

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AURELIO O. GONZALEZ, :

4 Petitioner :

5 v. : No. 04-6432

6 JAMES V. CROSBY, JR., :

7 SECRETARY, FLORIDA :

8 DEPARTMENT OF CORRECTIONS. :

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10 Washington, D.C.

11 Monday, April 25, 2005

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 11:05 a.m.

15 APPEARANCES:

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17 Miami, Florida; on behalf of the Petitioner.

18 CHRISTOPHER M. KISE, ESQ., Solicitor General, Tallahassee,  
19 Florida; on behalf of the Respondent.

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21 General, Department of Justice, Washington, D.C.; on  
22 behalf of the United States, as amicus curiae,  
23 supporting the Respondent.

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CHIEF JUSTICE REHNQUIST: We'll hear argument now in Aurelio Gonzalez v. James Crosby.

Mr. Rashkind.

ORAL ARGUMENT OF PAUL M. RASHKIND

ON BEHALF OF THE PETITIONER

MR. RASHKIND: Mr. Chief Justice, and may it please the Court:

We confront today the Eleventh Circuit's categorical and jurisdictional prohibition of rule 60(b) in habeas corpus cases absent fraud. That is a rule that has been rejected by nearly all of the other circuits and, in fact, has been rejected by the United States in its amicus brief filed in this case.

We urge the Court to adopt instead the approach of the other nine circuits that have commented on this issue, the functional approach, in which a court is deemed to examine each motion individually to determine whether or not the motion comports with both rule 60(b) and AEDPA.

I think the test we proposed here is a fairly simple one, although I'm not sure in the briefing it comes across as being as simple as it really is, but the test we are proposing, as opposed to the test proposed by the United States, is the one being used in nearly all of the

1 other circuits and it has percolated through the system as  
2 one that seems to work very well. It's a two-part test  
3 and it's very simple I think.

4 First, does the motion that's filed challenge  
5 the Federal judgment on a ground cognizable under one of  
6 the six prongs of rule 60(b)? If not, if it's really a  
7 new claim, if it is not within one of the six prongs of  
8 rule 60(b), then simply the district court denies it.

9 If, on the other hand, the motion is a true  
10 60(b) motion, as ours was in this case, then the court  
11 goes to step two, which is to examine which is the six  
12 prongs is implicated, what is the jurisprudence regarding  
13 the six -- that particular prong, and how would it apply  
14 in this particular case. That's the functional approach  
15 that most of the circuits have been using.

16 JUSTICE KENNEDY: At that point when the court  
17 makes that examination under your rule and it comes to  
18 point six --

19 MR. RASHKIND: Yes.

20 JUSTICE KENNEDY: -- does it refer at any point  
21 or in any circumstance to AEDPA?

22 MR. RASHKIND: It does not but -- but point six  
23 has been cabined by jurisprudence. Although point six  
24 appears to be a wide-open door for any motion to be filed  
25 and granted, the courts, even before AEDPA, have treated

1 category six as one that requires extraordinary  
2 circumstances.

3           We have been able to quantify. Both an amicus  
4 who filed on behalf of the petitioner and the United  
5 States and the respondent have quantified the number of  
6 cases that have gone through the rule 60(b) process.  
7 There have only been, since AEDPA was passed, 28  
8 successful motions that we can quantify, that are  
9 published in any way. And we would like to think, at  
10 least, that if the State or the Federal Government thought  
11 there was an inappropriate application, it would have been  
12 raised on appeal and we'd have that statistic. 28 in the  
13 9-year history of the statute means fewer than 3 per year  
14 -- or slightly more than 3 per year for the whole country,  
15 a fraction for circuits.

16           JUSTICE O'CONNOR: Well, if we were to make  
17 clear that 60(b) is widely available, even category six,  
18 don't you think -- and as a result the AEDPA restrictions  
19 don't apply, don't you think that number would increase  
20 rather dramatically?

21           MR. RASHKIND: I do not. And I do not because  
22 at this point apparently nine circuits are following the  
23 rule we propose, and so the statistics that both the  
24 respondent that we bring to you are that small, are that  
25 infinitesimal because the courts have always treated 60(b)

1 as a last ditch, extraordinary circumstances required.  
2 One can go through each of the six prongs and easily  
3 hypothesize examples that are appropriate, (b) (1),  
4 (b) (2) --

5 JUSTICE O'CONNOR: Well, there's no language in  
6 category six referring to extraordinary circumstances, any  
7 other reason justifying relief.

8 MR. RASHKIND: The Court in the Ackermann  
9 decision -- there were two early decisions construing  
10 60(b). The first was the Klapprott decision in which the  
11 Court recognized that 60(b) is intended to correct the  
12 kind of errors that might occur that are important. The  
13 Ackermann decision followed a year later and said,  
14 however, this is not a wide-open door. Extraordinary  
15 circumstances are required.

16 CHIEF JUSTICE REHNQUIST: But it's still very  
17 vague.

18 MR. RASHKIND: It is but it isn't. It's vague  
19 in terms of reading the simple rule, but it's not vague if  
20 one considers the jurisprudence that surrounds the rule.  
21 One cannot ignore a half-century of -- of decisions, which  
22 have rejected 60(b) (6) and other 60(b) --

23 JUSTICE BREYER: All that is true, but I think  
24 that the court below and the other parties say -- almost  
25 everybody is on your side. However, they also note a

1 problem, and the problem is that given the very rigid  
2 structure of AEDPA and the imagination of lawyers, that if  
3 60(b) hasn't proved an escape hatch for getting around the  
4 AEDPA restriction, it will, and that what the lawyers will  
5 do is they will reconstruct what they'd like as a second  
6 habeas and put it in the form of a 60(b).

7           And so I can accept everything you say, but if  
8 that in the back of my mind is a concern running around  
9 Congress in this way, what form of words could you put in  
10 to restrict 60(b) to its domain which is the domain in  
11 which it's been used so far?

12           Now, the Criminal Justice Legal Foundation filed  
13 a brief in which they tried to do that. I thought that  
14 was a constructive effort. So what's your opinion --

15           MR. RASHKIND: Well, I would --

16           JUSTICE BREYER: -- about how best to do that?

17           MR. RASHKIND: I would prefer to rely upon the  
18 Court's principles in this regard.

19           JUSTICE BREYER: No, but that's --

20           MR. RASHKIND: Rhines -- Rhines v. Weber is of  
21 good help here. Rhines v. Weber, that the Court delivered  
22 just very recently, considered the interaction of a rule  
23 and of AEDPA, and I thought it very clearly set forth  
24 three principles which work well within the test here.

25           First, that there has to be good cause and good

1 cause, of course, is clear in the jurisprudence here, that  
2 we're talking about extraordinary circumstances, not a  
3 simple legal error. In this case, for example, the  
4 extraordinary circumstance is that, for all intents and  
5 purposes, my client has been denied his first petition of  
6 right because the court foreclosed the issues erroneously.  
7 So good cause is the first thing that I learned from  
8 Rhines.

9           Secondly, that there have to be potentially  
10 meritorious underlying issues. Now, that's going to  
11 filter out a lot of the cases because you can't come into  
12 court with another issue that might not be good, it  
13 mightn't be an unexhausted issue, it might be --

14           JUSTICE SCALIA: It's pretty flabby.

15           MR. RASHKIND: -- one procedurally defaulted.

16           JUSTICE SCALIA: It's pretty flabby.

17 Potentially meritorious? Not probably, potentially.

18           MR. RASHKIND: Well, it is -- it is the  
19 terminology used in Rhines. And what I'm trying to do  
20 here for the Court is to draw upon your own authority, the  
21 words you've spoken, as opposed to the test proposed by  
22 the Criminal Justice Foundation and by the United States,  
23 which are interesting tests but in no way depend upon the  
24 Court's own jurisprudence. I'm trying to offer the Court  
25 its own tests that have worked.



1 CHIEF JUSTICE REHNQUIST: But this is going to  
2 be taken up by some 800 district judges and a couple  
3 hundred appellate judges, and they're the ones who have  
4 the final say in most of these cases just because we  
5 decide so few.

