor of the state or the petitioner. *See, e.g., Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987) (granting state relief under Rule 60(b)(6) due to Supreme Court's intervening change in death penalty jurisprudence); *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (*en banc*) (granting prisoner relief under 60(b)(6) due to intervening change in law of exhaustion). The authority conferred by Rule 60(b) provides essential flexibility to adapt to these circumstances.

Rule 60(b)(6), the "other reasons" residuary clause, covers "all reasons, except the five particularly specified," empowering courts to vacate judgments in the interests of justice. *Klapprott v. United States*, 335 U.S. at 614-15. Included in this category are motions for relief from a judgment where there has been an intervening change in law, coupled with extraordinary circumstances. *Id.; see Ackermann v. United States*, 340 U.S. 193, 199 (1950); *Agostini v. Felton*, 521 U.S. 203 (1997) (applying companion subsection, 60(b)(5), to reopen 12 year-old permanent injunction due to intervening change in law); *In re Abdur'Rahman*, 392 F.3d 174 (applying 60(b)(6) due to intervening clarification of state law on exhaustion); *Ritter v. Smith*, 811 F.2d 1398 (applying 60(b)(6) due to intervening Supreme Court decision); *Booker v. Singletary*, 90 F.3d 440 (11th Cir. 1996) (acknowledging viability of 60(b)(6), but finding neither qualifying change in

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2002); *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002) (*per curiam*); *Hamilton v. Newland*, 374 F.3d 822 (9th Cir. 2004), *pet. for cert. filed* (U.S. Nov.17, 2004) (No. 04-7992); *Robison v. Maynard*, 958 F.2d 1013, 1017 (10th Cir. 1992) (by implication); *Reed v. Champion*, 46 F.3d 1152 (table), 1995 WL 4007 (10th Cir. 1995) (pre-AEDPA); *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987) (pre-AEDPA); *Scott v. Singletary*, 38 F.3d 1547, 1553-54 (11th Cir. 1994) (pre-AEDPA); *United States v. Vargas*, 393 F.3d 172, 175 (DC Cir. 2004) (by implication).

law nor extraordinary circumstances); *Wilson v. Fenton*, 684 F.2d 249 (3d Cir. 1982) (acknowledging viability of 60(b)(6) to intervening decision of Supreme Court or Court of Appeals); *Cornell v. Nix*, 119 F.3d 1329, 1332 (8th Cir. 1997) ("'A post-judgment change in the law having retroactive application may . . . constitute an extraordinary circumstance warranting vacation of a judgment' [in a] habeas corpus proceeding."); *Tal v. Miller*, 1999 U.S. Dist. LEXIS 652, No. 97 Civ. 2275, 1999 WL 38254 (S.D.N.Y. Jan. 27, 1999) (granting Rule 60(b)(6) relief to prisoner whose petition was erroneously dismissed as time-barred, based on intervening Court of Appeals decision changing law on computation of one-year grace period); *Reinoso v. Artuz*, 1999 U.S. Dist. LEXIS 7768, No. 97 Civ. 3174, 1999 WL 335365 (S.D.N.Y. May 25, 1999) (same); *Robles v. Senkowski*, 1999 U.S. Dist. LEXIS 11565, No. 97 Civ. 2798, 1999 WL 556854 (S.D.N.Y. Jul. 30, 1999) (same).

As a number of these cases illustrate, Rule 60(b)(6) is commonly used to reopen a habeas corpus case that was terminated without a determination of the petitioner's claims, due to an erroneous interpretation of the procedural requirements of AEDPA, as revealed by a subsequent correction in the interpretation of that statute. This very circumstance is presented here.

Aurelio Gonzalez filed a "true Rule 60(b) motion," 366 F.3d at 1262, JA-34,[8] alleging an intervening change (cor-

[8] The *en banc* court reiterated the panel's conclusion on this point:

> The panel characterized Gonzalez's filing as a true Rule 60(b) motion, because it does not assert a new ground for relief from his conviction and sentence, or reassert an old one; instead, the motion is aimed solely at re-opening the judgment that had been entered against Gonzalez in his prior § 2254 proceeding on statute of limitations grounds without regard to the merits of any claims. *Id*. [*Gonzalez v. Sec'y for the Dep't of Corr*., 317 F.3d 1308] at 1311 [(11th Cir. 2003) (vacated panel opinion)].

*Gonzalez*, 366 F.3d at 1262, JA-34.

rection) in the interpretation of the governing law, coupled with exceptional circumstances.[9] Gonzalez had been denied *any* habeas corpus review of his claims, even though he filed a timely petition under 28 U.S.C. § 2254, including two issues meriting habeas corpus relief.[10] He was denied habeas

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[9] As a practical matter, Rule 60(b)(6) is the only available avenue for reopening consideration of the statute of limitations issue below. The intervening decision on which Mr. Gonzalez relies to show his habeas petition was improperly dismissed as untimely, *Artuz v. Bennett*, 531 U.S. 4 (2000), does not qualify to permit the filing of a second or successive habeas application. *See* 28 U.S.C. § 2244(b)(2). It is not a new claim, does not involve a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," nor does his claim involve newly discovered facts "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id*.

[10] Gonzalez "contends that his guilty plea was unintelligent, unknowing, and involuntary based upon specific evidence he has proffered." *Gonzalez*, 366 F.3d at 1268, JA-45. As amended, the petition for writ of habeas corpus sets forth two claims of facial merit: (1) Mr. Gonzalez's state guilty plea was involuntary because it was induced by untrue information about the relatively short time he would likely serve (13 years) on a 99-year sentence. R1:9. Such a claim, if established, supports a writ of habeas corpus. *See Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995) (due process requires vacating state defendant's guilty plea, induced by counsel's misadvice about concurrency of sentences, as not voluntary, intelligent and knowing plea). "[W]hen 'the defendant pleads guilty on a false premise' . . . a guilty plea violates the Due Process Clause." Id. at 914 (quoting *Mabry v. Johnson*, 467 U.S. 504, 509 (1984)); (2) Mr. Gonzalez was sentenced based upon an inaccurate criminal history, which included convictions of other persons mistakenly thought to be him. Such an error at sentencing implicates a constitutional due process violation. *Townsend v. Burke*, 334 U.S. 736, 740- 41 (1948) (due process requires that sentence be based only on accurate information); *see United States v. Tucker*, 404 U.S. 443, 447 (1972) (reversal required where "sentence founded at least in part upon misinformation of constitutional magnitude"); *United States v. Roman*, 989 F.2d 1117, 1128 n.25 (11th Cir. 1993) (*en banc*) (defendant has a "due process right to be sentenced based on reliable evidence").

corpus review of his claims due solely to the district court's erroneous computation of the statute of limitations under AEDPA, pre-*Artuz v. Bennett*, 531 U.S. 4 (2000). He was denied appellate review of that error due to the district court's and court of appeals' refusal to issue a certificate of appealability on that question because it did not raise a constitutional issue, a refusal that was based on an erroneous interpretation of AEDPA's COA requirement, pre-*Slack v. McDaniel*, 529 U.S. 473 (2000) (permitting COA for non-constitutional issue resulting from procedural dismissal of habeas petition); *see Delancy v. Fla. Dep't of Corr*., 246 F.3d at 1330 n.2.

This Court's intervening decisions in *Artuz* and *Slack* make clear that both the district court's dismissal and the Court of Appeals' refusal to grant a COA were wrongly decided. The errors of law combined to deprive Mr. Gonzalez of the habeas review of his claims to which he was entitled under 28 U.S.C. § 2254, effectively depriving him of his first habeas corpus petition. Under these circumstances, Mr. Gonzalez properly sought to reopen his habeas application because he had been erroneously left without any adjudication of the merits of his claims due to an extraordinary confluence of errors of law.

