No. 21-5726

IN THE SUPREME COURT OF THE UNITED STATES

DEXTER EARL KEMP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court correctly denied petitioner's motion under Federal Rule of Civil Procedure 60(b), which sought relief from an earlier order dismissing his motion under 28 U.S.C. 2255 as untimely.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Kemp v. United States, No. 18-cv-23173 (Nov. 15, 2018)

Kemp v. United States, No. 15-cv-21702 (Feb. 5, 2020)

United States v. Gray, No. 10-cr-20410 (Feb. 17, 2012)

United States v. Kemp, No. 10-cr-20224 (July 9, 2010)

United States Court of Appeals (11th Cir.):

Kemp v. United States, No. 20-10958 (May 25, 2021)

United States v. Gray, No. 12-10990 (Nov. 15, 2013)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the Federal Reporter but is reprinted at 857 Fed. Appx. 573. An earlier opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 544 Fed. Appx. 870.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2021. By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days

from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on September 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to possess with the intent to distribute cocaine base, cocaine, marijuana, and MDMA (ecstasy), in violation of 21 U.S.C. 841(a)(1) and 846; possession with intent to distribute up to 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1); possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c); and possessing ammunition as a felon, in violation of 18 U.S.C. 922(g) and 924(a). Pet. App. 11a. The district court sentenced him to 420 months of imprisonment, to be followed by eight years of supervised release. Ibid.; Judgment 3-4. The court of appeals affirmed. Pet. App. 11a-12a.

In 2015, petitioner moved to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 12a. The district court denied the motion as untimely. Ibid. In 2018, petitioner filed a motion under Federal Rule of Civil Procedure 60(b) seeking relief from the order dismissing his Section 2255 motion. Pet.

App. 12a-13a. The district court dismissed the Rule 60(b) motion. Id. at 1a-2a. The court of appeals affirmed. Id. at 1a-7a.

1. In 2009, police in Miami Gardens, Florida, identified petitioner as a dealer of crack cocaine, cocaine, marijuana, and MDMA (ecstasy). 544 Fed. Appx. 870, 874-875. Police captured petitioner discussing drug transactions with co-conspirators in a series of wiretapped calls. Id. at 878. In addition, the girlfriend of another drug dealer also saw petitioner supply her boyfriend with drugs and observed petitioner carrying a semiautomatic gun equipped with a laser sight. Ibid.

Searches of petitioner's car and residence further linked him to the drug trade. 544 Fed. Appx. at 878. In a search of petitioner's car, conducted with his consent as petitioner left the home of a co-conspirator, police found MDMA pills and marijuana in the compartment behind the door handle. Ibid. Two months later, a drug dog alerted to marijuana in the trunk of petitioner's car as he left the home of another co-conspirator, and during the ensuing search police found a box containing 9 mm ammunition in a pocket on the back of the front passenger seat. Ibid. And during a search of petitioner's residence in March 2010, police found 48 baggies of marijuana hidden behind the television in petitioner's bedroom, a small digital scale, a metal sifter, a gun holster, a gun box for a 9 mm pistol containing an empty magazine and magazine holder, and a photograph of a birthday cake for petitioner labeled "Boss." Ibid. In a post-Miranda statement, petitioner admitted

that he had bought ammunition at a store that did not conduct criminal background checks, but claimed that he no longer had the gun. Id. at 878-879.

2. A grand jury charged petitioner and several co-conspirators with, inter alia, conspiring to distribute certain quantities of cocaine base, cocaine, marijuana, and MDMA (ecstasy), in violation of 21 U.S.C. 841(a) and (b) and 846. Pet. App. 11a. It also charged petitioner with possessing with intent to distribute up to 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1); two counts of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c); and possessing ammunition as a felon, in violation of 18 U.S.C. 922(g) and 924(a). Pet. App. 11a. One of the firearm-possession counts was dismissed during the 21-day trial, and the jury found petitioner guilty on the remaining charges. Ibid. The district court sentenced petitioner to 420 months of imprisonment, to be followed by eight years of supervised release. Ibid.; Judgment 3-4.

b. The court of appeals consolidated the appeals of petitioner and seven of his co-defendants. Pet. App. 11a-12a. On November 15, 2013, the court affirmed their convictions and sentences. Id. at 2a, 12a; 544 Fed. Appx. at 874. Petitioner joined, and the court granted, two motions filed by petitioner's co-defendants to extend the time for filing a petition for rehearing. Pet. App. 2a. Two of petitioner's co-defendants filed

timely pro se rehearing petitions. Id. at 12a. Petitioner, however, filed neither a rehearing petition nor a petition for a writ of certiorari in this Court. Ibid. The court of appeals denied his co-defendants' rehearing petitions on May 22, 2014. Id. at 2a.

3. On April 29, 2015, petitioner filed a pro se motion to vacate his sentence under 28 U.S.C. 2255, and an accompanying 56-page memorandum alleging nine grounds of ineffective assistance of counsel. Pet. App. 2a; 15-cv-21702 D. Ct. Doc. (D. Ct. Doc.) 1 (May 5, 2015); D. Ct. Doc. 4 (May 5, 2015).