6 MR. RASHKIND: And I think that's why this test  
7 works.

8 The third point would be that there be  
9 timeliness.

10 JUSTICE O'CONNOR: Well, aren't we dealing here  
11 with a time bar issue?

12 MR. RASHKIND: We are.

13 JUSTICE O'CONNOR: I mean, there -- there was  
14 not a determination below, but an extraordinary amount of  
15 time expired before the application was made. Why would  
16 that count as some extraordinary circumstance? Why  
17 shouldn't the petitioner be stuck with the time bar? I  
18 don't see how this fits even under your proposed rule.

19 JUSTICE KENNEDY: I was going to ask the same  
20 question. It's about as pedestrian an issue as you could  
21 get. It comes up all the time. I mean, this is not a  
22 cosmic legal issue.

23 MR. RASHKIND: It really isn't as pedestrian as  
24 it may have seemed. We underwent a change in the law, in  
25 AEDPA, that the Court has recognized is not fully clear.

1 And so this was one provision the Court had to clarify in  
2 Artuz v. Bennett, and there was a very small number of  
3 cases. I think we totaled eight in which relief was  
4 granted because district courts had incorrectly barred a  
5 petitioner from the first petition because it really  
6 wasn't a violation of -- of the statute of limitations.

7 JUSTICE GINSBURG: Why -- why did Florida deny  
8 relief in -- in the post-conviction? I mean, one reason  
9 that looks like it might apply is that Florida had a 2-  
10 year statute of limitations and this was brought up 14  
11 years later.

12 MR. RASHKIND: Well, it wasn't a 2-year statute  
13 of limitations, Your Honor. In fact, it was slightly  
14 different from the Federal statute of limitations as well.  
15 There is a provision that allows for newly discovered  
16 evidence to bypass the standard 2-year statute of  
17 limitations, which by the way, the Florida statute of  
18 limitations wasn't even adopted until well after my client  
19 was convicted.

20 As you know, he says that he was told at his  
21 sentencing proceeding, you'll serve 13 years, thereabouts,  
22 on a 99-year sentence, and that induced his plea of guilty  
23 in this case. And when 13 years came about, he inquired  
24 what's happening and they said, no, that's not going to  
25 happen. You have a release date of 2057.

1           And as I think the Court knows from its decision  
2   in *Linz v. Mathis*, Florida -- Florida statutes really  
3   changed in that way. Gain time was reduced gradually and  
4   then much more quickly so that someone who might have  
5   served 13 years in 1982 is really looking at serving the  
6   99.

7           JUSTICE GINSBURG: Are you saying that counsel  
8   -- what -- what he alleges counsel told him was, in fact,  
9   accurate at the time counsel said it, that somebody who  
10   got a 99-year sentence wouldn't have to serve more than 13  
11   years?

12           MR. RASHKIND: To be clear -- and -- and I want  
13   to be clear about his allegation is -- because he does not  
14   speak English -- that the interpreter told him this, and  
15   this was not during a plea colloquy. This was during  
16   discussions between the lawyer and the client through an  
17   interpreter in advance of the plea itself. And so his  
18   allegation has consistently been that that's what the  
19   interpreter told him his lawyer said.

20           JUSTICE O'CONNOR: But has that been  
21   determined --

22           MR. RASHKIND: No.

23           JUSTICE O'CONNOR: -- by some court? That's the  
24   allegation --

25           MR. RASHKIND: Correct.

1 JUSTICE O'CONNOR: -- pure and simple --

2 MR. RASHKIND: Correct.

3 JUSTICE O'CONNOR: -- yet to be determined.

4 MR. RASHKIND: And it's never been.

5 JUSTICE O'CONNOR: And so we have to know how  
6 the time bar element folds in here, and in an ordinary  
7 civil case, a time bar would be an adjudication on the  
8 merits. I mean, that -- that would end the case, and why  
9 would it be a different, more liberal rule in habeas?

10 MR. RASHKIND: It is because that's the way the  
11 Court has treated the rule. The Court has always --

12 JUSTICE KENNEDY: But you're -- you're saying it  
13 is extraordinary.

14 MR. RASHKIND: In a different sense I'm saying  
15 it. In terms of computing whether a time bar is on the  
16 merits, the Court has not used that concept, which does  
17 relate to some sort of civil proceedings. Plaut would  
18 make it appear first to money judgment type cases. But  
19 the Court has not used that standard, for example, in  
20 Martinez-Villareal, has not used it in Slack v. McDaniel.

21 Instead, the Court has not looked at the  
22 nomenclature of the order that dismissed the case or  
23 denied this case. Instead, the Court looks to did the --  
24 the court below address the claims of the petitioner. And  
25 of course, a claim of statute of limitations is not a

1 claim of a petitioner. That's an affirmative defense of  
2 the State.

3 JUSTICE SOUTER: Okay. Counsel, what -- that --  
4 that brings me to a question that I don't understand about  
5 your argument. It seems to me you're biting off more than  
6 you have to bite off here. Would you win on the following  
7 argument? And I will tell you in advance that it looks to  
8 me as though you would. But maybe there's some reason  
9 you're not making it.

10 Number one, your statute of limitations claim is  
11 not the kind of claim that AEDPA is concerned with when it  
12 deals with limits on second and successive petitions.

13 Number two, although a statute of limitations  
14 issue is on the merits, it is not on the merits in the  
15 second or successive petition category. In this case, you  
16 don't have to worry about making a -- an -- an AEDPA end  
17 run so far as second or successive goes, and therefore,  
18 60(b) can be used simply not as a wide-open door, but as a  
19 door that could be opened when your claim is a claim about  
20 a rule that barred you from getting into Federal court,  
21 which is what the statute of limitations rule does.  
22 That's all you're asking for.

23 MR. RASHKIND: That's right.

24 JUSTICE SOUTER: And finally, you have an  
25 extraordinary situation here because you have a later

1 determination in Artuz which declared the law not as a  
2 change in the law, but as what the law presumably meant  
3 from day one.

4 As I understand it, if we accepted that  
5 argument, you would win. Do you agree?

6 MR. RASHKIND: Yes, sir.

7 JUSTICE SOUTER: Then why don't you make that  
8 argument?

9 MR. RASHKIND: I do make that argument, and to  
10 the extent -- and -- and I make that argument, but that  
11 argument was rejected in the court below which addressed  
12 it with a completely different approach. And so I begin  
13 in this Court by having to address where I was in the  
14 Eleventh Circuit Court of Appeals.

15 JUSTICE GINSBURG: Can you go back to the  
16 district court before the Eleventh Circuit? You've now  
17 told me that the ground on which the Florida court denied  
18 relief was not based on the statute of limitations.  
19 Right?

20 MR. RASHKIND: Correct.

21 JUSTICE GINSBURG: In the Federal court, what is  
22 the ground on which relief was denied and how would Artuz  
23 affect that decision?

24 MR. RASHKIND: In the Federal court, the  
25 district judge said that the tolling provision would not

1 apply here because it was the district court's  
2 determination that it was untimely when filed in the State  
3 court. That was not, however, the position of the Florida  
4 courts.

5 JUSTICE SOUTER: No, but your -- your immediate  
6 concern is how do I get into a Federal court. Whether you  
7 win or lose once you get in there is another problem, but  
8 I -- as I understand it, that's not what we're dealing  
9 with here. And -- and the -- you -- you were kept out of  
10 the district court on a statute of limitations issue. If  
11 you can say -- if you argue all I've got in front of you,  
12 us, is a statute of limitations issue, that's all I want  
13 under -- to raise under 60(b) and I have an extraordinary  
14 claim here because of the subsequent Artuz decision, that  
15 will get you into Federal court, if we accept that  
16 argument. Whether -- whether you win or lose, once you  
17 get there, I don't know, and I don't know that that's  
18 before us.

19 MR. RASHKIND: And it is not clear. I wish it  
20 were because that's precisely what my pro se client wrote  
21 in his rule 60(b) motion. He said I have been denied my  
22 right to a first petition because of an incorrect  
23 determination on the statute of limitations, that the  
24 Artuz decision makes clear that I was entitled to a  
25 tolling period that I was not awarded, and I would like

1 the judgment modified or reopened. And that's as clear as  
2 a pro se litigant can make that claim. That's what the  
3 claim has been from the very beginning, long before I was  
4 ever his counsel.