### B. Neither the Letter nor the Spirit of AEDPA Overrides the Express Provisions of Rule 60(b)(6).

#### (1) The Letter of AEDPA, As Codified in 28 U.S.C. § 2244(b)(1), Is Silent About Rule 60(b)(6).

This much is clear and indisputable: The Antiterrorism and Effective Death Penalty Act of 1996 says not one word about Rule 60(b) or its use in habeas corpus proceedings. Neither does any of the legislative history published in connection with the law. This is true even though: Rule 60(b) was in effect and in use for over a half-century by the time AEDPA was adopted; the Rule's application to habeas corpus proceedings was well developed in the law, *see supra* at

10-11 & n.7; and it is presumed that Congress legislates with knowledge of existing case law governing the subject. *See Whitfield v. United States*, ___ U.S. ___, 125 S. Ct. 687, 688 (2005) (Congress is presumed to have knowledge of existing law when enacting relevant legislation). The presumption is confirmed since Congress demonstrated its awareness of existing rules by choosing to amend one, while specifically not amending others.

> Tellingly, Congress was not blind to the effects AEDPA would have on the rules of procedure; for example, focusing on the relevant Federal Rules of Appellate Procedure, Congress amended Federal Rule of Appellate Procedure 22. *See* AEDPA of 1996, Pub. L. No. 104-132, 110 Stat. 1214 § 103. Congress did nothing, however, to Rule 60(b); rather, it simply let the Rule stand as is.

*Gonzalez*, 366 F.3d at 1303 n.30 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett, Wilson, JJ., joining), JA-111. These circumstances invoke recognized rules of statutory construction that do not permit congressional silence to repeal existing legislation.

**(2) Repeal by Silence is Disfavored.**

The Court has stated repeatedly that congressional silence is not a proper ingredient for a new rule of law that effectively counters existing law. When confronted with "at most legislative silence on the crucial statutory language," the Court has "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *United States v. Wells*, 519 U.S. 482, 496 (1997), citing *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-130 (1971) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)). It is, therefore, "a cardinal principle of statutory construction that repeals by implication are not favored," *United States v. United Con-*

*tinental Tuna Corp*., 425 U.S. 164, 168 (1976), a principle that "carries special weight when [the Court is] urged to find that a specific statute has been repealed by a more general one." *Id*. at 169.

Consistent with Habeas Rule 11, the specific statute of Rule 60(b) was applied in habeas corpus cases before AEDPA was adopted. *See supra* at 10-11 & n.7. The only change in law that might have altered such application was the adoption of AEDPA, a general statute that is completely silent on the question. Repeal by implication is, therefore, inappropriate, and especially so because Rule 60(b) embodies the federal courts' inherent power under the Constitution to correct erroneous and inequitable judgments.

Moreover, the suggestion that Congress implicitly restricted that power in habeas cases would raise substantial constitutional questions, implicating the Suspension of the Writ and Due Process clauses. *See* subsection D., *infra* at 32-39. Under the doctrine of constitutional avoidance, *see, e.g., INS v. St. Cyr*, 533 U.S. 289, 299-304 (2001); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000), AEDPA could not properly be construed as imposing such a restriction in the absence of an explicit and clear statement to that effect. And of course AEDPA contains no such statement, explicit or otherwise.

The Court has observed the difficulty of understanding precisely what Congress wrote in AEDPA. "[I]n a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Attempting to interpret a statute's silence when its written words are obtuse is that much more treacherous. Accepted principles of statutory construction militate against a finding that AEDPA's silence repealed much of Rule 60(b) in habeas corpus proceedings.

### C. Contrary to Cardinal Principles of Statutory Construction, the Court of Appeals' Decision Effectively Repeals by Implication Whole Sections of Rule 60(b).

Although AEDPA makes no reference to Rule 60(b) and expresses no limitations on its use in habeas corpus proceedings, the *en banc* Eleventh Circuit Court of Appeals nevertheless created a bright line prohibition on the use of all of Rule 60(b) in such cases (except fraud under 60(b)(3)).[11] Unable to identify an explicit congressional countermand of the previously adopted Rule 60(b), the Court of Appeals instead constructed its own premise and conclusion—"[the] central purpose of the AEDPA and its provisions specifically restricting the filing of second or successive petitions severely limit the application of Rule 60(b) to habeas cases," 366 F.3d at 1269, JA-[]—then attempted to support it by assembling other rules and laws that also say nothing about Rule 60(b). Implicitly acknowledging the shaky foundation for its conclusion, the Court of Appeals informed its viewpoint by misapplying as supporting precedent the Court's unrelated and inapposite decision in *Calderon v. Thompson*, 523 U.S. 538 (1998). After redefining a Rule 60(b)(6) motion to be something it is not—a second or successive habeas petition ("SSHP")—the Court of Appeals then held that the newly recharacterized motion is prohibited by the second and successive petition bar of 28 U.S.C. § 2244(b)(1), as amended by AEDPA.

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[11] That *Gonzalez* is a bright line rule was confirmed three months later when a panel of the Eleventh Circuit Court of Appeals relied on the *en banc* decision to *sua sponte* dismiss another habeas corpus case based on the jurisdictional bar erected in the *en banc* decision. *Boone v. Sec'y, Dep't of Corr.*, 377 F.3d 1315 (11th Cir. 2004) (on rehearing granted) ("Sitting *en banc*, our Court . . . held that district courts do not have the jurisdiction to consider Rule 60(b) motions to reconsider the denial of a habeas petition unless the motion is a 60(b)(3) motion, that is, one made to prevent fraud upon the court.").

As explained more fully below, the Court of Appeals' holding mischaracterizes Rule 60(b) motions as SSHP's; is inconsistent with the analytical framework used by this Court in post-judgment review of habeas corpus cases denied or dismissed on procedural grounds; improperly applies this Court's decision in *Calderon v. Thompson*; and, by failing to heed the doctrine of constitutional avoidance, raises grave questions about violating both the Suspension of the Writ Clause of U.S. Const. art. I sec. 9 and the Due Process Clause of the Fifth Amendment.

**(1) A Rule 60(b)(6) Motion is Not a Second or Successive Habeas Petition Subject to the Constraints of 28 U.S.C. § 2244(b)(1)**.

A Rule 60(b) motion is not a second or successive habeas petition ("SSHP"). "[T]he difference is explained by the relief that the applicant seeks." *Abdur'Rahman v. Bell*, 537 U.S. 88, 94 (2003) (STEVENS, J., dissenting from dismissal of certiorari as improvidently granted). "[A] motion for relief under Rule 60 of the Federal Rules of Civil Procedure contests the integrity of the proceeding that resulted in the district court's judgment . . . . [A] rule 60(b) motion is designed to cure procedural violations in an earlier proceeding—here, a habeas corpus proceeding—that raise questions about that proceeding's integrity." *Abdur'Rahman v. Bell*, 537 U.S. at 95 (STEVENS, J., dissenting) (quoting *Mobley v. Head*, 306 F.3d 1096 (11th Cir. 2002) (Tjoflat, J., dissenting) (vacated panel opinion)). But,

> [l]ike the ancient procedures it replaced, Rule 60(b) was never intended to permit parties to relitigate the merits of claims or defenses, or to raise new claims or defenses that could have been asserted during the litigation of the case. Rather, the aim of Rule 60(b) was to allow a district court to grant relief when its judgment rests upon a defective foundation.

> As applied in the habeas context, the "factual predicate [of a Rule 60(b) motion] deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief." *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir. 2003).

366 F.3d at 1291-92 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett, Wilson, JJ., joining), JA-89-90.

"An SSHP," in contrast, "is a different species[; l]ike a first petition for a writ of habeas corpus, an SSHP is a collateral attack upon the applicant's conviction or sentence." *Gonzalez*, 366 F.3d at 1292 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett, Wilson, JJ., joining), JA-90.

Put another way, a Rule 60(b) motion in a § 2254 case is designed to remedy unfairness in the *federal habeas* proceedings; it does not address directly the underlying *state court* proceedings that are otherwise the subject of the habeas lawsuit. A proper Rule 60(b) motion in a § 2254 case thus involves allegations that the federal court judgment was tainted because of some error infecting proceedings held in a federal court lawsuit, the subject of which is alleged unfairness in a state court criminal trial. *See Rodwell v. Pepe*, 324 F.3d at 70 (Rule 60(b) motion "attacks only the manner in which the earlier habeas judgment has been procured").