The government argued in opposition that petitioner's motion should be dismissed as untimely or summarily denied on the merits. On timeliness, the government observed that the one-year filing period under 28 U.S.C. 2255(f) in cases where a defendant does not file a petition for a writ of certiorari runs from "when the time for filing a certiorari petition expires." D. Ct. Doc. 16, at 12 (July 6, 2015) (quoting Clay v. United States, 537 U.S. 522, 527 (2003)). "Under Supreme Court Rule 13(3)," the government stated, "the 90-day period to petition for certiorari runs from the date of entry of judgment, not the date the [court of appeals'] mandate issues." Ibid. And the government asserted that petitioner's conviction became final on February 13, 2014 -- 90 days from the court of appeals' judgment -- and that his Section 2255 motion was untimely because it was not dated and tendered to prison officials

until April 29, 2015, which was more than a year later. Id. at 12-13; see 28 U.S.C. 2255(f)(1).

Petitioner twice moved for an extension of the deadline to file a reply in support of his Section 2255 motion, claiming that he had been separated from his legal materials following transfer to state custody to face separate criminal charges and that he was seeking information from the attorney who had represented him on direct appeal. D. Ct. Doc. 19 (Aug. 14, 2015); D. Ct. Doc. 21 (Aug. 21, 2015). After those extensions were granted, petitioner filed a reply -- to which he appended an email from appellate counsel -- arguing that his Section 2255 motion was timely because his lawyer had in fact filed a petition for a writ of certiorari on his behalf, this Court had not denied that petition "until May 28, 2014," and his April 2015 filing thus fell within the one-year period in Section 2255(f)(1). D. Ct. Doc. 22, at 2 (Sept. 16, 2015); id. at Ex. A.

A magistrate judge recommended that petitioner's motion be dismissed as untimely. D. Ct. Doc. 27, at 21 (Feb. 19, 2016). The magistrate observed that petitioner's timeliness argument turned on his assertion that he had filed a petition for a writ of certiorari. Id. at 9. But after conducting a "full and careful review" of the district court and appellate record, the magistrate determined "that no petition for [a] writ of certiorari was ever filed by [petitioner]." Ibid. The magistrate explained that the correspondence from appellate counsel was properly understood to

refer to petitions for writs of certiorari filed by petitioner's co-defendants, which had been denied in May 2014. Id. at 8-9. Having recommended dismissal on timeliness grounds, the magistrate judge did not reach the merits of petitioner's ineffective-assistance-of-counsel claims, but noted that the government's response to those claims "also appears meritorious." Id. at 7; see id. at 6-7.

Petitioner objected to the magistrate judge's recommendation, appending additional correspondence with his appellate counsel on the timeliness issue. D. Ct. Doc. 30, at 5-8 (Apr. 11, 2016). On September 30, 2016, the district court overruled petitioner's objections and adopted the report and recommendation. D. Ct. Doc. 32, at 5-6 (Sept. 30, 2016). The court explained that petitioner had challenged "only" the magistrate judge's determination that he "filed no petition for [a] writ of certiorari"; that he supported that position with "the same email from [appellate] counsel" available to the magistrate judge; and that de novo review revealed no error in the magistrate's determination. Id. at 5. The court dismissed the Section 2255 motion and denied a certificate of appealability (COA). Id. at 6. Petitioner did not file a notice of appeal.

4. On June 22, 2018, petitioner filed a pro se motion under Federal Rule of Civil Procedure 60(b) seeking relief from the district court's order dismissing his Section 2255 motion as untimely. D. Ct. Doc. 36, at 1. Petitioner argued for the first

time that his Section 2255 motion had been timely based on the rehearing petitions filed by his co-defendants on direct appeal and denied by the court of appeals on May 22, 2014. Id. at 10-14. Petitioner observed that, under this Court's Rule 13.3, "if a petition for re-hearing is timely filed in the lower court by any party, * * * the time to file the [p]etition for a [w]rit of [c]ertiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing." Id. at 13 (emphasis added); see Sup. Ct. R. 13.3.

A magistrate judge recommended that petitioner's Rule 60(b) motion be dismissed because it itself was filed out of time. D. Ct. Doc. 55, at 5 (Jan. 2, 2020). The magistrate judge reasoned that petitioner was seeking to correct "a legal error in the denial of his [Section] 2255 motion as untimely"; that such an argument raises a claim of "mistake" under Rule 60(b)(1); and that, although Rule 60(c)(1) requires that motions under Rule 60(b)(1) be filed within a year of the challenged order, petitioner had "waited nearly two years to seek [the requested] relief." Id. at 4.