5 JUSTICE BREYER: You -- you had a question.  
6 Remember my -- you were giving me the three principles to  
7 prevent the end run.

8 MR. RASHKIND: Yes.

9 JUSTICE BREYER: And the first was good cause.  
10 The second was potentially meritorious underlying issues,  
11 and the third is?

12 MR. RASHKIND: No indication of dilatory tactics  
13 by the plaintiff.

14 JUSTICE BREYER: Thank you.

15 MR. RASHKIND: And this is very helpful I think  
16 because it gives those three rules, which the Court has  
17 given us in Rhines, helped us and helped the district  
18 court to sort out the things that shouldn't be stopping or  
19 reopening proceedings.

20 JUSTICE STEVENS: May -- may I ask you a  
21 question that may be a little bit collateral? There was  
22 disagreement on the court of appeals, as I remember it, as  
23 to whether or not a COA requirement applies to a denial of  
24 a 60(b) motion. What is your view on that issue?

25 MR. RASHKIND: Well, I actually argued and I do



1 believe that it shouldn't require a COA. And the reason  
2 is because -- part of the reason is because this case  
3 began before Slack v. McDaniel and continued after. And I  
4 think that's where Judge Tjoflat's opinion came from. How  
5 can someone whose case is dismissed procedurally ever get  
6 a COA? It's impossible because there's never going to be  
7 a constitutional issue. By virtue of the procedural  
8 ruling, the constitutional was not addressed.

9           And Judge Tjoflat continued that dissenting  
10 position through the en banc decision, and I share the  
11 view that it is virtually impossible, if not completely  
12 impossible, in the typical case of a procedural resolution  
13 of the case, to ever get a COA.

14           In this case, majority would point to the  
15 fact the my client did receive a certificate of  
16 appealability, but I don't think there are many others who  
17 will every get it because the question presented was, is a  
18 rule 60(b) still viable post AEDPA? And that question  
19 won't recur, certainly not after the Court rules here.  
20 And I think the very genuine concern that Judge Tjoflat  
21 had was and that he -- that he articulated is it's  
22 virtually impossible to get appellate review.

23           One of the things we know about habeas corpus  
24 is --

25           CHIEF JUSTICE REHNQUIST: Well, we're not

1 talking about ordinary appellate review. We're talking  
2 about an appeal from an adverse decision by a Federal  
3 habeas court.

4 MR. RASHKIND: Correct.

5 CHIEF JUSTICE REHNQUIST: So that isn't quite  
6 as strange as you make it sound.

7 MR. RASHKIND: It is for this reason, Mr. Chief  
8 Justice. Before, you could file successive applications.  
9 In the early days of habeas corpus, you could file  
10 successive applications. And the reason given was there  
11 was no appeal. And so you could go from one judge to the  
12 next judge because there were no appeals. Then, of  
13 course, we had appeals, and the reason for having  
14 successive petitions would diminish.

15 But what has happened to the appeal in a habeas  
16 corpus case is it has become so constrained that in many  
17 respects it doesn't exist, and that's what happened here.  
18 Here's my client who faces a situation in which he has  
19 clearly been thrown out of court improperly, and he goes  
20 to the court of appeals to have that decision reviewed and  
21 can't get past the gateway of the certificate of  
22 appealability. And so he has no opportunity to really  
23 have an appellate review. He has none.

24 CHIEF JUSTICE REHNQUIST: Well, but maybe that's  
25 what Congress wanted.

1           MR. RASHKIND: I don't think Congress did intend  
2 that. When we looked --

3           JUSTICE O'CONNOR: But why isn't that always the  
4 case if it's time-barred?

5           MR. RASHKIND: If it is time --

6           JUSTICE O'CONNOR: If it's time-barred, you  
7 never have your chance to have the merits argued.

8           MR. RASHKIND: Well, that's one of the ways in  
9 which a case could be dismissed procedurally, but it's not  
10 time-barred if the court rules it was erroneously. And  
11 that's the concern that I think my client has here.

12           CHIEF JUSTICE REHNQUIST: But at what point do we bring  
13 this all to a halt? I mean, there's always one more argument  
14 to make that the last court to rule against me was wrong.

15           MR. RASHKIND: One of the nice things about rule  
16 60(b) is it really is a disciplined approach to a court  
17 examining its own mistakes. It isn't a wide-open door in  
18 any respect. It is a disciplined approach. There are six  
19 specific grounds, and even though the sixth one looks like  
20 it's wide-open, it certainly isn't under the jurisprudence  
21 of the Court.

22           And so what this does is provide a very  
23 important opportunity for a judge to be able to look at an  
24 intervening decision from the Supreme Court of the United  
25 States and say, I have denied this person what Congress

1 wanted them to have. There's no question. One reads  
2 AEDPA and one thing is very clear. They -- Congress  
3 intended for a person who has exhausted claims, not  
4 procedurally defaulted them in State court, and has filed  
5 a timely petition, that person under 2254 is entitled to  
6 have the claim entertained. And when a court makes a  
7 mistake, a procedural mistake, that forgoes or eliminates  
8 the opportunity for review, and that's barely reviewable on  
9 appeal, depending on how the certificate of appealability  
10 may be phrased -- and often these folks are pro se -- I  
11 think what happens is 2254 has failed and what Congress  
12 intended to happen isn't going to happen. The person was  
13 entitled to one petition, one bite at the apple and never  
14 receives that bite at the apple.

15 JUSTICE O'CONNOR: Well, now, the Federal  
16 Government has a different proposed rule than yours. Are  
17 you going to comment on their proposal?

18 MR. RASHKIND: I will. With due deference to my  
19 colleagues, it's 177 words long, over two pages. And  
20 that's why I thought that the approach that we brought to  
21 the Court from the other nine circuits is a simpler --  
22 what I would call a simple two-step.

23 Their approach actually can be read, as we did  
24 in our reply brief, to fit within our own rule, but I  
25 think the problem with the Government's rule is it is so

1 broad and it does not rely upon any of the Court's  
2 precedents in -- in its writing. And so what you do, if  
3 you adopt a rule like that, first of all, is create  
4 confusion. And secondly, what you do is you make a whole  
5 new set of rules that are separate and apart from what you  
6 -- the Court has previously done in its AEDPA  
7 jurisprudence.

8 To be able to touch upon *Slack v. McDaniel*, to  
9 be able to draw upon *Martinez-Villareal*, to be able to  
10 take from *Rhines v. Weber*, create a formula and a package  
11 that's familiar to the courts, to take a rule that's 177  
12 words long that the Government puts together that I  
13 interpret as being favorable to my client and they  
14 interpret as being unfavorable to my client, I think just  
15 puts the kind of difficulty in the courts that this case  
16 should try to avoid.

17 So my comment on it is that it may well, if it's  
18 read as we did in our reply brief, be the same thing that  
19 we're saying and what I refer to as a simple two-step  
20 test. And if not, it's just going to be a source of great  
21 confusion.

22 JUSTICE GINSBURG: What about the -- you -- you  
23 said 60(b) fits this like a glove because it's the  
24 district court correcting its own errors. But it isn't  
25 usually -- 60(b) was framed with the idea of the district

1 court being the very first instance court. And here you  
2 will have the district court as the third going up the  
3 ladder. So -- and -- and given that the habeas rules say  
4 that -- that civil rules are applicable but have to be  
5 modified to be compatible with habeas jurisdiction.

6 MR. RASHKIND: I think it's very important to  
7 realize that both rule 81 of the Federal Rules of Civil  
8 Procedure and rule 11 of the rules of habeas procedure,  
9 which the State would have us use as a constraint, really  
10 are the first things that tell us that there's supposed to  
11 be a functional approach. Both of those rules tell us  
12 that the rules apply to the extent that they're  
13 compatible, and so that's certainly not a categorical  
14 approach. That is a functional approach.