The Sixth Circuit found this distinction meaningful when it recently abandoned allegiance to the Eleventh Circuit's bright line prohibition of Rule 60(b)(6) motions. "[T]he rigid approach, adopted by the Eleventh Circuit and the dissent here, prohibits too much. It fails to appreciate both the significant functional differences between Rule 60(b) motions and habeas petitions and that those differences mean that many Rule 60(b) motions will not run afoul of AEDPA." *In re Abdur'Rahman*, 392 F.3d at 179.

Other circuits found this distinction vital, as well. One week after the Eleventh Circuit's *Gonzalez* ruling, the Second Circuit

rejected the Eleventh Circuit's approach and reiterated its contrary view in *Harris v. United States*, 367 F.3d 74, 79 & n.3 (2d Cir. 2004) ("since the Rule 60(b)[6] motion arguably attacks the integrity of Harris's habeas proceeding, we must consider its merits"). Two weeks later, the Fourth Circuit also rejected the Eleventh Circuit's bright line rule, holding instead that a true Rule 60(b)(6) motion is jurisdictionally cognizable: "[A] motion seeking a remedy for some defect in the collateral review process will generally be deemed a proper motion to consider." *Reid v. Angelone*, 369 F.3d 363, 375 (4th Cir. 2004) (vacating order denying mixed Rule 60(b) motion including both successive and true issues, permitting petitioner to elect to proceed only on true 60(b)(6) issue). And, for like reasons, the Ninth Circuit refused to apply a bright line rule forbidding habeas petitioners to utilize Rule 60(b)(6), holding instead that a "district court should have treated [a habeas petitioner's] motion solely as a 60(b)(6) motion and not as a second or successive petition under . . . 'AEDPA'[]." *Hamilton v. Newland*, 374 F.3d at 823.

As the majority of circuits have held, given that a Rule 60(b) motion is not a SSHP, 28 U.S.C. § 2244(b)(1) simply does not apply to restrict filings under the Rule.[12] Cir-

[12] *Rodwell v. Pepe*, 324 F.3d at 70-71 (1st Cir.) (holding that Rule 60(b) motion is available when it "deals primarily with some irregularity or procedural defect" of the habeas proceeding itself); *Harris v. United States*, 367 F.3d at 79 & n.3 (2d Cir.) ("since the Rule 60(b) motion arguably attacks the integrity of Harris's habeas proceeding, we must consider its merits"); *Pridgen v. Shannon*, 380 F.3d at 725 (3rd Cir.) (holding that where factual predicate of Rule 60(b) motion attacks manner in which earlier habeas judgment was procured, it is not successive and is cognizable); *Reid v. Angelone*, 369 F.3d at 375 (4th Cir.) (vacating order denying mixed Rule 60(b) motion including both successive and true issues, permitting petitioner to elect to proceed only on true 60(b)(6) issue); *United States v. Weinstock*, 340 F.3d at 206-07 (4th Cir.) (holding that not all Rule 60(b) motions are successive applications; each case should be analyzed based on the nature of the claims presented); *Hess v. Cockrell*, 281 F.3d at 215 (5th Cir.) (taking a dim view of using a Rule

cumventing this conclusion, the Eleventh Circuit decided that all Rule 60(b) motions (other than those brought under 60(b)(3)) are the functional equivalent of SSHP's, recharacterized the Rule 60(b)(6) motion below as an SSHP, and then applied 28 U.S.C. § 2244(b)(1) to jurisdictionally bar the recharacterized motions. This reasoning suffers from a number of interpretational infirmities and ignores the doctrine of constitutional avoidance, thereby raising grave questions about two discrete constitutional violations.

**(2) Judicial Recharacterization of a True Rule 60(b) Motion to Deprive the Court of Jurisdiction is Impermissible.**

The Court has recently reversed a judicial attempt to recharacterize a *pro se* prisoner filing to the detriment of the prisoner. In *Castro v. United States*, 540 U.S. 375 (2003), this Court reversed a decision of the Eleventh Circuit that permitted involuntary recharacterization of a prisoner's motion

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60(b) motion to set aside the denial of habeas, but expressly declining to decide whether such Rule 60(b) motions are always successive habeas petitions); *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir.) (en banc) (expressly rejecting categorical approach of *Gonzalez* in favor of functional case-by-case analysis); *Dunlap v. Litscher*, 301 F.3d at 876 (7th Cir.) (allowing Rule 60(b) motion to reopen previous habeas case as long as the substance of the motion does not pertain to "territory occupied by AEDPA"); *Boyd v. United States*, 304 F.3d at 814 (8th Cir.) (per curiam) (directing district courts to conduct "a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack" in which case the motion should be denied as barred or transferred to the court of appeals for certification); *Hamilton v. Newland*, 374 F.3d 822 (9th Cir.) (holding district court should have treated habeas petitioner's motion solely as a 60(b)(6) motion and not as a second or successive petition under AEDPA); *Thompson v. Calderon*, 151 F.3d at 921 & n.3 (9th Cir.) (en banc) (holding that a Rule 60(b) motion ordinarily "should be treated as a successive habeas petition," but declining to adopt "a bright line rule equating all Rule 60(b) motions with successive habeas petitions").

for new trial, filed pursuant to Federal Rule of Criminal Procedure 33, as a habeas petition, thereby rendering it a second and successive petition barred by AEDPA. The gravamen of the Court's decision is that (1) federal courts should not "stretch the [jurisdiction limiting] words of the [habeas corpus] statute too far," jurisdictionally closing federal court doors to habeas petitioners seeking review "without any clear indication that such was Congress' intent," 540 U.S. at 380; and (2) federal courts may not recharacterize a pleading to the detriment of a *pro se* litigant with the effect of depriving the court of jurisdiction to hear the claim (subject to limitations not applicable in this case). *Id.*[13] Castro's holding strongly suggests that a court may not unilaterally recharacterize a Rule 60(b) motion in a habeas corpus case to be a second or successive petition over which the court would then not have jurisdiction. *Castro* also militates against informing a decision in this case contrary to the terms of Rule 60(b), in a way that effectively deprives the court of jurisdiction to hear the merits of the Rule 60(b) matter.

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[13] Although two justices concurred separately, the Court ruled unanimously in Parts I and II of the decision, which are summarized above. The only disagreement was about the authority for *any* judicial recharacterization at all, in which "a court deliberately [] override[s] the *pro se* litigant's choice of procedural vehicle for his claim." 540 U.S. at 386 (SCALIA, J., concurring in part and concurring in the judgment, THOMAS, J. joining). A majority of the Court held that *pro se* habeas pleadings may be recharacterized only if the court first gives notice to the litigant of the negative consequences of recharacterization and an opportunity to amend or withdraw the recharacterized pleading; Justice Scalia opined that "pleadings should *never* be recharacterized . . . ." *Id.* at 385. The Court's decision is unanimous, however, that federal courts may not unilaterally recharacterize a pleading to the detriment of a *pro se* litigant, especially if it effectively deprives the court of jurisdiction to hear the claim.

### (3) Analogy to the Mandate Recall Decision of *Calderon v. Thompson* is Not Apt.

In the face of the plain language of Rule 60(b) and the silence of Congress in AEDPA, the Eleventh Circuit set forth an unwarranted analogy to *Calderon v. Thompson*, 523 U.S. 538, thereby replacing Rule 60(b)'s specific provisions for relief with *Calderon*'s miscarriage of justice standard for the recall of an appellate mandate. *Calderon* is both procedurally and substantively distinct, making it an inappropriate source to support the Court of Appeals' holding and newly created standard of relief. As Chief Judge Edmondson noted in his separate opinion below: "The Supreme Court's decision in *Calderon* . . . does not control the present cases . . . [because] *Calderon* . . . did not deal with Rule 60 and was not governed by AEDPA . . . . [E]xtending *Calderon*—an inherent-judicial-powers case in which the Supreme Court acted not only as interpreter of laws, but also as supervisor of lower courts—is [n]either necessary [n]or proper . . . ." 366 F.3d at 1286 (Edmondson, C.J., specially concurring in part and dissenting in part), JA-79. These distinctions are highlighted by comparing Rule 60(b) with the mandate-recall events of *Calderon*.