Petitioner objected to the report and recommendation. D. Ct. Doc. 56 (Jan. 21, 2020); D. Ct. Doc. 57 (Jan 23, 2020). He argued that his motion should be construed as seeking catch-all "extraordinary circumstances" relief under Rule 60(b)(6); and that, when considering that he was in state custody for much of the relevant period, his motion was filed within a "reasonable

time" as required under Rule 60(c)(1). D. Ct. Doc. 56, at 3; see id. at 3-5.

The district court overruled petitioner's objection on two independent grounds. Pet. App. 10a-19a. The court first agreed with the magistrate judge that petitioner's challenge to the timeliness dismissal of the original Section 2255 motion was "cognizable under Rule 60(b)(1)"; that petitioner could not rely on Rule 60(b)(6) because the two subsections are mutually exclusive; and that the motion was untimely under Rule 60(c)(1) "because it was filed more than a year after the [c]ourt entered its [d]imissal [o]rder." Id. at 17a. In the alternative, the court reaffirmed its prior determination that the Section 2255 motion was untimely. Id. at 17a-18a. The court later denied petitioner's motion for reconsideration of the Rule 60(b) motion. Id. at 4a.

5. After a two-judge panel granted petitioner a COA, Pet. App. 8a, the court of appeals affirmed in an unpublished, per curiam opinion. Id. at 1a-7a.

The court of appeals recognized, as had the government in its appellate brief, that petitioner's April 2015 motion under Section 2255 "appears to have been timely." Pet. App. 6a; see Gov't C.A. Br. 11-13. The court observed in particular that, in light of this Court's Rule 13.3, the one-year limitations period applicable to petitioner under Section 2255(f)(1) did not begin to run until 90 days after the court of appeals "denied his co-appellants'

petitions for rehearing" in May 2014 and did not expire until August 2015, several months after petitioner filed his Section 2255 motion. Pet. App. 6a.

The court of appeals determined, however, that petitioner had not timely filed his Rule 60(b) motion challenging the dismissal of his Section 2255 motion. Pet. App. 5a-7a. Pointing to established circuit precedent, the court explained that Rule 60(b)(1) "encompasses mistakes in the application of the law and the mistakes of judges"; that petitioner's arguments raised "precisely the sort of judicial mistakes" that Rule 60(b)(1) covers; and that his motion was therefore subject to -- and failed to meet -- the one-year time limit in Rule 60(c)(1). Id. at 6a; see id. at 5a-7a. Having affirmed the dismissal of the motion under Rule 60(b)(1), the court of appeals did not reach the government's alternative argument (Gov't C.A. Br. 15-17) that the motion would have failed even if construed as one seeking relief under Rule 60(b)(6).

ARGUMENT

Petitioner renews his contention (Pet. 3-4, 12-30) that the district court erred in dismissing his motion under Federal Rule of Civil Procedure 60(b). The court of appeals' decision is correct, and any tension with decisions of other courts of appeals on the classification of petitioner's Rule 60(b) motion does not warrant the Court's intervention given how rarely the difference between treatment under Rule 60(b)(1) and Rule 60(b)(6) is likely

to be outcome determinative. In addition, this case is an unsuitable vehicle for considering the question presented because petitioner would not be entitled to Rule 60(b) relief even if the question presented were resolved in his favor. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that petitioner's request for relief from the dismissal of his Section 2255 motion asserted a "mistake" cognizable under Rule 60(b)(1), and was therefore subject to dismissal when made outside the one-year period that Rule 60(c)(1) prescribes for motions under that subsection of the Rule. Pet. App. 5a-7a.

a. Federal Rule of Civil Procedure "60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." Gonzalez v. Crosby, 545 U.S. 524, 528 (2005). As relevant here, Rule 60(b)(1) applies to motions seeking relief based on "mistake, inadvertence, surprise, or excusable neglect," while Rule 60(b)(6) "permits reopening when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)." Id. at 528 n.2, 529 (quoting Fed. R. Civ. P. 60(b)(6)); see Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 n.11 (1988) (motions under "clause (6) and clauses (1) through (5) are mutually exclusive"). Relief is available under the "catchall category" of Rule 60(b)(6) "only in 'extraordinary circumstances,' and the Court has

explained that '[s]uch circumstances will rarely occur in the habeas context.'" Buck v. Davis, 137 S. Ct. 759, 772 (2017) (quoting Gonzalez, 545 U.S. at 535).

The separate clauses in Rule 60(b) are subject to different time restrictions. Any motion under Rule 60(b), including a motion under Rule 60(b)(6), must "be made within a reasonable time," but a Rule 60(b)(1) motion is subject to the further and more specific limitation that it may be brought "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1).

b. The court of appeals correctly recognized that the ground for relief asserted in petitioner's request for Rule 60(b) relief -- an error in determining the timeliness of petitioner's Section 2255 motion that was apparent from the sources of law and record materials before the district court -- is cognizable as a "mistake" under Rule 60(b)(1). Pet. App. 5a-7a. A district court's error in overlooking or failing to apply provisions of law that the parties have cited to it falls within the plain meaning of the term "mistake." Both current dictionaries and those contemporaneous with Rule 60's adoption define "mistake" in terms synonymous with errors -- which courts and litigants alike can commit -- and misunderstandings. See, e.g., Black's Law Dictionary (11th ed. 2019) (defining "mistake" as "[a]n error, misconception, or misunderstanding; an erroneous belief. See ERROR."); The Cyclopedic Law Dictionary 721 (3d ed. 1940) (defining "mistake" as

"[a]n erroneous conception, conviction, or belief in respect to matter of either fact or law, arising from ignorance, surprise, imposition, or misplaced confidence").