15 JUSTICE BREYER: But the -- the Government, by  
16 the way, seems a broader rule than yours. The only thing  
17 it rules out is new legal claims or new evidence. I don't  
18 see anything in your -- tell me if I'm wrong, but I don't  
19 see anywhere where you say we should be able to bring a  
20 60(b) motion based on new legal claims or new evidence.

21 MR. RASHKIND: New legal -- this is the part  
22 that I think we have to look both at 60(b) and the  
23 statute. New claims -- new claims -- are brought under  
24 2244(b)(2). Same claims are either going to be barred by  
25 (b)(1) or, if heard at all, under 60(b).

1 JUSTICE BREYER: That's what I said. I don't  
2 see how the Government hurts you. I think -- I think if  
3 you the Government's, you're even better off.

4 MR. RASHKIND: Well, I think that they're --

5 JUSTICE BREYER: I mean, it's even -- but I want  
6 to know why -- why -- there's some reason you don't like  
7 the Government, and -- and -- other than fact that they  
8 must hurt you in some way. I don't see how it hurts you.

9 MR. RASHKIND: Well, I don't think it does, but  
10 they do. So that troubles me.

11 (Laughter.)

12 JUSTICE BREYER: -- make us --

13 MR. RASHKIND: They make an argument that under  
14 their test, my client should not prevail. I can make an  
15 argument under our test my client prevails.

16 JUSTICE BREYER: And under their test too, you  
17 say it's applying the same rule of -- it's not a new  
18 claim. It's the same claim as -- as -- just that they --  
19 shows that the district judge got it wrong.

20 MR. RASHKIND: I think the heart of the  
21 Government's position is it requires a much more radical  
22 departure from general procedure than a simple change of  
23 law. But I don't think it's a simple change of law, for  
24 example, when it is an intervening decision that  
25 interprets a statute that was in effect and that the

1 mistake of not interpreting correctly is to effectively  
2 bar the first bite at the habeas apple.

3 Now, the Government does not give that ground in  
4 their test, and I think it's important that the Court  
5 leave that door open. And that's why I think our test is  
6 better and theirs in inadequate.

7 I think ultimately we come down to three issues  
8 that support the position that we're taking. Chief Judge  
9 Edmonson made note of this in his concurring and  
10 dissenting opinion. He was troubled that we were not  
11 giving effect to both laws that Congress had approved,  
12 60(b) and AEDPA. By virtue of the majority rule, 60(b)  
13 had been categorically eliminated. And I think the  
14 position we take before the Court today is that the Court  
15 should honor both provisions that Congress has adopted.

16 May I reserve the balance of my time?

17 CHIEF JUSTICE REHNQUIST: Very well, Mr.  
18 Rashkind.

19 MR. RASHKIND: Thank you.

20 CHIEF JUSTICE REHNQUIST: Mr. Kise, we'll hear  
21 from you.

22 ORAL ARGUMENT OF CHRISTOPHER M. KISE

23 ON BEHALF OF THE RESPONDENT

24 MR. KISE: Thank you, Mr. Chief Justice, and may  
25 it please the Court:



1           This case presents a fundamental inconsistency  
2 to this Court. Congress said through AEDPA that a habeas  
3 petitioner is to take all their claims, put them in one  
4 basket, bring them to court within 1 year, and a sovereign  
5 State is going to defend that judgment in Federal court  
6 one time. Rule 60(b) says, petitioner, use as many  
7 baskets as you need, take as long as you like, and the  
8 State, you're going to have to keep coming back over and  
9 over and over again.

10           And this case here presents that -- that very  
11 problem.

12           JUSTICE GINSBURG: Isn't that an exaggeration of  
13 how 60(b) works in practice? It isn't that every civil  
14 judgment can come back and back again with 60(b) motions.  
15 The district courts have been rather disciplined in  
16 handling 60(b) motions. So I think you have exaggerated  
17 what 60(b) does in the ordinary civil rules context.

18           MR. KISE: Well, respectfully, Justice Ginsburg,  
19 I -- I would disagree with that in this sense. I would  
20 disagree with it in the sense that as Justice O'Connor  
21 pointed out, if this Court were to open that door, I think  
22 you would see that sort of abuse. I think you would see  
23 that sort of manipulation of the process. I think you  
24 would see that sort of --

25           JUSTICE STEVENS: But have we seen it in the --

1 there are other circuits who do adopt that rule, aren't  
2 there? And have we seen the abuse you're describing?

3 MR. KISE: We have not yet, but I would submit  
4 to Your Honor that that is because there is still this  
5 uncertainty because this case is here before this Court,  
6 and -- and because this has not yet been approved. If  
7 this is approved by this Court, then you're going to see  
8 sovereign States like Florida dragged back in here nearly  
9 25 years later --

10 JUSTICE SOUTER: Well, that depends --

11 JUSTICE KENNEDY: Well, I had the same comment  
12 or the same reaction as Justice Ginsburg. Forget about  
13 the habeas area. Just in -- with general civil judgments,  
14 have there been Law Review articles saying that rule 60(b)  
15 undermines finality? People kept going back, back, and  
16 back. I -- I thought quite the opposite, that we were  
17 living very well with rule 60(b).

18 MR. KISE: Well, in -- in the ordinary civil  
19 context, that's perhaps correct, Your Honor, but -- but  
20 this isn't the ordinary civil context. This is the habeas  
21 context. And Congress has said that this is the structure  
22 that we want to take. This is the rule that we want to  
23 take. And as this Court has recognized that -- that AEDPA  
24 was passed with -- with this enduring respect for  
25 finality, this respect for the sovereignty of States.

1 State, you're only going to have to come back here one  
2 time. You're only supposed to litigate one time, one --  
3 all the claims in one basket. They're brought within 1  
4 year, and the State is to defend its judgment one time  
5 because --

6 JUSTICE SOUTER: Okay. But his -- his whole  
7 argument is you, State, get exactly what you're entitled  
8 to if I win on 60(b) because what I was entitled to and  
9 what you were entitled to was the 1-year statute but  
10 subject to the rule in Artuz. That's all you get, State.  
11 And what he is saying is, I want to get back into court so  
12 that I can have the statute of limitations -- the benefit  
13 of the statute of limitations as Artuz construed it. That  
14 means you, State, get what you want and I get my one  
15 chance. How is that an open door to the abuse that you're  
16 talking about?

17 MR. KISE: Well, Your Honor, again, there --  
18 there has to be some finality to the process, and -- and  
19 here what the petitioner got was at the time a  
20 perceptively correct view of the law.

21 JUSTICE SOUTER: He got what Artuz said was an  
22 erroneous view of the statute of limitations.

23 MR. KISE: 2 years after the district judge made  
24 his ruling in this particular case. And it -- it was in  
25 this particular case 2 years. It could be 10 years. It

1 could be 15 years, and that's the problem that we see is  
2 that if --

3 JUSTICE SOUTER: And do you -- do you think that  
4 there is -- that there is this -- this sort of tidal wave  
5 of -- of erroneous statute of limitations determinations  
6 that, if Artuz is applied, will suddenly be coming 5, 10,  
7 and 20 years into Federal court? I mean, it -- it -- your  
8 argument, in relation to his particular claim seems  
9 exaggerated.

10 MR. KISE: Well, Your Honor, it's not  
11 exaggerated when you look at it from the standpoint that  
12 -- that Congress intended us to be in court one time to  
13 defend this judgment in Federal court. We were there. He  
14 received a --

15 JUSTICE SOUTER: You -- you were there for the  
16 purpose of getting him booted out. I mean, you didn't --  
17 you didn't get into the merits of anything.

18 MR. KISE: Well, he received a -- a final  
19 disposition on the non-technical procedural basis which  
20 was the applicable law at the time. He received that  
21 adjudication and --

22 JUSTICE STEVENS: Well, it was not the  
23 applicable law at the time. The decision related back to  
24 before that hearing.

25 MR. KISE: Well, Your Honor, then that would,

1 respectfully, eviscerate any -- any notion of -- of the  
2 statute of limitations --

3 JUSTICE STEVENS: No. Sometimes there are law-  
4 changing decisions, but this was not a law-changing  
5 decision. It's a decision interpreting what the law was  
6 from the date of its enactment.