Rule 60(b) has six grounds for relief, fortified with an extensive body of jurisprudence. *See generally* 11 Wright, et al., *Federal Practice and Procedure* §§ 2851-2873; 28 U.S.C.A. Fed. R. Civ. P. 57-60. The rule derives from the common-law and inherent powers of a court, 366 F.3d at 1289-91 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett, Wilson, JJ., joining), JA-[], but was codified in a rule-making process involving the Supreme Court and Congress. 366 F.3d at 1270, JA-84-88. According to the Rule and the many cases interpreting it, Rule 60(b) relief is granted in the discretion of the district court, based upon one of the enumerated grounds, *id.; see Klapprott v. United States*, 335 U.S. 601, and, in the case of 60(b)(6), exceptional circumstances. *Ackermann v. United States*, 340 U.S. at 199.

In contrast, the authority of an appellate court to recall its mandate is debatable, *Calderon*, 523 U.S. at 549, and is not codified by statute or rule. To the extent it is recognized at all, it is a remedy "of last resort, held in reserve against grave, unforseen contingencies." *Id.* Due to a paucity of rules or jurisprudence of its own, the standards for recalling an appellate mandate must necessarily be informed by other rules and law. *Id.*

*Calderon* involved the propriety of an appellate court recalling its mandate to "revisit the merits of its earlier decision" for a prisoner who "already had extensive review of his claims in federal and state courts." 523 U.S. at 557. Thompson's "extensive review" included litigation on the merits of his claims in at least six separate proceedings, and a plenary appeal of a merits decision based on a federal habeas corpus evidentiary hearing. 523 U.S. 545-46.

Mr. Gonzalez, on the other hand, has never had a hearing, in state or federal court; has never had an evidentiary hearing, in state or federal court; had his first federal habeas petition erroneously dismissed without consideration of the merits of his claims; and was denied an appeal of that error by the restrictions of AEDPA and a misinterpretation of the COA requirement by the lower courts, pre-*Slack v. McDaniel*.

The vehicle by which Thompson sought relief, recall of a mandate, is rarely exercised by appellate courts, the authority for the process is questionable, and there are neither rules, statutes, nor a body of jurisprudence by which to judge its use. This Court was compelled, therefore, to inform its decision by analogous jurisprudence. In contrast, Mr. Gonzalez's remedy of choice is a common legal procedure, the authority for which is recognized by a congressionally adopted rule of procedure and a rich body of jurisprudence. Determining the proper application of Rule 60(b) can be accomplished through the explicit words of the rule and its own jurisprudence, so resort to analogy is unnecessary.

Moreover, resort to the analogy of *Calderon* conflicts with the established principles of Rule 60(b), as well as the Court's analytical approach to habeas corpus proceedings that have been terminated on procedural grounds, without determination of the merits of a petitioner's claims.

**(4) Applying 28 U.S.C. § 2244(b)(1)'s Second and Successive Application Bar to Prohibit Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Suspension of the Writ Clause of U.S. Const. art. I sec. 9. and the Fifth Amendment's Due Process Clause.**

Unlike the reasoned, balanced and case-specific functional approach adopted by the majority of circuits, the Eleventh Circuit's wholesale excision of Rule 60(b) in habeas corpus cases crashes headlong into difficult issues of constitutional law, contrary to the Court's precedents.

When a literal reading of AEDPA would collide with the Constitution, the Court has read the language differently, or seized upon congressional silence or AEDPA's incorporated habeas corpus jurisprudence, to avoid the collision.[14] This result follows from the Court's doctrine of constitutional avoidance—"[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Harris v. United States*, 536 U.S. 545, 555 (2002) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). Three illustrations of this analytical

[14] *See generally* Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 Harv. L. Rev. 1578 (April 1998) (summarizing the courts' consistent interpretation of the AEDPA to avoid constitutional difficulties).

approach are *Slack v. McDaniel*, 529 U.S. 473, *Felker v. Turpin*, 518 U.S. 651 (1996), and *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998).

In *Slack*, the Court refused to allow the specific language of AEDPA—§ 2253(c)'s requirement that a "COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right"—to prevent appeal of a dismissal based on purely procedural grounds. 529 U.S. at 474. The state in *Slack* pointed to apparently-plain language of AEDPA, but the Court rejected that approach, balancing AEDPA's harsh result against the importance of correctly decided habeas corpus proceedings:

> According to the State, only constitutional rulings may be appealed. Under this view, a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss the petition on procedural grounds would be denied relief. We reject this interpretation. The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal. . . . Our conclusion follows from AEDPA's present provisions, which incorporate earlier habeas corpus principles.

529 U.S. at 483. Where the apparent requirement of AEDPA would lead to an unconstitutional result, the Court looked instead to the earlier habeas corpus jurisprudence incorporated in the statute. Faced with a constitutional collision between AEDPA and a prisoner's right of habeas review, the Court chose to avoid it by interpreting the statute's limits to fit within what the Constitution permits, allowing a COA for procedural dismissals, without the need to demonstrate an appellate issue of constitutional dimension. In holding that the new petition was not second or successive because the

original dismissal was procedural (not on the merits), a significant consideration was that "[n]o claim made in Slack's 1991 petition was adjudicated during the three months it was pending in federal court." 529 U.S. at 488.

This same approach guided the Court's decision in *Felker v. Turpin*. Rather than interpret AEDPA's apparently-plain language prohibiting Supreme Court jurisdiction to violate the Exceptions Clause of Art. III, § 2, or the Suspension Clause of Art. I, § 9 of the Constitution, the Court read the law to "not preclude this Court from entertaining an application for habeas corpus relief . . . thereby obviat[ing] any claim by petitioner under the Exceptions Clause ... and ... the Suspension Clause. . . ." 518 U.S. 654. The Court's decision relied upon congressional silence about the fate of prior habeas corpus jurisprudence, not to repeal prior law, but rather as indicia that prior law remains intact, despite an express statutory directive:

> [W]e conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in *[Ex parte] Yerger*, 8 Wall. 85, 19 L.Ed. 332 (1869). No provision of Title I mentions our authority to entertain original habeas petitions; in contrast, § 103 amends the Federal Rules of Appellate Procedure to bar consideration of original habeas petitions in the courts of appeals. Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28—its descendant–by implication now.

518 U.S. 660-61 (footnotes omitted). As in *Slack*, *Felker* avoided constitutional collision by refusing to read into

AEDPA prohibitions that the Constitution would likely not tolerate.

Similarly, in *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998), the Court refused to construe a second habeas petition as being second or successive even though the ground raised—competency to be executed—had been raised in the original petition. Rather than read the second and successive ban literally, at the expense of a first habeas corpus ruling on the issue (implicating constitutional concerns), the Court instead seized upon the fact that the district court never ruled on the merits of the original claim. 523 U.S. at 645. This allowed the Court to find that the second filing was not successive and permitted the claim to be heard, despite the apparent statutory prohibition. *Id.*

Interpreting AEDPA to fit within the Constitution, rather than interpreting it at an unconstitutional face value, has been the Court's accepted approach. And it is this analytical framework on which a majority of circuits have relied in determining the continuing viability of Rule 60(b)(6). To this end, Rule 60(b) motions relying on *new* legal developments that reveal *pre-existing* law with which a habeas judgment arguably conflicts have been consistently treated as non-successive. *Blackmon v. Money*, 531 U.S. 988 (2000) (mem.), *on remand*, 27 Fed. Appx. 543 (6th Cir. 2001) (denial of 60(b) motion for relief from unappealed, with-prejudice, dismissal as untimely is remanded for reconsideration in light of *Artuz v. Bennett*, construing AEDPA's statute of limitations in a way that could make Blackmon's dismissed petition timely); *In re Abdur'Rahman*, 392 F.3d at 179 (permitting Rule 60(b)(6) motion based on intervening correction on law of exhaustion); *Thomas v. Roe*, 23 Fed. Appx. 847 (9th Cir. 2001) (granting 60(b) relief from unappealed, with-prejudice, dismissal of habeas petition after *Artuz* revealed that dismissing the petition as untimely was arguably in error); *see Guyton v. United States*, 23 Fed. Appx. 539, 540 (7th Cir.