Context confirms that plain-meaning interpretation. Rule 60(b)(1) follows a subsection that authorizes courts to make "corrections" to judgments or orders "based on clerical mistakes[,] oversights and omissions." Fed. R. Civ. P. 60(a) (capitalization altered). That provision plainly authorizes the correction of errors whether committed by the court itself, court personnel, or the parties. See ibid. ("The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record.") (emphasis added); 11 Charles Alan Wright et al., Federal Practice and Procedure § 2854 (3d ed. & Supp. 2021) ("The mistake correctable under the rule need not be committed by the clerk or the court; the rule may be utilized to correct mistakes by the parties as well."); In re Walter, 282 F.3d 434, 440 (6th Cir. 2002) ("Clerical mistakes include those made by judges as well as ministerial employees."). The term "mistake" in neighboring Rule 60(b)(1) is likewise naturally read to reach errors by courts and litigants alike. Indeed, it could often be difficult to distinguish between court and litigant mistakes, as a court's mistake may simply repeat a mistake by one or both parties, and no evident reason exists to treat them differently.

Any remaining doubt would be dispelled by Rule 60's drafting history. In its original form, Rule 60(b) authorized district courts to "relieve a party * * * from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b) (1940) (emphasis added). But the Rule was amended just six years later to eliminate "[t]he qualifying pronoun 'his' * * * on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through his mistake, inadvertence, etc." Fed. R. Civ. P. 60 advisory committee's note (1946 Amendments). A leading treatise explains that that amendment "was specifically intended to make it clear that the moving party could have relief from a judgment on account of the mistake * * * of any party, any party's attorney, the clerk, or the court." 12 James Moore et al., Moore's Federal Practice § 60.41[3] (3d ed. 2021).

To avoid redundancy within the Rule itself, this category of mistakes by the court that are cognizable under Rule 60(b)(1) must include at least some substantive errors outside the scope of Rule 60(a)'s clerical-error provision. And the court of appeals reasonably determined that the error petitioner asserted here -- obvious misapplication of a timing provision under the facts as

recited in the district court's own opinions -- qualified as just such a mistake. Pet. App. 5a-7a.

c. Petitioner nevertheless contends (Pet. 25-30) that the drafters of Rule 60(b) shunted all legal mistakes by a court -- a commonly asserted basis for relief -- into the catch-all paragraph Rule 60(b)(6). That contention lacks merit.

According to petitioner, the word "mistake" in Rule 60(b)(1) refers exclusively "to oversights by litigants that led to the judgment, not to a court's own legal errors." Pet. 25. Petitioner principally relies (ibid.) on the associated-words canon of construction (noscitur a sociis), asserting that "mistake" must be construed in light of the other words in Rule 60(b)(1) ("inadvertence, surprise, or excusable neglect"), which in his view "contemplate relief where some oversight or carelessness by the litigants -- not the court -- contributed to the judgment." Ibid. But the associated-words doctrine, like other canons of construction, is a "tool[] of statutory interpretation whose usefulness depends on the particular statutory text and context at issue." Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1175 n.5 (2021); see Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923) ("That a word may be known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association."). And as explained above, pp. 12-15, supra, the relevant "contextual cues," Ali v. Federal Bureau of Prisons, 552 U.S. 214, 226 (2008), confirm

that the term "mistake" in Rule 60(b)(1) should not be read to apply only to the errors or oversights attributable to litigants.

Petitioner likewise errs in asserting (Pet. 25-27) that the court of appeals' approach is "incompatible" with other provisions governing appeal or relief from an adverse judgment. Pet. 25. Nothing in the court's construction of Rule 60(b)(1) displaces a timely appeal or a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e) as the primary mechanisms for correcting a district court's legal errors. Motions under Rule 60(b)(1) nevertheless serve salutary efficiency ends in cases where an obvious judicial error first comes to a party's attention after the time for filing a Rule 59(e) motion (currently 28 days, see Fed. R. Civ. P. 59(e)) has run, such as when reconsideration has been denied. As the Second Circuit has explained, in that category of cases, which may in practice be relatively narrow, "there is indeed good sense in permitting the trial court to correct its own error and" little "purpose" in "requiring the parties to appeal to a higher court." Schildhaus v. Moe, 335 F.2d 529, 531 (1964) (Friendly, J.). Furthermore, "where a district judge recognizes a clear legal or factual error before a pending appeal has been briefed," the parties "may be spared the effort and expense of preparing an appeal and educating a new court on the particulars of their case" through an immediate remand. Mendez v. Republic Bank, 725 F.3d 651, 660 (7th Cir. 2013). And courts have addressed petitioner's concern (Pet. 26) that Rule 60(b)(1)

