No. ____

IN THE
Supreme Court of the United States

TRAVIS HORNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 60(b)(1) authorizes relief from final judgment based on "mistake," as well as inadvertence, surprise, or excusable neglect.

The question presented is:

Whether Rule 60(b)(1) authorizes relief based on a district court's error of law.[1]

[1] This is the same question presented in *Kemp v. United States*, No. 21-5726 (argued Apr. 19, 2022).

RELATED CASES

28 U.S.C. § 2255 Proceedings Below:

- *Horne v. United States*, No. 20-14503 (11th Cir. Mar. 4, 2022) (opinion affirming grant of Rule 60(b) motion for relief from final judgment in the 28 U.S.C. § 2255 proceeding)

- *Horne v. United States*, No. 20-CV-22108 (S.D. Fla. Nov. 19, 2020) (order granting government's Rule 60(b) motion for relief from final judgment on the 28 U.S.C. § 2255 motion)

- *In re Travis Horne*, No. 20-11680 (11th Cir. May 4, 2020) (order granting application to file second or successive 28 U.S.C. § 2255 motion)

- *Horne v. United States*, No. 18-10450 (11th Cir. Mar. 30, 2018) (order denying motion for certificate of appealability), *cert. denied*, *Horne v. United States*, No. 18-5061 (U.S. Oct. 1, 2018)

- *Horne v. United States*, No. 16-CV-22796 (S.D. Fla. Dec. 7, 2017) (order denying 28 U.S.C. § 2255 motion)

Underlying Criminal Proceedings:

- *United States v. Brown, et al.*, 227 F. App'x 795 (11th Cir. 2007) (opinion affirming convictions and sentences on direct appeal)

- *United States v. Brown, et al.*, No. 03-CR-20678 (S.D. Fla. May 2, 2005) (judgment of conviction imposing 450-month sentence)

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IN THE
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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is unreported and reproduced as Appendix ("App.") A-1. The Eleventh Circuit's order granting petitioner's request to expand the certificate of appealability is unreported and reproduced as App. B-2. The district court's order granting the government's motion for reconsideration and issuing a certificate of appealability is unreported and reproduced as App. C-3.

JURISDICTION

The Eleventh Circuit issued its decision on March 4, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES OF PROCEDURE INVOLVED

Federal Rule of Civil Procedure 60 provides, in relevant part:

> (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.
>
> (c) TIMING AND EFFECT OF THE MOTION.
>
> (1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
>
> (2) *Effect on Finality*. The motion does not affect the judgment's finality or suspend its operation.

INTRODUCTION

Federal Rule of Civil Procedure 60(b) authorizes relief from final judgment. Rule 60(b)(1) authorizes such relief based on "mistake, inadvertence, surprise, or excusable neglect." The question presented is whether the "mistake" prong of Rule 60(b)(1) authorizes relief based on a district court's legal error. The courts of appeals have been divided on that question for the last *fifty* years. The Court is considering this very issue in *Kemp v. United States*. No. 21-5726 (argued Apr. 19, 2022). This case presents the same issue as does *Kemp*. The Court should hold this case pending the resolution of *Kemp*.

STATEMENT

A. Legal Background

"Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 (1988). Codified in Rule 60(b)(1), the first of five specified reasons for relief from a judgment is "mistake, inadvertence, surprise, or excusable neglect." The question presented is whether Federal Rule of Civil Procedure 60(b)(1) authorizes relief from judgment based on a district court's legal error.

Until this term, this Court has never interpreted Rule 60(b)(1)'s "mistake" prong. Nor has it squarely addressed whether Rule 60(b)(1) authorizes relief based on a court's legal error. In *Kemp v. United States,* No. 21-5726 (argued Apr. 19, 2022), the Court recognized the importance of the issue and granted certiorari. This case presents the same issue raised in *Kemp*, which remains pending before the Court.