2001) (dicta) (Rule 60(b) motion may be used to reopen a with-prejudice dismissal, as untimely, of a 2255 motion that clearly was timely under recent cases applying the "prison mailbox rule" to federal prisoners).

More than simply providing an analytical approach, *Slack, Felker*, and *Martinez-Villarel* are binding precedent. In accord with these precedents, the Second Circuit effectively rebutted the reasoning supporting the Eleventh Circuit's bright line formulation. In *Muniz v. United States*, 236 F.3d 122 (2d Cir. 2001), the prisoner filed a timely § 2255 application within one year of AEDPA's effective date, but more than a year after his conviction became final. His petition was incorrectly dismissed as untimely. Before his appellate rights expired, the Second Circuit decided two cases that construed a grace period within AEDPA's time limitation, which would have made Muniz's application timely. But Muniz's COA was denied and his out-of-time appeal was dismissed. The Second Circuit held that Muniz's subsequent 2255 petition (raising the new cases on timeliness) was not a "second or successive" application. The Court of Appeals noted that "constitutional implications" preclude application of the AEDPA's second or successive provisions in cases where the initial application was erroneously dismissed due to judicial error. *Muniz v. United States*, 236 F.3d at 127-29. "Because 'a dismissal of a first habeas petition for technical procedural reasons would bar the petitioner from ever obtaining federal habeas review,' excusing a prior petition from 'counting' as a first petition in such cases avoids serious constitutional questions arising under the Suspension Clause." *Id*. (quoting *Martinez-Villareal v. Stewart*, 523 U.S. at 645).

Lower federal courts have also followed the precedent of this Court's analytical formulation. For example, district courts in *Tal v. Miller*, 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan 27, 1999), *Reinoso v. Artuz*, 1999 U.S. Dist. LEXIS 7768

(S.D.N.Y. May 25, 1999), and *Robles v. Senkowsi*, 1999 U.S. Dist. LEXIS 11565 (S.D.N.Y. Jul. 30, 1999), granted Rule 60(b) motions to reopen habeas corpus proceedings that had been dismissed based upon an incorrect reading of the tolling and grace period allowed by AEDPA. The decisions are well-conceived, grounding 60(b) relief upon the precedent of this Court and the Second Circuit:

> [A] procedural dismissal "of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. . . . Given the importance of a first federal habeas petition, it is particularly important that any rule that would deprive inmates of all access to the Writ should be both clear and fair." [*Ross v. Artuz*, 150 F.3d 97, 100 (2d Cir. 1998)] (quoting *Lonchar v. Thomas*, 517 U.S. 314 (1996)).

*Tal*, 1999 U.S. Dist. LEXIS 652 at *9 (alternative citations omitted). Indeed, the Court's decision in *Lonchar* holds specifically that *ad hoc* variance from the law, rules and precedents governing habeas corpus constitutes error, even if based upon equitable principles, particularly where, as here, dismissal of a *first* habeas petition is at issue. 517 U.S. at 1299. To adopt the Eleventh Circuit's view is to necessarily reject this Court's precedents, including its holding and reasoning in *Lonchar*, permitting *ad hoc* equities to override the written rules governing habeas practice.

Overlooking congressional silence on Rule 60(b), and failing to acknowledge the Court's analytical approach in interpreting AEDPA, or the plain-language distinction between a Rule 60(b) motion and a habeas application, the Eleventh Circuit held that AEDPA repealed virtually all of Rule 60(b) for use by a prisoner in a habeas corpus case, claiming that prisoners' Rule 60(b) motions (other than 60(b)(3)) are necessarily "second or successive," prohibited

by AEDPA, as codified in 28 U.S.C. § 2241(b)(1). The fact that the Eleventh Circuit's holding is based on judicial fiat rather than congressional legislation is pointedly revealed in Chief Judge Edmondson's separate opinion: "[F]ederal judges are not the rightful makers of policy in this sphere. And we cannot properly favor what is convenient over what is true." *Gonzalez*, 366 F.3d at 386 (Edmondson, C.J., specially concurring in part and dissenting in part), JA-79. Chief Judge Edmondson's observation is confirmed by the competing rule formulations of Judge Carnes (for the majority) and Judge Tjoflat (for the dissenters). *Compare Gonzalez*, 366 F.3d at 1279-80 (Carnes, J.) *with* 366 F.3d at 1287 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett and Wilson, JJ., joining), JA-67-68, 81, 99-100. One thing is certain: Congress did not write one whit about limiting Rule 60(b), even though the Rule had been in effect and in use for over a half-century by the time AEDPA was adopted. Congress' only rule is written in Rule 60(b), while the Eleventh Circuit's decision constitutes *ad hoc* judicial rule-making, built of implication from silence.

Rather than an analogy to *Calderon*, the posture of Mr. Gonzalez's case suggests that the better decision for analogy is *Slack v. McDaniel*, in which this Court carved out special considerations for habeas cases reaching a court of appeals after a dismissal on procedural grounds. Recognizing that the alternative left petitioners without habeas review or an appeal of that decision, the Court treated procedurally dismissed cases to a special rule, designed to ensure appellate review even where no constitutional appellate issue is present. It did not adopt the harsh miscarriage of justice approach of *Calderon*, but rather it recognized that procedurally dismissed cases have never had a merits determination of the petitioner's claims in which miscarriage of justice could be demonstrated. Weighing the importance of the Writ's role in ensuring justice under the Constitution against potential abolition of that process for procedurally dismissed cases, the

Court opted in favor of a less demanding, not more demanding, standard.

It is implausible that Congress intended this major overhaul, deleting five of the six paragraphs of Rule 60(b), without ever saying a word on the subject. It is equally implausible that this Court's precedents—which take pains to ensure that erroneous habeas corpus procedural decisions will remain open to review (even if lacking issues of constitutional dimension)—are to be ignored in favor of a more restrictive miscarriage of justice jurisprudence.

The Court avoids the Suspension of the Writ and Due Process implications of 2244(b)(1) by overruling the Eleventh Circuit's decision. If, however, the Eleventh Circuit decision stands—unilaterally recharacterizing Mr. Gonzalez's Rule 60(b) motion as an SSHP barred under all circumstances by 28 U.S.C. § 2244(b)(1)—substantial questions regarding the constitutionality of 2244(b)(1)'s complete *res judicata* bar would arise.

### D. Failing to Heed the Doctrine of Constitutional Avoidance Raises "Grave and Doubtful Constitutional Questions" Concerning Suspension of the Great Writ and Due Process.[15]

The Eleventh Circuit's formulation of a categorical rule raises "grave and doubtful constitutional questions" concerning suspension of the Great Writ in violation of U.S. Const. art. I sec. 9 and, in a separate context, denial of Due Process of Law in violation of the Fifth Amendment. This is, of course, a particularly serious matter that arises when a first habeas proceeding is dismissed without a ruling on the

[15] The substance of Question One, on which certiorari has been granted, includes both the Suspension of the Writ and Due Process issues. *Pet. for Writ* at 19-22, 29. The same principles were also addressed in a different context in Question Two, on which certiorari was not granted.

petition's claims. *Lonchar v. Thomas*, 517 U.S. at 324. To protect the continuing viability of the Great Writ, the Court cautioned in *Lonchar*, lower courts are bound to follow the established law, and are "not authorize[d] . . . to ignore this body of statutes, rules and precedents." The Eleventh Circuit's decision fails to heed this caution or the doctrine of constitutional avoidance.