motions could be used to "circumvent[] the time limits to appeal" (ibid.), "through careful enforcement of the requirement that Rule 60(b) relief be sought within a 'reasonable time,'" including by generally (though not inflexibly) requiring that the motion be filed within the time for noticing an appeal. See Mendez, 725 F.3d at 660 (quoting Fed. R. Civ. P. 60(c)(1)); see also Hill v. McDermott, Inc., 827 F.2d 1040, 1043 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988) ("[A] Rule 60(b)(1) motion filed within the time for appeal saves the parties and the court the time and expense of a needless appeal."); 12 Moore's Federal Practice § 60.41[4][a] (noting Judge Friendly's agreement with that approach).

Finally, petitioner errs in contending (Pet. 28-30) that because this Court has previously addressed whether certain claims of legal error entitled a movant to relief under Rule 60(b)(6), that subsection must be the exclusive avenue in Rule 60(b) for seeking relief based on legal error. As an initial matter, this Court had no occasion to address Rule 60(b)(1) "mistake[s]" in the decisions on which petitioner relies (Pet. 28-30) because none of the movants claimed one. In Gonzalez v. Crosby, supra, "Rule 60(b)(6)" was "the only subsection * * * invoke[d]." 545 U.S. at 536. In both Klapprott v. United States, 335 U.S. 601 (1949), and Ackermann v. United States, 340 U.S. 193 (1950), the only ground for relief under Rule 60(b)(1) at issue was the "excusable neglect" criterion. See Klapprott, 335 U.S. at 613 ("It is

contended that the one-year limitation [in current Rule 60(c)(1)] bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect.'"); Ackermann, 340 U.S. at 197 (noting that any motion based on "excusable neglect" under Rule 60(b)(1) was untimely). And in Liljeberg v. Health Services Acquisition Corp., supra, the party seeking relief based on a district judge's failure to recuse had "moved pursuant to Federal Rule of Civil Procedure 60(b)(6) to vacate the judgment." 486 U.S. at 850. This Court's footnoted discussion stating that the motion was properly brought under "clause (6)," id. at 863 n.11, did not analyze the "mistake" language in Rule 60(b)(1); did not hold (Pet. 30) that "legal errors by courts" are not "'mistake[s]'"; and addressed a circumstance where the basis for recusal was apparently not discovered until "[a]pproximately 10 months" after the court of appeals affirmed the judgment at issue, 486 U.S. at 850.

Moreover, not only Liljeberg, but the other decisions as well, addressed alleged errors different in kind from the one in this case. Both Gonzalez and Ackermann, for example, involved claims of error based at least in part on legal developments that postdated the judgments challenged under Rule 60(b) -- in Gonzalez, an intervening decision of this Court interpreting the applicable statute of limitations, 545 U.S. at 536; and in Ackermann, an appellate decision reversing the denaturalization judgment against the movant's co-defendant, 340 U.S. at 201-202. Accordingly, even

were subsection (6) available for raising challenges of that nature, that would not dictate the same conclusion for the legal error at issue here, which involves the failure to apply the terms of a legal provision cited to the district court (this Court's Rule 13.3) to facts apparent on the face of the record (that petitioner's co-defendants had filed rehearing petitions in the court of appeals). See Pet. App. 6a-7a; id. at 15a-17a; D. Ct. Doc. 55, at 4-5.

2. Petitioner contends (Pet. 12-21) that the Court's review is warranted to resolve division among the courts of appeals as to whether Rule 60(b)(1)'s "mistake" prong ever authorizes relief from judgment based on a district court's legal error. Disagreement in those courts, however, is not as extensive as petitioner asserts; has existed for decades without producing evidently outcome-determinative differences; and does not warrant the Court's review at this time.

a. As the Seventh Circuit has explained, and as petitioner appears to acknowledge (Pet. 13-15), "the significant majority of the circuits" have recognized that at least some judicial errors are "mistake[s]" subject to correction in a motion under Rule 60(b). Mendez, 725 F.3d at 658-660. The Second, Sixth, Seventh, and Eleventh Circuits have generally recognized that Rule 60(b)(1) encompasses certain errors committed by district courts, not solely those of the parties. See In re 310 Associates, 346 F.3d 31, 35 (2d Cir. 2003) (per curiam); United States v. Reyes, 307