7 MR. KISE: But based on that, Your Honor, then  
8 there would be no statute of limitations. If -- if that  
9 decision came out 10 years from now, we would then be back  
10 in this Court on a 60(b) motion, which I would submit is  
11 fundamentally inconsistent with what Congress intended.

12 JUSTICE SOUTER: If there had been an Artuz  
13 violation and not every statute of limitations  
14 determination implicates Artuz.

15 MR. KISE: That's correct, Your Honor. But at  
16 the same time, there may be some other mistake or some  
17 other excusable neglect or some other issue that comes up.

18 I mean, what Congress intended to prevent is not  
19 just the successful filing of a 60(b) or the successful  
20 revisiting, if you will, of the judgment. It -- it  
21 intended to prevent the actual attempt itself. I mean,  
22 the idea is -- is that once this judgment is adjudicated,  
23 once we've had this adjudication, you are not to come  
24 back. You are not to --

25 JUSTICE SOUTER: Well, what -- what Congress was

1 principally concerned with -- Congress was concerned with  
2 two things. It was concerned with second and successive.  
3 That's not what is before us. Congress was also concerned  
4 with a 1-year statute of limitations. What is before us  
5 on that point is that this guy did not get the benefit of  
6 the statute of limitations that he had a right to get the  
7 benefit of, that there was a flat mistake of law. So by  
8 -- by recognizing his statute of limitations claim, we do  
9 not open the door to second and successive litigation. We  
10 open the door simply to Artuz problems on statute of  
11 limitations rulings and that's a pretty narrow category it  
12 seems to me.

13 MR. KISE: But I would -- I would respectfully  
14 disagree with Your Honor's premise that -- that he -- he's  
15 not seeking to revisit an adjudicated petition. He did --  
16 he is seeking, as -- as we see it, to --

17 JUSTICE SOUTER: Sure. Sure, he does. And if  
18 it's second and successive, he's going to get thrown out  
19 again.

20 MR. KISE: And we would submit that it is second  
21 and successive because it's seeking to revisit that  
22 adjudication, an adjudication that was had on a non-  
23 technical procedural basis.

24 JUSTICE BREYER: So that's the --

25 JUSTICE SOUTER: You may -- you may be right,

1 but that's what district courts are there for.

2 MR. KISE: But -- but the Congress intended to  
3 take that discretion away from the district courts.

4 2244(b) (1) says you will not look at it again, and  
5 2244(b) (3) says, in fact, that when you do go back to  
6 potentially revisit an issue, when you do go back to  
7 potentially look at a second or successive, that it's not  
8 even the same district judge that makes that  
9 determination. As in 60(b), you go back to the same  
10 judge. 2244(b) (3) says, no, a three-judge panel of a  
11 circuit court of appeals must first determine whether or  
12 not you even have a right to get in --

13 JUSTICE BREYER: That's also true of (b) (3).

14 MR. KISE: Yes, Your Honor --

15 JUSTICE BREYER: And not even the Eleventh  
16 Circuit said (b) (3). And therefore, you want to say  
17 absolute, or are we really talking about which 60(b)  
18 motions escape the strictures of AEDPA?

19 MR. KISE: Well, I -- I think we're talking  
20 about which 60(b) (3) motions -- or 60(b) motions do escape  
21 the strictures of AEDPA.

22 JUSTICE BREYER: And you're prepared to defend  
23 the -- the Eleventh Circuit.

24 MR. KISE: I -- I am , Your Honor.

25 JUSTICE BREYER: Correct, though you're alone on

1 that because even the Government doesn't and nor does the  
2 criminal justice.

3 But if you're prepared to defend them, I guess  
4 you'd say why is it that they will allow (b) (3), fraud on  
5 the court by the adverse party, to escape, but should your  
6 own witness turn out to have been committing his own fraud  
7 for whatever set of reasons, you can't.

8 MR. KISE: Well, I would -- I would say why  
9 fraud -- to answer your question, Your Honor, why fraud --  
10 let me back up first to the premise that -- that our  
11 position and the Government's position are that far apart.  
12 I would respectfully say that -- that we are not that far  
13 apart. I do not see that much light between the  
14 positions, although I know their brief leaves some room --

15 JUSTICE BREYER: Well, under I guess the  
16 Government, you can bring everything under 60(b). By the  
17 way, if they do bring a motion to reopen under 60(b)  
18 because of change of law, they're almost bound to lose.  
19 There are hardly any cases which find that an adequate  
20 ground under 60(b).

21 But they let you do anything under 60(b), I take  
22 it, as long as the claims presented do not -- as long as  
23 they are not trying to obtain relief on the basis of new  
24 legal claims or new evidence.

25 Now, I just noticed there's another one here.



1 Do not support habeas relief. Maybe that's the problem.

2 MR. KISE: Perhaps I --

3 JUSTICE BREYER: You explain. I -- I thought  
4 when I first read this, that this was quite broad, but I  
5 may not have read it perfectly.

6 MR. KISE: Well, and I don't want to pretend to  
7 speak for the United States because -- because that --  
8 that might cause me to misspeak.

9 But to answer your question about why fraud is  
10 different, I -- I have three bases for why fraud is  
11 different and why we think that that exception is the  
12 right exception.

13 One, this Court has said in the past that fraud  
14 is different than other things. In the Hazel case that's  
15 cited in Calderon, this Court has said that tampering with  
16 the administration of justice through fraud involves more  
17 than an injury to a single litigant. It is a wrong  
18 against the very institutions designed to safeguard the  
19 public, institutions that cannot tolerate fraud.

20 JUSTICE BREYER: So is that also true if his own  
21 witness has committed the fraud?

22 MR. KISE: Well, I -- I would -- our fraud  
23 exception that -- that we -- we are delineating here is  
24 material, intentional conduct that subverts the process.  
25 And it can't be just anyone, Your Honor.

1 JUSTICE BREYER: Yes.

2 MR. KISE: It needs to be someone in a position  
3 to subvert the process for -- for a purpose like the  
4 Government or the court if you -- if -- a judge that's  
5 been bribed in the unusual example of that, or -- or the  
6 -- the subornation of perjury in the Hazel sense. Those  
7 examples -- that would be fraud that I think is what this  
8 Court was talking about in Hazel --

9 CHIEF JUSTICE REHNQUIST: What about a claim  
10 that a witness perjured himself, a witness for the  
11 government, during trial?

12 MR. KISE: Well, a witness for -- a -- a claim  
13 that a witness for the government perjured himself during  
14 the trial would certainly implicate material, intentional  
15 conduct designed to subvert the process. And one of the  
16 advantages to using fraud is -- is that it is a familiar  
17 bright line, workable standard for district courts. And  
18 with fraud, you have to plead a little bit more  
19 particularly, and so you would avoid in some respects some  
20 of the question marks that would come up --

21 JUSTICE BREYER: And all I'm saying is exactly  
22 whatever criteria is met, that it happens to be his own  
23 witness, and sometimes your own witnesses do have their  
24 little games, you know, with prisoners, and so it's the  
25 same thing.

1 MR. KISE: Well --

2 JUSTICE BREYER: Does that not count too?

3 MR. KISE: Well, Your Honor, I think that would  
4 leave so much room for mischief, it would not be possible  
5 to contain the potential for -- for abuse. I mean, if  
6 every jailhouse snitch were -- were subject to -- to the  
7 -- the 60(b) exception that we're -- we're articulating  
8 here, if every -- every petitioner could simply say, well,  
9 my own witness that I put up on the stand -- that -- that  
10 witness perjured himself or herself, then -- then the  
11 opportunity for mischief would abound, and we would be  
12 back in the same position that we would be in general with  
13 -- with States having to respond again.