**(1) Wholesale Excision of Rule 60(b), Rather than Case-Specific Consideration, Raises Grave Questions About Suspension of the Writ.**

Article I, section 9 of the U.S. Constitution provides that, "The Privilege of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." This Court has said repeatedly that "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence" and remains "a bulwark against convictions that violate 'fundamental fairness.'" *Engle v. Isaac*, 456 U.S. 107, 126 (1982). *See, e.g., Slack*, 529 U.S. at 483; *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

Significant questions arise about whether Mr. Gonzalez's right to the Great Writ has been suspended. Certainly he has been deprived of any ruling on the merits of a timely filed first petition. To the extent AEDPA means what the Eleventh Circuit says it does, the law would violate the Suspension of the Writ clause, a result that must not occur under the doctrine of constitutional avoidance. *See INS v. St. Cyr*, 533 U.S. at 299-304; *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. at 787. This constitutional question becomes clear by examining the historical role of successive claims and the change the Eleventh Circuit held was effected by AEDPA.

Prior to the enactment of AEDPA, a state prisoner could file a same-claim second or successive federal habeas corpus petition (*i.e.*, one raising a claim presented and denied in a

prior habeas corpus petition) where the "'ends of justice' would be served by addressing a claim on the merits," because a manifest injustice would result if petitioner was not permitted to relitigate a claim. Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 28.4, at 1324-25 (4th ed. 2001). AEDPA "drastically revised prior law" by imposing a "blanket ban on successive litigation, codified in 28 U.S.C. § 2244(b)(1): 'A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.'" *Id*. Although this Court has upheld AEDPA's restrictions on *new-claim* successive petitions (§ 2244(b)(2)), "the constitutionality of AEDPA's blanket ban on *same-claim* petitions [(§ 2244(b)(1)] is less certain." *Id*. (emphasis added). The reasons given by the Court for upholding § 2244(b)(2) simply do not apply to the blanket ban of § 2244(b)(1).

*Felker v. Turpin*, 518 U.S. 651 (1996), upheld the new-claim successive petition restrictions imposed by 28 U.S.C. § 2244(b)(2), which limited new-claim successive petitions to those involving enumerated exceptional circumstances. Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 28.4(a), at 1326. Although AEDPA "'further restricted the availability of' such petitions, the Court ruled, it did so via provisions that were 'well within the compass' of 'the complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" Hertz & Liebman, *supra* § 28.4(a), at 1326 (quoting *Felker*, 518 U.S. at 664).

Subsection (2) of § 2244(b) is to be contrasted with the blanket prohibition of same-claim successive petitions—an absolute *res judicata* bar—imposed by § 2244(b)(1). Subsec-

tion (b)(1) contains this absolute and completely unforgiving blanket ban on every same-claim SSHP:

> A claim presented in a second or successive habeas corpus application under 2254 that was presented in a prior application shall be dismissed.

28 U.S.C. § 2244(b)(1). Period. No exceptions. Not even if the district court failed to rule on the claim. Not even if the refusal to rule was erroneous as a matter of law. Commentators have called into question whether 2244(b)(1) therefore suspends the Writ in a way never addressed in *Felker*:

> Because (1) section 2244(b)(1) does *not* simply "further[] restrict" new-claim successive petitions, but, instead, forbids them under all circumstances, (2) because doing so works a literal suspension of the writ for such cases, and (3) doing so moves qualitatively *beyond* "the compass" of preexisting "equitable principles . . . [,] historical usage, statutory developments, and judicial decisions," the same-claim provision poses a serious constitutional issue that *Felker* did not resolve.

Hertz & Liebman, *supra* § 28.4(a), at 1326. The Hertz & Liebman treatise's caution is enhanced by this Court's reluctance to apply strict rules of *res judicata* in habeas corpus cases:

> [T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude strict rules of *res judicata*. Thus, for example, in *Sanders v. United States*, 373 U.S. 1 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." *Id*., at 15-17. The *Sanders* Court applied this equitable principle even to petitions brought under 28 U.S.C. § 2255, though the language of § 2255

> contained no reference to an "ends of justice" inquiry. 373 U.S. at 12-15.

*Schlup v. Delo*, 513 U.S. 298 (1995) (alternate citations omitted).

The Eleventh Circuit's categorical rule prohibiting any Rule 60(b)(6) jurisdiction below—inferring as applicable § 2244(b)(1)'s blanket prohibition of same-claim habeas petitions—raises grave questions about whether its interpretation suspends the Writ in violation of the Constitution. Such a result would be constitutionally unacceptable, and for that precise reason, should trigger the Court's doctrine of constitutional avoidance. As this Court demonstrated in *Slack*, *Felker*, *and Martinez-Villareal*, the proper course is to interpret AEDPA to avoid the unconstitutional result, incorporating instead "earlier habeas principles" that allow the law and Constitution to coexist.[16]

**(2) Categorical Denial of Rule 60(b) Relief for a Habeas Petitioner Wrongly Denied a Determination of the Claims Asserted Raises Grave Questions of Due Process of Law.**

Grave due process questions also arise from the Eleventh Circuit's formulation. A habeas petitioner, such as Mr. Gonzalez, has a statutory right to a single federal habeas corpus review of his state imprisonment. 28 U.S.C. § 2254. Denial of that right may violate the Fifth Amendment's assurance of due process of law.

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[16] Alternatively, if the doctrine of constitutional avoidance cannot avoid the conflict, the Court must address the constitutionality of § 2244(b)(1). In such case, we submit, the Court should hold that subsection (b)(1) is so far removed from the direction of the compass of preexisting equitable principles, historical usage, statutory developments, and judicial decisions, that it suspends the Great Writ in violation of the Constitution.

The right of federal habeas corpus is effected by statute, created by Congress, beginning with the Judiciary Act of 1789. The statutory right is subject to the constitutional dictates of the Due Process Clause.[17] *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 165 (1951) (Frankfurter, J., concurring) (recognizing principle in "full gamut" of cases involving "property and liberty"); *see, e.g., Evitts v. Lucey*, 469 U.S. 387 (1984) (denial of statutory entitlement to direct appeal subject to due process); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (denial of statutory entitlement to be considered for discretionary parole subject to due process); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (denial of statutory entitlement to welfare benefits subject to due process); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (denial of property under prejudgment replevin statute subject to due process). It matters not that the proceeding derives from a statute, as opposed to a constitutionally-mandated procedure. Due process inheres in statutory rights, as well.[18]

Congress has conferred by statute the right of a criminal defendant to a direct appeal. 28 U.S.C. § 1291. Congress has conferred by another statute, 28 U.S.C. § 2254, the right of a state prisoner to a single habeas corpus proceeding in federal court. Both rights protect liberty, ensuring that claims of

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[17] Due process of law is guaranteed by both the Fifth and Fourteenth Amendments. Although the latter is only applied to the states, due process has identical meanings under both amendments. *See Bloom v. Illinois*, 391 U.S. 194, 195 (1968) (applying due process protection to contempt proceedings: "The Fifth and Fourteenth Amendments forbid both the Federal Government and the States from depriving any person of 'life liberty, or property, without due process of law.").

[18] Although habeas corpus also has constitutional derivations, U.S. Const. art. I sec. 9 (Suspension Clause), the right to appeal a criminal conviction is purely statutory, not based on a constitutional right. *Abney v. United States*, 431 U.S. 651, 656 (1977). In this sense, due process in a federal habeas corpus proceeding is at least as compelling as it is in a direct appeal.

unjust imprisonment are heard and decided. Both rights have time limitations within which they must be perfected. Yet, if properly perfected, neither proceeding can be negated without due process of law. As with the parallel statutory right of appeal, the statutory right to habeas corpus "would be unique among state actions if it could be withdrawn without consideration of applicable due process norms" for "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution–and, in particular, in accord with the Due Process Clause." *Evitts*, 469 U.S. 400-01 (internal citations omitted).