F.3d 451, 455 (6th Cir. 2002); Mendez, 725 F.3d at 658-660 (7th Cir.); Parks v. U.S. Life & Credit Corp., 677 F.2d 838, 839-840 (11th Cir. 1982) (per curiam). Two other courts have similarly recognized that movants may obtain relief under Rule 60(b)(1) based on a court's "'obvious error[s] of law,'" Benson v. St. Joseph Reg'l Health Ctr., 575 F.3d 542, 547 (5th Cir. 2009) (citation omitted), cert. denied, 559 U.S. 937 (2010), or "certain substantive mistakes in a district court's rulings," Cashner v. Freedom Stores, Inc., 98 F.3d 572, 578 (10th Cir. 1996). And the Ninth and D.C. Circuits have recognized that at least some errors committed by a court are cognizable as mistakes under Rule 60(b)(1), see Kingvision Pay-Per-View Ltd. v. Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999); D.C. Federation of Civic Ass'ns v. Volpe, 520 F.2d 451, 453 (D.C. Cir. 1975) (per curiam), while noting that other legal errors might lie beyond its scope, see Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n, 781 F.2d 935, 940 (D.C. Cir. 1986), or may properly be asserted under another subsection of the Rule, see In re International Fibercom, Inc., 503 F.3d 933, 940 n.7 (9th Cir. 2007) (Rule 60(b)(6)).

As petitioner observes (Pet. 15-16), the First Circuit has long taken a different position, adopting the view that Rule 60(b)(1) "does not include errors of law." Elias v. Ford Motor Co., 734 F.2d 463, 467 (1984); see Silk v. Sandoval, 435 F.2d 1266, 1267-1268 (1st Cir.), cert. denied, 402 U.S. 1012 (1971). Although

some panels of that court have expressed discomfort with the results compelled by that view of Rule 60(b)(1), see Venegas-Hernandez v. Sonolux Records, 370 F.3d 183, 189 (2004), the First Circuit has adhered to it. See Fontanillas-Lopez v. Morell Bauzá Cartagena & Dapena, LLC, 832 F.3d 50, 64 (1st Cir. 2016). Petitioner errs, however, in asserting that the Third, Fourth, and Eighth Circuits (Pet. 16-17) have aligned with the First Circuit or definitively adopted his view that Rule 60(b)(1) encompasses only mistakes by litigants. Cf. Mendez, 725 F.3d at 659 n.4 (listing only the First Circuit and a non-precedential order of the Third Circuit as rejecting Rule 60(b)(1)'s application to correction of legal errors by courts).

Courts in the Third Circuit, for example, appear to view the availability of Rule 60(b)(1) relief based on a district court's legal error as an open question under circuit precedent. The Third Circuit treated the question as open in Page v. Schweiker, 786 F.2d 150 (1986), describing the views of other courts and stating that it had "yet to decide t[he] issue." Id. at 155. Petitioner suggests (Pet. 16) that the Third Circuit rejected the majority view in Smith v. Evans, 853 F.2d 155 (1988). But both Smith and United States v. Fiorelli, 337 F.3d 282, 288 (2003) (cited at Pet. 16) addressed only whether post-judgment motions for reconsideration were properly characterized as arising under Rule 59(e), or instead Rule 60(b), for purposes of determining the timeliness of appeals. And since those decisions, the Third

Circuit has continued to view Page as leaving open "the possibility that a claim of legal error can be raised under Rule 60(b)(1)," at least where the motion is filed within the time allowed for appeal. Sanders v. Downs, 622 Fed. Appx. 127, 129–130 (2015) (per curiam).

The Fourth Circuit also appears not to have squarely decided whether Rule 60(b)(1) encompasses legal errors analogous to the one that petitioner raised in his motion. In arguing otherwise, petitioner cites the Fourth Circuit's statement that its decision in United States v. Williams, 674 F.2d 310 (1982), held "that Rule 60 does not authorize motions for correction of a mistake of law." In re GNC Corp., 789 F.3d 505, 511 (4th Cir. 2015). Williams, however, acknowledged based on Second Circuit precedent that "the word 'mistake' in Rule 60(b)[1] ha[d] indeed been read to include mistakes by the court." 674 F.2d at 313. The court in Williams did not indicate disagreement with that view or with the Fourth Circuit's own prior suggestion that Rule 60(b)(1) may apply in circumstances where a court commits an error of law that is "clear on the record, and involve[s] a plain misconstruction of the statute on which the action was grounded." Compton v. Alton S.S. Co., 608 F.2d 96, 104 (1979). Instead, Williams concluded only that relief based on claimed legal error would not be available under Rule 60(b)(1) "[w]here the motion is nothing more than a request that the district court change its mind." 674 F.2d at 313; see CNF Constructors, Inc. v. Donohoe Const. Co., 57 F.3d 395 (4th Cir. 1995) (per curiam) (following Williams where the Rule

60(b) "motion simply reiterate[d] legal arguments already addressed in the district court's first order"). District courts in the Fourth Circuit have accordingly understood that circuit precedent does not necessarily foreclose correction of at least some judicial errors under Rule 60(b)(1). See, e.g., In re Chilson, No. 15-cv-20, 2016 WL 1079149, at *8 n.5 (W.D.N.C. Mar. 18, 2016); Lindsey v. Highwoods Realty Ltd. Partnership, No. 11-cv-447, 2011 WL 5326291, at *3 (E.D. Va. Nov. 4, 2011).