B. Proceedings Below[2]

Petitioner was convicted in the Southern District of Florida for federal drug, robbery, and carjacking offenses. (Cr-DE 522:1). He was also convicted of a violation of 18 U.S.C. § 924(c) for carrying, using, or possessing a firearm in furtherance of a crime of violence or drug trafficking crime, as well as a violation of 18 U.S.C. § 924(o)

[2] Citations to the record in the 28 U.S.C. § 2255 proceedings in the district court will be referred to by the abbreviation "Cv-DE," followed by the docket entry number and the page number. Citations to the record in the underlying criminal case will be referred to by the abbreviation "Cr-DE," followed by the docket entry number and the page number.

for conspiring to use or carry a firearm in furtherance of a crime of violence or drug trafficking crime. *Id.* He was sentenced to 450 months in prison. *Id.* The Eleventh Circuit affirmed his (and his co-defendants') convictions and sentences in an opinion dated April 10, 2007. *United States v. Brown, et al.*, 227 F. App'x 795 (11th Cir. 2007).

On June 24, 2016, Petitioner initially moved *pro se* to vacate his convictions and sentence under 28 U.S.C. § 2255, arguing that his convictions under § 924(c) and (o) should be vacated in light of this Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015). The district court appointed counsel to represent Petitioner in those proceedings. On December 7, 2017, the district court denied the motion, and the Eleventh Circuit subsequently denied Petitioner's request for a certificate of appealability. *Horne v. United States*, Case No. 18-10450-C (11th Cir. Mar. 30, 2018).

On May 4, 2020, Mr. Horne filed an application with the Eleventh Circuit for leave to file a second or successive motion to vacate under § 2255 based upon the new rule of constitutional law announced in *United States v. Davis*, 139 S. Ct. 2319 (2019). *See In re Travis Horne*, No. 20-11680 (May 4, 2020).

The court of appeals granted Mr. Horne's application as to the *Davis* challenge to the § 924(c) conviction, finding that Mr. Horne had made a *prima facie* showing that he was entitled to relief under *Davis* as to that count. *See* Order, *In re Travis Horne* 20-11680 (May 20, 2020). The Court noted that, "[T]he record does not clearly specify which crime(s) served as the predicate offense(s) for Horne's § 924(c) conviction in Count 8." *Id.* at 7.

On September 8, 2020, following complete briefing by both parties, the district court issued an order granting Mr. Horne's § 2255 motion. (Cv-DE 10). The court found Mr. Horne had established both cause and prejudice, thereby overcoming any procedural default. (Cv-DE 10:5-7). The court further found "undisputed error" pursuant to *Stromberg v. California*, 283 U.S. 359 (1931), insofar as the jury in Mr. Horne's case was instructed it could return a verdict based on any one of several grounds, one of which was constitutionally invalid. (Cv-DE 10:8). The court held that it was impossible to determine upon which ground the jury rested its verdict, as it returned only a general verdict with respect to the § 924(c) conviction in Count 8. (Cv-DE 10:8). And because the error was not harmless, Mr. Horne's conviction and sentence as to the § 924(c) count required reversal. (Cv-DE 10:10) (citing *Parker v. Sec'y for Dep't of Corrs.*, 331 F.3d 764, 777 (11th Cir. 2003). The district court entered a final judgment in favor of Mr. Horne. (Cv-DE 11).

Then, on September 21, 2020, the district court issued a *sua sponte* order, inviting the government to move for reconsideration of its September 8, 2020, order granting Mr. Horne's § 2255 motion. (Cv-DE 13). The court stated that briefing by the government in a related case "informed the [c]ourt's understanding of the underlying legal issues" in Mr. Horne's case and persuaded the court to "recognize[] the possibility of error in the September 8, 2020 Order and Judgment." (Cv-DE 13:2-3). The district court invited the government to move for reconsideration, noting that Rule 60(b)(1) permitted relief in such cases. (Cv-DE 13:3).