To terminate a habeas corpus proceeding arbitrarily and erroneously, without determination of the petitioner's claims —then to deny jurisdiction to reconsider that error based on a clear intervening corrective decision—raises grave constitutional questions of due process of law. *Cf. Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) (by implication) (due process not violated because "defendants were given a full hearing . . . ; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation").

**(3) The Court of Appeals' Holding Raises Grave Constitutional Questions in Mr. Gonzalez's Case.**

Mr. Gonzalez complied with the statutory requisites for filing a timely federal habeas corpus petition under 28 U.S.C. § 2254, raising meritorious claims that constitute grounds for granting of the Writ. *See supra* at 13, n.10. His timely habeas corpus petition was improperly terminated by the district court, which misconstrued and miscalculated AEDPA's limitations period, without any ruling on his claims. He was deprived of any appeal of that error due to the court of appeals' erroneous construction of AEDPA's gatekeeping

certificate of appealability requirement (decided pre-*Slack*, when the Eleventh Circuit Court of Appeals still required a constitutional issue for issuance of a COA, even for procedural dismissals). *See Delancy v. Fla. Dep't of Corr*., 246 F.3d at 1330 n.2.

The confluence of AEDPA legislation and erroneous court rulings deprived Mr. Gonzalez of habeas review to which he was entitled and appellate review to correct that error, ultimately effecting an arbitrary and complete denial of the statutory right of habeas corpus review, suspending the Writ, and denying the most basic precepts of due process. Once this Court decided *Artuz v. Bennett*, correcting the legal interpretation of the previously misconstrued AEDPA limitations period, Rule 60(b)(6) was the only available procedural device to prevent injustice and remedy the due process violation.[19] Permitting another provision of AEDPA—or the spirit of AEDPA—to effectively repeal, *sub silentio*, Rule 60(b)(6) jurisdiction again suspends the Writ and denies due process of law, something the Court's precedents have taken care to avoid.

### E. Rule 60(b) Complements and Coexists Peacefully with AEDPA.

The premise of the Eleventh Circuit's decision is that "[t]he discretion to reopen final judgments contemplated in most provisions of Rule 60(b) cannot co-exist in a habeas case with § 2244(b)." 366 F.3d at 1271, JA-[]. To the contrary, Rule 60(b) and AEDPA complement each other and coexist peacefully. Indeed, a part of AEDPA depends for its constitutionality on a vibrant Rule 60(b) in habeas corpus cases.

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[19] *See* note 9, *supra*.

Section 2244(b)(1)'s absolute ban on SSHP's in 2254 proceedings, as amended by AEDPA[20], is far beyond the compass of preexisting equitable principles, historical usage, statutory developments, and judicial decisions. *See* Hertz, et. al, *supra* § 28.4, at 1324-25. Its novelty is at cross-currents with the inertia of history and the Court's precedents. *Id*. The bold absoluteness of the ban calls into question whether it suspends the Great Writ. *Id*. This is especially problematic where, as here, a first habeas petition is dismissed improperly without a ruling on the prisoner's claims. *Lonchar*, 517 U.S. at 324. Under the Court's doctrine of constitutional avoidance, 2244(b)(1) should be interpreted in a manner that sustains its constitutionality, if possible. A robust Rule 60(b) serves that end.

**(1) Rule 60(b) Complements AEDPA, Serving the Same Ends in Similar Ways.**

Rule 60(b) and AEDPA are complementary. Rule 60(b) accomplishes in a narrow sense precisely what AEDPA legislated more broadly—a set of rules for when *res judicata* may yield in order to correct an injustice. In 28 U.S.C. § 2244(b)(2), as amended by AEDPA, for example, Congress has authorized a variety of events that trigger a prisoner's right to have a *new claim* heard in a second or successive habeas petition. Such a new claim is based, by statute, on qualifying changes of law or facts.[21] Such developments have

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[20] 28 U.S.C. § 2244(b)(1) provides: "A claim presented in a second or successive habeas corpus application under 2254 that was presented in a prior application shall be dismissed."

[21] 28 U.S.C. § 2244(b)(2) permits the filing of a second or successive habeas application if a claim was not presented in a previous application and:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the

no temporal limits and the terms of AEDPA authorize new habeas claims and hearings in perpetuity, for as long new legal or factual developments occur. Congress plainly legislated AEDPA with a view that habeas judgments would not be absolutely *res judicata*, recognizing that justice might demand otherwise, and that the events triggering new proceedings could occur at any time after an original habeas judgment.

Rule 60(b) serves similar interests but in a less invasive way since it does not authorize a *new petition* or *new claim* at all. Rather, it simply authorizes a habeas court to reopen the *original* habeas judgment to revisit the *original claim* based on one of the grounds enumerated in Rule 60(b). Unlike 2244(b)(2), which has no temporal limits, a Rule 60(b) motion must be made "within a reasonable time" and for motions based on the grounds contained in subsections (1)-(3), the filing must be within the year after judgment is entered. Rule 60(b) parallels 2244(b)(2), with a more narrow application. The Rule comports with congressional intent that habeas judgments could be revisited.

The thrust of Rule 60(b) is to prevent the continuation of an unjust result based upon an otherwise final judgment, that, due to new developments, is now wrong. *See Agostini v. Felton*, 521 U.S. at 239 (relief appropriate where permanent injunction rests on legal principle that can no longer be sustained). It allows a court to relieve a litigant of a judgment that otherwise has a continuing significant impact for a significant duration. *Id*. Sections 2244(b)(2) and 2244(d)(1)(C) serve that same end, allowing the opening or reopening of

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facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

habeas corpus proceedings based on qualifying changes in law or fact.

Unless a district court retains its traditional authority under Rule 60(b)(6), the plain language of AEDPA could result in inexplicable anomalies. Consider a single illustration based upon the Court's decision three Terms ago in *Atkins v. Virginia*, 536 U.S. 334 (2002), holding that the execution of mentally retarded criminals is cruel and unusual punishment prohibited by the Eighth Amendment. *Atkins* has been made retroactive by the Court to cases on collateral review.[22] By any standard of AEDPA the decision should be applicable to all qualifying mentally retarded death row inmates. Without the assistance of Rule 60(b)(6), however, application of *Atkins* to mentally retarded death row prisoners would be disparate and inequitable.

Those on death row who never filed a habeas petition had a new year after *Atkins* to file a petition with an *Atkins* claim. *See* 28 U.S.C. § 2244(d)(1)(C) (limitation period commences on "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review").

Those on death row who previously filed a habeas petition that overlooked the Eighth Amendment issue were entitled to file a second or successive petition raising the *Atkins* claim, in accordance with 28 U.S.C. § 2244(b)(2) ("A claim presented in a second or successive habeas corpus application under section 2254 *that was not presented in a prior application* shall be dismissed unless—(A) the applicant shows that the

[22] *See In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003) (holding *Atkins* has been held retroactive by the Supreme Court based on reasoning in Justice O'CONNOR's concurrence in *Tyler v. Cain*, 533 U.S. 656, 668 (2002), that a decision can be made retroactive by application of a series of Supreme Court holdings that logically dictate that result).

claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . . .") (emphasis added).

Neither 2244(d)(1)(C) nor 2244(b)(2) apply, however, to diligent death row prisoners who previously filed a timely habeas petition including a claim for the right later recognized in *Atkins*, but were unsuccessful, and whose judgment became final. Those diligent prisoners do not qualify for relief because 2244(d)(1)(C) applies only to those who have not previously filed a habeas petition, and § 2244(b)(2) restricts permission for such a claim to one "that was not presented in a prior application." *See In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003) (successful movant under *Atkins* must show proposed claims in successive petition "have not previously been presented in any prior application"); *In re Campbell*, 82 Fed. Appx. 349, 2003 WL 22682129 (5th Cir. 2003)(same); *see Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (Loken, J., dissenting) (observing that § 2244(b)(2) relief is for claims "not previously presented"). Left out of relief by 2244(b)(2), diligent death row inmates fit squarely within the absolute bar of 2244(b)(1): "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Those inmates, who were mentally retarded when they committed the crime for which they were sentenced to death, could be executed.