Finally, while the Eighth Circuit does not construe the term "mistake" in Rule 60(b)(1) to reach legal errors by the district court, see Spinar v. South Dakota Bd. of Regents, 796 F.2d 1060, 1062-1063 (8th Cir. 1986), petitioner acknowledges (Pet. 17) that that court has "recognized judicial inadvertence as a ground for" relief under Rule 60(b)(1). See Larson v. Heritage Square Assocs., 952 F.2d 1533, 1536 (8th Cir. 1992) (considering under Rule 60(b)(1), and rejecting on the merits, an argument that the district court "act[ed] under the mistaken assumption that the parties already were bound by a previous settlement agreement"). Although the Eighth Circuit has not expressly defined the contours of the judicial-inadvertence category, see 12 Moore's Federal Practice § 60.41[4][b][viii], its embrace of judicial acts or omissions as the basis for Rule 60(b)(1) relief suggests that it would reject petitioner's view (Pet. 25, 30) that Rule 60(b)(1) covers only carelessness by litigants.

b. Even if disagreement in the circuits were as stark as petitioner posits, this Court's intervention would not be warranted. Far from being "important" (Pet. 19), the answer to the question presented is unlikely to make an outcome-determinative difference in any substantial number of cases.

As petitioner acknowledges (Pet. 4), the primary practical consequence of the question presented concerns the timing of a motion for relief from judgment.* In circuits that treat an allegation of legal error like the one in this case as implicating Rule 60(b)(1), the motion for relief is subject to a limitations period of one year after entry of the challenged judgment. See Fed. R. Civ. P. 60(c)(1). Where Rule 60(b)(1) relief is not understood to apply to a district court's obvious legal error, in contrast, the motion for relief can be filed under Rule 60(b)(6) "within a reasonable time" and is not subject to the express one-year limitation. Ibid. But that timing distinction will make a

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* Some of petitioner's cited decisions address the distinct question of whether, for purposes of determining the timeliness of an appeal, a motion for reconsideration was properly brought under Rule 59(e) or Rule 60(b)(1). See, e.g., Smith, 853 F.2d at 158 (3d Cir.); Silk, 435 F.2d at 1266-1267 (1st Cir.). But that question is likely to be less consequential in light of amendments to the Federal Rules of Appellate Procedure that treat the two motions as equivalent when filed within 28 days of the judgment. See Fed. R. App. P. 4(a)(4)(A)(vi); Banister v. Davis, 140 S. Ct. 1698, 1710 n.9 (2020). And it remains the case that an appeal from the denial of any Rule 60(b) motion filed after the 28-day period will "not bring up the underlying judgment for review." Banister, 140 S. Ct. at 1710 (quoting Browder v. Director, Dep't of Corrections of Ill., 434 U.S. 257, 263 n.7 (1978)).

difference in, at most, cases where (1) the district court has committed an obvious and dispositive legal error in a judgment or order; (2) the party aggrieved by that error failed to file a timely notice of appeal and/or a motion to alter or amend the judgment under Rule 59(e); (3) that party also failed to submit its Rule 60(b) motion within the one-year limit in Rule 60(c)(1) (or any shorter period required under circuit law, see pp. 16-17, supra); but (4) the party nevertheless filed the motion within a period that would qualify as a "reasonable time" under Rule 60(c)(1).

Petitioner has not shown that a meaningful number of cases involve that combination of characteristics. Nor has he shown that any timing-related benefits to movants from addressing claims of legal error under Rule 60(b)(6) would offset the additional hurdles that movants must clear before obtaining relief under that clause. In particular, and as explained above, this Court has long "required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances,'" and has stated that "[s]uch circumstances will rarely occur in the habeas context." Gonzalez, 545 U.S. at 535. And whether asserted alone or in combination with other factors, an argument that the district court committed an obvious error under existing law, correctable on appeal had the movant timely filed one, is unlikely to establish extraordinary circumstances. See Ackermann, 340 U.S. at 198-200 (no extraordinary circumstances where the movant made the unwise, yet

"free, calculated, [and] deliberate choice[,]" not to appeal); Matter of Ta Chi Navigation (Panama) Corp. S.A., 728 F.2d 699, 703 (5th Cir. 1984) ("[A] Rule 60(b) appeal may not be used as a substitute for the ordinary process of appeal," especially when "a mistake of law is alleged as the primary ground" for relief); see also 11 Federal Practice & Procedure § 2864 ("[I]t ordinarily is not permissible to use a Rule 60(b)(6) motion to remedy a failure to take an appeal."). The difficulty of establishing extraordinary circumstances makes it likely that a court addressing an asserted legal error under Rule 60(b)(6) will deny relief, even if the motion is deemed timely.