14 JUSTICE GINSBURG: Mr. Kise, this may be  
15 important. Do you agree with Mr. Rashkind that in the  
16 Florida court the dismissal or the denial of relief was  
17 not on the Florida statute of limitations --

18 MR. KISE: No, Your Honor. We -- we would  
19 submit that it is on the statute of limitations, that --  
20 that rule 3.850 provided the petitioner with 2 years  
21 within which to apply, and both of his petitions were  
22 dismissed on statute of limitations grounds. And I don't  
23 know that that matters --

24 JUSTICE GINSBURG: But it's not -- not clear  
25 from --

1           MR. KISE:  -- to the end result here, but -- but  
2   that -- that's our position.

3           JUSTICE GINSBURG:  That's not what the -- this  
4   is -- the -- the form of dismissal in the Florida Supreme  
5   Court doesn't tell us that.  It just says something about  
6   allegations contained therein do not constitute legal  
7   grounds for granting the new trial.

8           MR. KISE:  Your Honor may be referring to the  
9   second 3.850 dismissal, and that second 3.850 didn't meet  
10  the requirements of the successive rule.  There -- there  
11  was a first --

12          JUSTICE GINSBURG:  The first one was on the  
13  statute of limitations?

14          MR. KISE:  Yes, Your Honor, and then the second  
15  one was also on the statute of limitations in addition to  
16  the fact that it did not meet the requirements of -- of  
17  the successive rule because it was essentially the same  
18  claim raised again.  He raised the same claim a second  
19  time.

20          JUSTICE GINSBURG:  Do we have that anyplace at  
21  -- in the papers before us, the first -- the first  
22  dismissal in the Florida -- in the Florida trial court?

23          MR. KISE:  I'm not sure exactly where it is in  
24  the appendix, Your Honor.  Let me see.  I -- I don't know  
25  that we do.  I know we have reference to it, but I don't

1 know that we have the actual language.

2 JUSTICE GINSBURG: But you said --

3 MR. KISE: It is -- it is in the Eleventh  
4 Circuit opinion, I believe, Your Honor.

5 JUSTICE GINSBURG: -- that it was based on the  
6 Florida 2-year statute of limitations.

7 MR. KISE: Yes. I believe -- when I said  
8 opinion, I'm sorry. The Eleventh Circuit record, Your  
9 Honor. It is in the Eleventh Circuit record, the -- the  
10 decision of the Florida court. But it is not in the  
11 appendix before this Court.

12 But returning again to Justice Breyer, because I  
13 don't think I finished my three reasons.

14 The first was because this Court said and says  
15 fraud is different.

16 The second is because there never was a first  
17 review in that sense. I mean, they never obtained the  
18 first review that they -- they were seeking.

19 And the third is -- is the State's finality  
20 interest, which this Court has -- has recognized as -- as  
21 near paramount under certain circumstances, must yield  
22 where you have the presence of fraud. And -- and so  
23 that's why Florida maintains that this is the correct and  
24 -- and only exception. And -- and there are several  
25 reasons that we maintain that this is the correct and only

1 exception.

2           The first and -- and most important, and -- and  
3 as I started this presentation, is that this is the only  
4 exception that preserves congressional intent.

5           The second is -- is that AEDPA and rule 60(b)  
6 cannot coexist except in very narrow circumstances because  
7 they address the same subject matter in fundamentally  
8 different ways.

9           And the third is, as I mentioned before, because  
10 the court --

11           JUSTICE STEVENS: But is it correct that they  
12 address the same subject matter? Isn't 60(b) directed at  
13 the integrity of the habeas proceeding, whereas AEDPA is  
14 directed at the integrity of the original conviction?

15           MR. KISE: Well, I -- I would respectfully  
16 disagree with Your Honor because 2244(b)(1) does deal with  
17 the -- the revisiting of the Federal habeas petition. The  
18 2244(b)(1) specifically applies to the revisitation of the  
19 Federal habeas petition. And in -- in terms of how they  
20 deal with the same subject matter in different ways, as I  
21 began, AEDPA's whole purpose is to provide one basket of  
22 claims within 1 year so the State has to defend one time,  
23 and 60(b) allows for the potential -- and -- and I would  
24 submit to you more than just the potential if this Court  
25 were to approve a standard -- for -- for repetitive

1 claims, many baskets, many -- many years, and -- and many  
2 times that the State has to come back.

3           And as I say, in this case the -- the principle  
4 of finality is all but abolished in this case and all be  
5 eviscerated simply by the fact that nearly 25 years later  
6 Florida is still in this Court defending this judgment  
7 that was based on a guilty plea, not even a -- a  
8 conviction. And -- and as this Court recognized, albeit  
9 not as part of the holding, but -- but mentioned in -- in  
10 Calderon with respect to the enduring respect for  
11 finality, this is something that has survived both direct  
12 and post-conviction review in the State court system.

13           I mean, this is -- this is Federal review of a  
14 sovereign State's determination as to the application of  
15 its criminal laws, and Congress has made a policy  
16 determination that -- that that Federal review must be  
17 limited because State -- State exercise of its -- of its  
18 police power and -- and the enforcement of its judgments  
19 is something that needs to be respected.

20           And Congress -- because the power to grant  
21 habeas is given by written law, Congress has the power to  
22 make that policy determination. And while the petitioner  
23 argues that 60(b) somehow strikes a balance, I would  
24 submit to this Court that Congress has already struck that  
25 balance. Congress has already made that determination.

1 There isn't another balance to be struck by the use of  
2 60(b), but that a balance has already been struck by  
3 Congress and Congress has made a determination that in  
4 most circumstances finality is going to trump.

5 And this isn't a perfect system. There are  
6 going to be exceptions with any bright line rule. With  
7 any bright line rule that this Court has ever carved  
8 out --

9 JUSTICE GINSBURG: Didn't Congress rule -- rule  
10 out 60(b) in -- in death cases?

11 MR. KISE: I'm sorry, Your Honor. Specifically  
12 rule out 60(b) --

13 JUSTICE GINSBURG: Yes, yes.

14 MR. KISE: -- in -- in capital cases.

15 JUSTICE GINSBURG: Yes.

16 MR. KISE: I don't know -- under the statute?

17 JUSTICE GINSBURG: Yes. I may be wrong about  
18 having --

19 MR. KISE: I'm not certain. We -- we're  
20 submitting that the Congress under -- under AEDPA ruled  
21 out 60(b) in all cases with the exception of -- of the  
22 fraud.

23 JUSTICE GINSBURG: I thought there was a special  
24 provision for capital cases.

25 MR. KISE: I don't believe so, Your Honor.



1           But with respect to the bright line rule that --  
2   that we submit is necessary to effectuate congressional  
3   intent, as I was saying, that it's not a perfect system.  
4   And the petitioner can come up with all manner of examples  
5   that -- that seem to implicate various policy  
6   determinations about what should or should not happen in a  
7   given situation.

8           But -- but our position -- and we believe the  
9   position of the Eleventh Circuit is -- is that Congress  
10   has already weighed that now. Congress has already made  
11   that determination. Congress has already told us where  
12   the line is going to be drawn and it's going to be drawn  
13   on the side of finality and it's going to be drawn on the  
14   side of respect for State sovereignty.

15           And I would -- would also submit that -- that  
16   the Sixth Circuit test and the functional equivalent  
17   approach test that's advanced by the petitioner ignores  
18   really both the statute and it ignores reality. It  
19   ignores the statute because AEDPA tells us you can't  
20   revisit an adjudicated habeas petition unless there are  
21   certain limited circumstances that are met. And it  
22   ignores reality because the only reason to revisit a  
23   habeas petition is to ultimately revisit the underlying  
24   State court judgment. And the only purpose for being  
25   there is to ultimately get at that State court conviction

1 that is -- that is under siege.

2 With respect to the coexistence, the petitioner  
3 made a point about this case is somehow like the Rhines  
4 case that was decided recently by this Court. But in the  
5 Rhines case, this Court was balancing the exhaustion  
6 requirements with the statute of limitations provisions.  
7 Here there's nothing to balance. Here this is just simply  
8 a prohibition. Congress says you cannot revisit except in  
9 these isolated, limited circumstances. And so rule 81,  
10 habeas rule 11, and this Court's decision in Pitchess all  
11 say that 60(b) does not trump if the habeas statute holds  
12 differently.