On September 28, 2020, the government moved for reconsideration, arguing that it was Petitioner's burden to prove that the jury relied solely on the now-invalid predicate of conspiracy to commit Hobbs Act robbery. (Cv-DE 14:2-5).

Mr. Horne argued in response that reconsideration was inappropriate and unwarranted, noting that a motion for reconsideration under Rule 60(b) cannot be used to "relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." (Cv-DE 15:2) (internal quotation and citations omitted). Mr. Horne added that the government had either previously failed to make the arguments contained in its motion or had made them in its original briefing, and the court had rejected them. (Cv-DE 15:2-3).

On November 19, 2020, the district court issued an order granting the government's motion for reconsideration pursuant to Rule 60(b), and setting aside its September 8, 2020, order granting Mr. Horne's § 2255 motion. (Cv-DE 16). The court noted that Rule 60(b) allowed a party to seek relief from a final judgment under a limited set of circumstances, including fraud, mistake, and newly discovered evidence. The court interpreted "mistake" to include the court's own mistake of law, and found that it had made such a mistake of law in granting Petitioner's § 2255 motion. (Cv-DE 16:7-8). It reversed its earlier decision, now finding in favor of the government regarding Petitioner's substantive claims. (Cv-DE 16:8-16).

The district court granted a certificate of appealability on two issues: (1) whether the court erred in applying the reasonable probability harmless-error review standard to an error arising from a jury that was instructed on multiple possible

predicate crimes — *one* of which is invalid, and a general verdict that does not specify the predicate(s) on which the jury relied; and (2) whether the court erred in determining the error was harmless. (Cv-DE 16:16-17).

Petitioner appealed the district court's order to the Eleventh Circuit. *See Horne v. United States*, No. 20-14503. He also moved to expand the certificate of appealability to include an additional issue: whether the district court reversibly erred by inviting and granting the government's motion for reconsideration on grounds not available pursuant to Fed. R. Civ. P. 60(b). The Court of Appeals granted that motion. *See* Order Granting Motion to Expand Certificate of Appealability. *Horne v. United States*, No. 20-14503 (11th Cir. Mar. 29, 2021).

On appeal, Mr. Horne argued that the district court erred when it granted the government's motion for reconsideration, because none of Rule 60(b)'s bases for vacating a judgment applied. *See* Appellant's Brief, *Horne v. United States*, No. 20-14503 (11th Cir. May 10, 2021). In response, the government argued that its motion was not subject to Rule 60(b), because the district court's order granting the § 2255 motion was not a final order. *See* Appellee's Brief, *Horne v. United States*, No. 20-14503 (11th Cir. July 13, 2021). In addition, the government argued that reconsideration was nonetheless appropriate under Rule 60(b)(1), which permits relief from a final judgment based on the court's own mistake in its interpretation of the law. *See id.*

The Eleventh Circuit affirmed. *Horne v. United States*, No. 20-14503 (11th Cir. Mar. 4, 2022). With respect to the Mr. Horne's substantive claims, the court held that

the district court did not err in finding the *Stromberg* error harmless and denying his request to vacate his § 924(c) conviction. The court of appeals held that the record did not "promote grave doubt" that Mr. Horne's § 924(c) conviction rested on the invalid ground of conspiracy to commit Hobbs Act robbery.

With respect to the district court's order granting reconsideration, the court held there was no error because the word "mistake" in Rule 60(b)(1) "encompasses errors of law by the district court." And, because the district court invited the motion, it was not error for the district court to grant the government's request for reconsideration, pursuant to Rule 60(b). *Horne v. United States*, No. 20-14503 (11th Cir. Mar. 4, 2022)