Petitioner's own observation (Pet. 24) about the paucity of certiorari petitions seeking review of the question presented illustrates that question's lack of practical importance. Petitioner explains (ibid.) that he "has identified only two prior petitions that even mentioned the circuit conflict"; that they "are from well over a decade ago"; and that "neither petition actually purported to present the Rule 60(b)(1) question for review." The government has likewise been unable to identify any case in which it responded to a petition for a writ of certiorari raising the question presented. But given that Rule 60(b) motions are filed in habeas corpus cases and every other "type of federal civil proceeding" (Pet. 20), it is highly unlikely that no prior litigants would have raised the question for this Court's resolution if divergent standards in the circuits were producing

"'uncertaint[y]'" and "[c]onfusion about the scope of Rule 60(b)" of substantial practical import. See ibid. (citation omitted). The more logical explanation is that this Court's intervention has been unnecessary because the courts of appeals, even if taking different analytical paths under Rule 60(b), have generally reached consistent results when faced with similar allegations of error.

3. Even if the question presented warranted review, this case would not be an appropriate vehicle in which to consider that question, for multiple reasons.

First, petitioner's own case falls into the wide category of cases where his proposed construction of the Rule would likely make no difference to an entitlement to relief. See Gov't C.A. Br. 16-17. The fact that the error was apparent from the face of the 2016 dismissal order and correctable through a timely appeal would weigh heavily against petitioner's entitlement to Rule 60(b)(6) relief. See pp. 25-26, supra. Indeed, just as it was "hardly extraordinary" that an intervening decision of this Court affected a statute-of-limitations issue in Gonzalez, 545 U.S. at 536, it is unexceptional that a district court adjudicating a pro se motion under Section 2255 could err in its timeliness determination. It therefore remained incumbent on petitioner to review the court's decision for legal error and file a notice of appeal to preserve his ability to seek correction of any errors. See id. at 537 (habeas petitioner's "lack of diligence in pursuing

review of [a] statute-of-limitations issue" on appeal cut against treating intervening decision as "an extraordinary circumstance justifying relief from the judgment"); Polites v. United States, 364 U.S. 426, 432 (1960) (reaffirming Ackermann's admonition that a deliberate "decision not to appeal" weighs against Rule 60(b)(6) relief).

Petitioner claims (Pet. 22) that he was incarcerated and "proceed[ed] pro se at all times below," and suggests that he received inaccurate advice from the attorney who had represented him on direct appeal. An incarcerated movant's pro se status and ignorance of the law, however, do not amount to extraordinary circumstances. See Matarese v. LeFevre, 801 F.2d 98, 107 (2d Cir. 1986), cert. denied, 480 U.S. 908 (1987); see also Klapprott, 335 U.S. at 629 (Frankfurter, J., dissenting) ("Men can press their claims from behind prison walls, as is proved by the fact that perhaps a third of the cases for which review is sought in this Court come from penitentiaries."). While petitioner faults his appellate counsel (Pet. 22) for failing to mention the specific provision that rendered his Section 2255 motion timely, the government's opposition had already cited this Court's Rule 13.3. See D. Ct. Doc. 16, at 12. And petitioner's efforts to take advantage of filings by his co-defendants to render his Section 2255 motion timely demonstrate no diligence on his own part and cannot be characterized as extraordinary.

Second, even if the question presented were resolved in petitioner's favor and he were entitled to reopening under Rule 60(b)(6), he is exceedingly unlikely to succeed on the merits of the ineffective assistance claims in his Section 2255 motion. See D. Ct. Doc. 27, at 6-7 (magistrate judge's statement that the government's responses "appear[ed] meritorious"). For example, two of the claims concerned trial counsel's failure to argue against recidivist enhancements under the Armed Career Criminal Act or the advisory Sentencing Guidelines. See D. Ct. Doc. 4, at 16-31. But any such arguments have since been foreclosed by this Court's decisions in Shular v. United States, 140 S. Ct. 779 (2020), and Beckles v. United States, 137 S. Ct. 886 (2017), respectively.

Petitioner's claims related to his conviction are similarly unlikely to succeed. The government explained below that petitioner's lead claim -- that his first attorney failed to communicate to him the terms of a plea offer -- lacked merit because the offer at issue had pertained only to earlier charges that were dismissed when the grand jury returned the indictment under which petitioner was eventually convicted. D. Ct. Doc. 22, at 16-17. That explanation was consistent with the correspondence that petitioner appended to his motion. D. Ct. Doc. 4, at 64 (Ex. E) (e-mail reflecting second trial counsel's "understanding" that "there was a plea offer in approximately that range BEFORE the indictment was superseded"). And petitioner offered no

substantive response to the government's arguments for why several of his remaining conviction-related claims lacked merit. See D. Ct. Doc. 22, at 12-13, 15.

Petitioner points out (Pet. 23) that a two-judge panel of the court of appeals granted him a COA after concluding that reasonable jurists would find debatable whether his ineffective assistance claims "stated facially valid claims of a denial of constitutional right." Pet. App. 9a. But the two-judge panel's single-sentence statement that the facial validity of petitioner's claims was "debatable" (ibid.) does not indicate that petitioner's claims ultimately have merit. See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) ("[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."). The low likelihood that petitioner would obtain relief accordingly counsels even further against granting review of the threshold procedural question presented in the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

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