13 And finally, the courts do need a bright line  
14 that's not subject to variance, as I mentioned earlier.  
15 This is a workable standard. They're familiar with fraud.  
16 It's well defined in the case law. It requires more  
17 particularized pleading which makes less room for  
18 mischief, and it -- it gives the courts an easily  
19 identifiable standard by which they can effectuate that  
20 congressional policy, that congressional policy of one  
21 basket of claims within 1 year and the State will come  
22 into this Federal court one time to defend its sovereign  
23 judgment.

24 If there are no further questions, thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kise.

1 Ms. Millett, we'll hear from you.

2 ORAL ARGUMENT OF PATRICIA A. MILLETT

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

5 MS. MILLETT: Mr. Chief Justice, and may it  
6 please the Court:

7 Justice Breyer, let me assure you that our  
8 position is, if not as strict, only marginally less strict  
9 than the State of Florida's.

10 JUSTICE BREYER: On page 24, I read the or  
11 wrong.

12 MS. MILLETT: Okay.

13 JUSTICE BREYER: It's -- you meant the things on  
14 both sides of the or.

15 MS. MILLETT: It's very --

16 JUSTICE BREYER: And I was thinking the first  
17 side you'd allow, the second side you wouldn't. But if  
18 it's very, very strict, which now I understand it, because  
19 I read the or correctly when I went back.

20 MS. MILLETT: All right. I wanted to make  
21 sure --

22 JUSTICE BREYER: My question would be why.

23 MS. MILLETT: Yes. And -- and if you want a  
24 shorter statement -- I mean, a brief is a brief -- a short  
25 statement of what our test is, Justice Breyer, it's quite

1 simple, and that is a rule 60(b) motion that seeks to set  
2 aside a denial of habeas relief on the grounds that it was  
3 incorrectly decided is barred. That is the territory that  
4 AEDPA occupies. That includes, Justice Souter, not just  
5 determinations on the --

6 JUSTICE O'CONNOR: Would you say that again?

7 MS. MILLETT: A rule 60(b) motion that seeks to  
8 set aside a final judgment denying Federal habeas relief  
9 on the grounds that it was incorrectly decided is a second  
10 or successive petition under AEDPA. It can proceed only  
11 under AEDPA's terms, which change not only the standards  
12 for a second decision, but the decision-maker, the  
13 gatekeeper.

14 Justice Souter --

15 JUSTICE STEVENS: Is that a statement of when  
16 it's not available? I want to be sure I -- are you  
17 stating it positively or negatively?

18 MS. MILLETT: It --

19 JUSTICE STEVENS: It is not available in the  
20 circumstance you described. Right?

21 MS. MILLETT: That's right. It is -- it is --

22 JUSTICE STEVENS: Now, would you state -- tell  
23 us when it is available?

24 MS. MILLETT: Okay. The flip side of that, if I  
25 can -- the -- the title of section 2244 is finality of

1 determination. If you are seeking to upset a final  
2 determination, you are governed by 2244 not 60(b).

3 If you are not seeking to upset a final  
4 determination, let me give you the two -- the two  
5 circumstances that come to mind right away.

6 One is the fraud exception recognized by the  
7 court of appeals, and there could be similar errors like  
8 that -- and this is what we talk about in our brief -- that  
9 essentially vitiate the existence of a determination in  
10 the first place. They are that profound and that  
11 rudimentary. Then you are not upsetting what our system  
12 recognizes to be a determination and what Congress wanted  
13 you to have.

14 The other exception is essentially 60(a),  
15 clerical -- you're not -- errors. You're not really  
16 upsetting anything. You're actually trying to implement  
17 or effectuate the actual ruling by the court of appeals.

18 The only gap -- I'm not sure it's a gap at all  
19 after the argument here -- is that we don't limit it to  
20 fraud. We recognize that there are some other  
21 foundational, rudimentary, fundamental errors that  
22 conceivably could occur. I'm not aware of them happening,  
23 but something like a biased judge addressed by this Court  
24 in *Toomey v. Ohio*.

25 JUSTICE BREYER: But now you're into -- I mean,

1 you can use a tone of voice. You know, it sounds very  
2 strong. But I thought 60(b)(6) is weird things happen,  
3 and 60(b)(1) is there are all kinds of mistakes. You  
4 know, some of them can just be accidental. The lawyer was  
5 hit by a trolley. And in fact, all of 60(b) is meant to  
6 capture that kind of thing.

7 So it sounds like what you're saying is, sure,  
8 follow 60(b), maybe not the evidentiary, maybe not the new  
9 evidence part, follow it, but be sure you do so strictly.  
10 Are you saying more than that?

11 MS. MILLETT: I am saying a lot more than that,  
12 and that is, first of all, because the vast majority of  
13 things that are covered by 60(b) do not qualify as  
14 tantamount to fraud or a biased judge.

15 And -- and the second incredibly important thing  
16 is that Congress changed the decision-maker. Under 60(b),  
17 you have 645 individual district court judges applying the  
18 historic equity power to -- to overturn final judgments.

19 JUSTICE KENNEDY: Where -- where do you disagree  
20 with Judge Carnes?

21 MS. MILLETT: With Judge?

22 JUSTICE KENNEDY: With -- with the majority of  
23 -- in -- in the Eleventh Circuit.

24 MS. MILLETT: If that opinion is read -- and I  
25 think fairly it has to be -- as saying only fraud and not

1 errors of similar magnitude like a biased judge or some  
2 other complete breakdown so that our system doesn't  
3 recognize that to be a judgment -- it's not what Congress  
4 thought it was giving you -- then that would be -- I can't  
5 tell you there's cases where this happens, but that -- but  
6 the -- the rationale for including fraud would exclude --  
7 include some other similar errors of magnitude. That's  
8 our only --

9 JUSTICE O'CONNOR: Now, how do you apply it in  
10 this case, the Artuz problem?

11 MS. MILLETT: In -- in this case, the Artuz  
12 problem is only an argument, and I -- we're not even  
13 accepting that it's accurate, but only an argument that  
14 the court made a mistake of law. A mistake of law is not  
15 a fundamental breakdown in our system. It does not mean  
16 the court didn't act as a court. This Court reverses in  
17 -- or vacates in about 75 percent of its cases. It doesn't  
18 mean all the lower courts were not operating as courts as  
19 we recognize them as at the same level of fraud. It's  
20 routine to have mistakes of law --

21 JUSTICE BREYER: Well, suppose Artuz had been  
22 decided and it was in the mail and the judge forgot to  
23 open his advance sheets that day. And so he goes back to  
24 his office, says, oh, my God. You know, I mean, a weird  
25 thing like that. And of course, he says nobody has been

1 hurt yet. I'll reopen it. Okay? Is that all right?

2 MS. MILLETT: If he does it within 10 days under  
3 rule --

4 JUSTICE BREYER: Well, it's 10 days and a half.

5 MS. MILLETT: 10 --

6 (Laughter.)

7 MS. MILLETT: Then, Justice Breyer, the nature  
8 of lines is somebody falls on the other side sometimes.  
9 There's an appeal process to deal with exactly that.

10 JUSTICE BREYER: And the reason that it's  
11 happened is because all the lawyers were hit by four  
12 trolleys.

13 (Laughter.)

14 JUSTICE BREYER: I mean, you see what I'm doing?  
15 I'm simply trying to find cases that fit within the  
16 language, but they're very weird and justice cries out for  
17 a reopening. Now, that's what it seems to me one is  
18 about. Two is about. Three doesn't really. Three you  
19 agree applies. Two may not apply. Three you agree  
20 applies. Four I think you probably agree applies or not  
21 at all. Five doesn't apply at all, and six is anything  
22 under the sun.

23 MS. MILLETT: Justice Breyer, the problem is --  
24 and -- and Justice Souter, you referenced this. There  
25 have been many references to this, that 60(b) is not a



1 problem. It's already cabined out there. In fact, it's  
2 not. It's abuse of discretion review in courts of  
3 appeals.

4 We cite a case, Hamilton v. Newland, from the  
5 Ninth Circuit where they used 60(b)(6). The -- the  
6 petitioner filed his claims. They were clearly barred by  
7 the statute of limitations, not an Artuz problem. So he  
8 said, all right, I'm going back to Federal court with a  
9 60(b)(6) claim. I'm actually innocent. That puts me in  
10 60(b)(6). I admit actual innocence. It's -- it's a very  
11 weak claim. I can't been get relief on it. But the  
12 district court said, come on in. I'm going to decide your  
13 claims.