Of the three categories of death row inmates, only the diligent ones are unable to benefit from *Atkins*' constitutional holding. This bizarre and likely unconstitutional outcome is completely unavoidable if Rule 60(b)(6) is held to be silently superseded by AEDPA. Rule 60(b)(6) saves the rationality and likely the constitutionality of AEDPA by permitting a district court to exercise its discretion to apply the intervening (corrective) change of law under *Atkins* as a basis to reopen the final judgment and apply the decision, as appropriate. In

that way, rather than being "[o]ne of the most popular vehicles used in the attempted end-runs" around AEDPA, as the Eleventh Circuit describes Rule 60(b), *Gonzalez*, 366 F.3d at 1256, JA-24, the Rule is an important and vital complement to 2244(b).

**(2) Rule 60(b) Coexists Peacefully with AEDPA**.

This is not to say that Rule 60(b) is an open door to arbitrary reopening of final judgments in habeas corpus cases. The Rule is to be used only in rare cases and the limited record of successful motions supports that. One treatise observes:

> The cases show that although the courts have sought to accomplish justice, they have administered Rule 60(b) with a scrupulous regard for finality. Thus, they have held that a motion must be made within a "reasonable time" . . . . They have prevented the needless protraction of litigation by requiring the party to show a good claim or defense. . . . Relief will not be given if substantial rights of the moving party have not been harmed by the judgment.

11 Wright, et al., *supra* § 2857, at 260-62 (footnotes and citations omitted). This chariness has been applied especially in the case of Rule 60(b)(6) motions. Although this subsection allows relief for intervening changes in law, *Klapprott*, 335 U.S. at 614-15, coupled with extraordinary circumstances, *Ackermann*, 340 U.S. at 199, this hardly means that every intervening change in law justifies reopening every final habeas judgment. To the contrary, "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6) . . . ." *Agostini v. Felton*, 521 U.S. at 239.[23]

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[23] In the context of intervening legal developments, the *Agostini* Court also observed that application of Rule 60(b) is constrained by the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) ("new constitutional rules of

In part for this reason, comparatively few Rule 60(b)(6) motions have been granted in habeas corpus cases, post-AEDPA. Although AEDPA itself caused an initial flurry of threshold circuit decisions about the cognizability of 60(b) motions and the need for a COA to appeal adverse decisions, the number of successful 60(b)(6) motions is paltry. Only one category—which arises rarely—has been commonly applied in the habeas corpus setting and that is the circumstance presented here: The underlying proceeding was terminated without reaching the merits, but an intervening decision demonstrates that it was done based on a misinterpretation of the procedural requirements of the habeas corpus law. Thus, for example, the very few reported cases reveal that relief has been granted where there are extraordinary circumstances coupled with intervening changes in the law of exhaustion, *Devino v. Duncan*, 215 F. Supp. 2d 414 (S.D.N.Y. 2002) (granting 60(b)(6) motion reinstating dismissed first petition due to intervening Supreme Court decision), or the law regarding the statute of limitations. *Vega v. Artuz* 2002 WL 252764 (S.D.N.Y. Feb. 20, 2002) (granting 60(b)(6) motion but ultimately denying relief on the merits); *Tal v. Miller*, 1999 U.S. Dist. LEXIS 652 (granting Rule 60(b)(6) relief to reopen first petition erroneously dismissed as time-barred, based on intervening Court of Appeals decision changing law on computation of one-year grace period); *Reinoso v. Artuz*,

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criminal procedure will not be applicable to those cases which have become final before the new rules are announced"). *Agostini*, 521 U.S. at 239. But the *Teague* doctrine is inapplicable here, since the intervening change in law, *Artuz v. Bennett*, 531 U.S. 4, relates to the federal habeas corpus proceeding itself, not to the underlying state court criminal prosecution. *See Teague*, 489 U.S. at 305, 311 (addressing retroactivity of new rules for the conduct of "criminal prosecutions" and the reliability of findings of guilt in original state court proceedings); *see, e.g., O'Neal v. McAninch*, 513 U.S. 432 (1995) (applying clarification of rules for deciding habeas corpus cases when evidence is in equipoise).

1999 U.S. Dist. LEXIS 7768 (same); *Robles v. Senkowski*, 1999 U.S. Dist. LEXIS 11565 (same). As these cases reveal, extraordinary circumstances occur where the original termination misconstrued the law, effectively resulting in a denial of a first Writ. These cases mirror the circumstances of Mr. Gonzalez's case.

**(3) The Functional Approach Followed in the Vast Majority of Circuits is a Straightforward Formulation for District Courts to Follow.**

The Eleventh Circuit's categorical bright line rule against Rule 60(b) jurisdiction has been rejected by every other circuit, save one. And for good reason. As Chief Judge Edmondson observed in his separate opinion, the Eleventh Circuit's categorical approach is a "sharp-edged formulation . . . of Rule 60," 366 F.3d at 1286, JA-79, which dispenses with case-by-case analysis: "It might be easier because this approach seems to require less deliberate study of the pertinent motion—study to determine accurately not just the name of the pertinent motion, but the function of the motion . . . ." *Id*. Yet, the functional approach adopted by the vast majority of circuits rejects the Eleventh Circuit's "categorical" and "rigid" approach precisely because it prohibits too much, not even allowing the judge to study the 60(b) motion to see if it covers permissible ground that "will not run afoul of AEDPA." *Abdur'Rahman*, 392 F.3d at 179.

The functional approach is not complex nor unduly burdensome. It requires the district judge to study the motion to determine if it is a proper Rule 60(b)(6) motion, or if it is an SSHP in disguise. *See, e.g., supra* at 13 n.10. In the latter case, the motion is simply dismissed. *Id*.

In the case of a proper motion, such as Mr. Gonzalez's, 366 F.3d at 1262, JA-34, the district judge then decides if it was filed within a reasonable time, and if so, if there exist the kinds of extraordinary circumstances that permit exercising

judicial discretion to reopen the judgment. *See, e.g*., decisions cited *supra* at 28-30, 45-46.

Where the motion is brought based on an intervening change in law, as under Rule 60(b)(6), a threshold determination must be made about the application of the doctrine of *Teague v. Lane*, 489 U.S. 238. *See Agostini*, 521 U.S. at 239. If the question is *Teague*-barred, the motion is simply denied. *Id.; see, e.g., Williams v. Chrans*, 1994 WL 630598, No. 87 C 2084 (N.D. Ill. Nov. 8, 1994) (denying 60(b) motion because underlying issue is barred by the *Teague* doctrine). If the issue is not *Teague*-barred, then the district court considers whether the intervening change in law impacts the continuing validity of the final habeas judgment and whether extraordinary circumstances exist for granting the motion.

The extraordinary circumstances a case presents will be, in most instances, fact specific. They include, for example, whether a first petition was decided on the merits and if refusal to reconsider the claim leads to continuing injustice that cannot be justified under current law. *Cf. Agostini*, 521 U.S. 238-39. Extraordinary circumstances include, as here, that the petitioner's habeas claims have facial merit, were never determined on the merits, and that continued enforcement of the judgment of imprisonment for an additional extended term is unjust. Mr. Gonzalez meets all three considerations, especially the last one, because there are 76 years remaining on his 99-year sentence of imprisonment.

* * *

Fifty-five years ago Justice Frankfurter paused to reflect on jurisprudential fallibility: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee, Collector of Internal Revenue v. Union Planters Nat'l Bank & Trust*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). It is fitting that these words are

recorded in the *United States Reports* on the page immediately preceding the decision in *Klapprott v. United States*, 335 U.S. 601, the Court's seminal Rule 60(b)(6) case. Congress seemingly understood the fallibility of habeas review, adopting AEDPA against a backdrop that included Rule 60(b), and specifically adding other exceptions to *res judicata* of habeas judgments. Giving full effect to this statutory scheme, including both § 2244(b) and Rule 60(b), fulfills the intent of Congress and the requirements of the Constitution.

## CONCLUSION

Based upon the foregoing brief, the Court should reverse the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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