REASONS FOR GRANTING THE PETITION

For the past 50 years, the courts of appeals have been openly divided on whether Rule 60(b)(1) authorizes relief from judgment based on a court's legal error. The Second, Sixth, Seventh, and Eleventh Circuits share the view that Rule 60(b)(1) allows a district court to correct its own mistakes of law. *See United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009) ("Rule 60(b)(1) is available for a district court to correct legal errors by the court."); *Penney v. United States*, 870 F.3d 459, 461 (6th Cir. 2017) ("We have held that 'a Rule 60(b)(1) motion is intended to provide relief when the judge has made a substantive mistake of law . . . in the final judgment.'"); *Mendez v. Republic Bank*, 725 F.3d 651, 657–61 & n.4 (7th Cir. 2013) ("agree[ing] with the significant majority of the circuits that subsection (1) of Rule 60(b) allows a district court to correct its own errors that could be corrected on appeal, at least if the

motion is not a device to avoid expired appellate time limits"); *Parks v. U.S. Life & Credit Corp.*, 677 F.2d 838, 839–40 (11th Cir. 1982).

The Fifth, Ninth, Tenth, and D.C. Circuits have held that Rule 60(b)(1) applies to only certain types of legal errors. *See Benson v. St. Joseph Regional Health Ctr.*, 575 F.3d 542, 547 (5th Cir. 2009) ("Our rule is that a Rule 60(b)[1] motion may be used 'to rectify an obvious error of law, apparent on the record.'") (quoting *Hill v. McDermott, Inc.*, 827 F.2d 1040, 1043 (5th Cir. 1987)); s*ee Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 441 & n.5 (9th Cir. 1982) (Ninth Circuit law "clearly states . . . that errors of law may be corrected under Rule 60(b) motions"); *In re Int'l Fibercom, Inc.*, 503 F.3d 933, 940 n.7 (9th Cir. 2007) (clarifying that Rule 60(b)(1) was proper in *Liberty Mutual* because that case involved "a *mistake* under the law of the case doctrine," but stating that Rule 60(b)(6) was proper for procedural and statutory violations); *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 578 (10th Cir. 1996) ("The Tenth Circuit has made it clear that certain substantive mistakes in a district court's rulings may be challenged by a Rule 60(b)(1) motion."); *D.C. Fed. of Civic Assocs. v. Volpe*, 520 F.2d 451, 453 (D.C. Cir. 1975) (holding that the district court erred by failing to grant a Rule 60(b)(1) motion based on an intervening change in the law); *Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 940 (D.C. Cir. 1986) (clarifying that "*Volpe* could be read as adopting the more liberal interpretation of Rule 60(b)(1), allowing correction of substantive legal errors during the appeal period," but declining to say whether it "would extend this rule to

allow corrections of substantive legal errors where no such change in the law of the circuit has occurred").

Finally, the First, Third, Fourth, and Eighth Circuits have held that relief from a judgment based on the court's mistake of law is not available under Rule 60(b)(1). *See Fontanillas-Lopez v. Morell Bauzá*, 832 F.3d 50, 64 (1st Cir. 2016) ("this circuit does not understand Rule 60(b)(1)'s reference to 'mistake' to include a district court's mistaken ruling on a point of law"); *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003) ("legal error, without more does not warrant relief under that provision"); *In re GNC Corp.*, 789 F.3d 505, 511 (4th Cir. 2015) ("we held in *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982), that Rule 60 does not authorize motions for correction of a mistake of law"); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 460–61 (8th Cir. 2000) ("'relief under Rule 60(b)(1) for judicial error other than judicial inadvertence' is not available") (quoting *Fox v. Brewer*, 620 F.2d 177, 180 (8th Cir. 1980)).

This Court recognized the circuit conflict when it granted certiorari this term in *United States v. Kemp*, No. 21-5726 (argued Apr. 19, 2022). The instant case addresses the very same legal question presented in *Kemp*. The Court heard arguments in *Kemp* on April 19, 2022; a decision in that case is pending.

The Court should hold Petitioner's case pending the resolution in *Kemp*. Should this Court decide in *Kemp* that a district court's own legal error does not provide a basis for relief from judgment under Rule 60(b)(1), this Court should grant certiorari in this case, vacate the judgment, and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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