14 JUSTICE SOUTER: Well, maybe --

15 MS. MILLETT: And the -- and the --

16 JUSTICE SOUTER: -- maybe the district court  
17 shouldn't have done that, but whatever -- whatever was  
18 wrong there, it was merely a classic application of -- of  
19 review of a statute of limitations point. There -- there  
20 was much else involved and maybe it was improper.

21 My question, I guess, is why do you say that the  
22 -- why do you assume that the policy animating applying  
23 60(b) to a gatekeeping issue like statute of limitations,  
24 where there is an unusual circumstance as in Artuz, should  
25 be the same policy that animates applying 60(b), let's

1 say, when there is an attempt to -- to make an end run  
2 around the second and successive rules?

3 The latter I think we can all understand pretty  
4 readily. I mean, it's very important. You've got the --  
5 the -- AEDPA if you allow that.

6 With respect to this kind of a statute of  
7 limitations problem, what the guy is asking for is what he  
8 was entitled to under AEDPA as a matter of timing and  
9 gatekeeping. Why is the policy under 60(b) the same in  
10 those two cases?

11 MS. MILLETT: Justice Souter, there's two  
12 answers to that. The first is that this won't be -- it  
13 will be hard to limit this to a statute of limitations  
14 because the next argument is going to be procedural  
15 default, and the next argument is going to be  
16 misapplication of Teague's non-retroactivity principle,  
17 and the next one is going to be mistake in applying  
18 adequate, independent State grounds.

19 The -- a bulk -- a huge percentage of Federal  
20 court decision-making in habeas cases is procedural rules  
21 because Federal habeas is not a roving commission for  
22 error correction. You have to -- at -- in the same breath  
23 that you establish a constitutional violation, you have to  
24 show it's proper for Federal courts to act. Procedural  
25 default and statute of limitations are as much your job to

1 show to have Federal relief as it is to show that  
2 something went wrong under the Constitution. It's a --  
3 there's a dual character to Federal habeas relief. So  
4 this, in fact, is exactly part of the habeas -- this is  
5 part of the second or successive determinations that --  
6 applications that Congress wanted to bar.

7           And we have to step back and think about what  
8 would happen here. What we have is the State of Florida  
9 coming up 23 years after a guilty plea not because to  
10 defend -- once again, it's judgment. It's conviction not  
11 because of anything they did in the conduct of the trial,  
12 not because the guy claims to be actually innocent, but  
13 because almost 2 decades after the plea, a Federal court  
14 allegedly made a mistake of law that wasn't cleared up  
15 through the appellate process. That's not the point of  
16 Federal habeas corpus. That's not what it's supposed to  
17 be about.

18           But if we open the door, if we let the camel's  
19 nose in the tent, a camel is going to come behind it, and  
20 it's going to be procedural default, non-retroactivity of  
21 Teague, and all of the multiple other grounds on which  
22 Federal habeas decisions are made by courts.

23           JUSTICE GINSBURG: Did the Federal court make a  
24 mistake of -- of law if the -- if the Florida court  
25 dismissed under the Florida 2-year statute of limitations?

1 MS. MILLETT: Did -- did the Florida make a  
2 mistake of what --

3 JUSTICE GINSBURG: No, no. Did the Federal  
4 court. And suppose that the --

5 MS. MILLETT: No. I guess -- I think this Court  
6 is going to tell us. I think the -- the Pace v.  
7 DiGuglielmo case that this Court heard -- I think it was  
8 last month --

9 JUSTICE GINSBURG: It's sub judice, before us  
10 now.

11 MS. MILLETT: Right.

12 JUSTICE GINSBURG: But do you agree with Mr.  
13 Kise that the first dismissal in the Florida court, the  
14 first denial was on the Florida 2-year statute of  
15 limitations?

16 MS. MILLETT: My -- the order from the court, my  
17 understanding, simply denied it on the grounds of legal  
18 insufficiency, and it didn't give a further explanation.  
19 It doesn't say what exact grounds was, but if you look to  
20 what was argued by Florida, they were arguing on  
21 timeliness.

22 Thank you.

23 CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
24 Millett.

25 Mr. Rashkind, you have 4 minutes left.

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REBUTTAL ARGUMENT OF PAUL M. RASHKIND  
ON BEHALF OF THE PETITIONER

MR. RASHKIND: Thank you, Your Honor.

If I may begin by correcting what I think are two inadvertent mistakes, but important ones.

Justice Ginsburg, in answer to your question about the first State habeas, these are -- these documents are contained in -- in your record. They're noted at joint appendix 2-5.

The first State habeas was dismissed because it was not notarized. That's the sole basis for its dismissal: it was not notarized.

The second one was brought and denied, and the court specifically notes, as we note in the yellow brief, footnote 7 on page 12, it set forth the -- the court's grounds. It says the motion does not state grounds for relief.

At no point does Florida ever adopt the State's position that either of the petitions was untimely. The State court addressed them directly on the merits.

Justice Breyer, if I may, I can actually hypothesize several examples under subsection (5), of subsection (4), and perhaps even subsection (2) of rule 60(b), which would be permissible. For example, under (5), a judgment that should no longer have continuing

1 effect might be that the district court entered an  
2 alternative writ of habeas corpus, tried the defendant  
3 within 60 days or 90 days, or set him free. And when  
4 everyone gets back to State court, it becomes plainly  
5 apparent that can't be done within 60 days, and either the  
6 State or the defendant might go back and say, please,  
7 amend that order out of time. It's a final order. Please  
8 amend it to make it 180 days.

9           We can come up with examples, I think, for each  
10 of the provisions, and I think that's really what's  
11 interesting about this rule. It is written in a way  
12 that's durable against AEDPA, and it conforms nicely with  
13 AEDPA. And it does not take a lot of extra thought, it  
14 does not take a lot more than adopting the Court's  
15 previous holdings for us to be able to make it workable  
16 within AEDPA.

17           The fact that this case is now in its 25th year  
18 is a result of law and not of delay. Mr. Gonzalez alleges  
19 -- and no one has ever been able to say otherwise because  
20 we've never had a hearing -- that it took him 13 years to  
21 find out about the newly discovered evidence. He  
22 exhausted his claims for 4 years. He was only in Federal  
23 court for 1 year before the State raised a bar, a statute  
24 of limitations bar, which turns out to be incorrect. In  
25 the last 7 years, there's been litigation both in the

1 court of appeals and now before this Court caused by the  
2 State's argument that the case should have been dismissed  
3 on the statute of limitations.

4 My client is not responsible for the fact that  
5 it's the 25th year, but what we do know about this case is  
6 he has approximately 76 years remaining on his 99-year  
7 sentence. And unless he gets one bite at the habeas  
8 apple, he has not gotten what Congress directed he  
9 receive. Congress made one thing clear in AEDPA, and I  
10 think it's a good thing, and that is, if a defendant goes  
11 through and does what he's supposed to do in State court,  
12 he does not procedurally default the issues, he exhausts  
13 fully, and he timely files a petition, that was the  
14 candidate Congress wanted to have to get habeas review.

15 In this case Aurelio Gonzalez did all of those  
16 things, and he sits on the outside, having been told you  
17 get no bite at the apple, it's too late. And that's just  
18 plain wrong. And there's something wrong about that, and  
19 that's why there's rule 60(b).

20 60(b) is nothing but a coalescence of many great  
21 writs that were designed for one purpose and one purpose  
22 alone and that was to correct mistakes in extraordinary  
23 circumstances. There can be no more extraordinary  
24 circumstance than that a person is denied their right to  
25 habeas review, and that's what's happened here. And we

1 respectfully submit that rule 60(b) is the only and best  
2 tool to remedy the error made within the discretion of the  
3 district court, and we ask for that result.

4 Thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
6 Rashkind.

7 The case is submitted.

8 (Whereupon, at 12:04 p.m., the case in the  
9 above-entitled matter was submitted.)

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