

NO
23-5212

IN THE SUPREME COURT OF THE UNITED STATES

DeAndra L Stephenson, PETITIONER

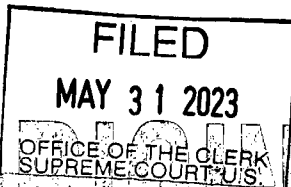
Vs.

Dexter Payne

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI



ORIGINAL

DeAndra Stephenson
Pro, se
Po Box 970
Marianna Ar 72360

QUESTION PRESENTED

FEDERAL RULE OF CIVIL PROCEDURE 60 (b)(2) AUTHORIZES RELIEF FROM JUDGEMENT BASED ON NEWLY DISCOVERED EVIDENCE.

THE QUESTION PRESENTED IS...

(1) WHETHER THE EIGHTH CIRCUIT ERRED IN HOLDING, IN SQUARE CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS, THAT EVERY RULE 60 (b) MOTION CONSTITUTES A PROHIBITED SECOND OR SUCCESSIVE HABEAS PETITION AS A MATTER OF LAW.

LIST OF PARTIES

[] DeAndra Stephenson

[] Dexter Payne.

- QUESTION PRESENTED
- TABLE OF AUTHORITIES
- OPINIONS BELOW?
- JURISDICTION
- STATUTORY PROVISIONS INVOLVED
- STATEMENT OF CASE
- FEDERAL RULE OF CIVIL PROCEDURE 60

REASONS FOR GRANTING THE WRIT...

I.) THE EIGHTH CIRCUIT HELD THAT PETITIONER'S RULE 60 (b)(2) MOTION IS A PROHIBITED SECOND OR SUCCESSIVE HABEAS APPLICATION. CONFLICTS WITH DECISION OF OTHER CIRCUITS ON AN ISSUE THAT HAS THE POTENTIAL TO ARISE IN ESSENTIALLY ANY HABEAS CASE.

II.) THE EIGHTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

CONCLUSION

APPENDIX

- DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS
- ORDER DENYING REHEARING
- ORDER GRANTING CERTIFICATE OF APPEALABILITY

- BORGAN VS. UNITED STATES, 884 F.2d 767, 771 (4TH CIR 1989)
- BUC INT'L CORP. VS. INT'L YACHT COUNSEL LTD., 517 F.3d 1271, 1275 (11TH CIR. 2008)
- 1) CALDERON VS. THOMPSON, 28 U.S.C. 125 b4 (1), 523 U.S. 538
 -) COMPTON VS. ALTON, S.S. Co., 608 F.2d 96, 102 4TH CIR (1979)
 -) COSS VS. LACKAWANNA COUNTY, PA, 532 U.S. 394 (2001), 204 F.3d 53, 461 (CA 32000) EN BANC
 -) DOWELL VS. STATE FARM FIRE CAS AUTO INS. CO, 993 F.2d 46, 48 (4TH CIR. 1993)
 -) DURATION AM, LLC VS. RAIN TRADING, INC., 787 F.3d 1161, 1163 (7TH CIR. 2015)
 -) ELLINGSWORTH VS. CHRYSLER 665 F.2d 180, 184 + A.3 (7TH CIR 1981)
 -) (ESQUIRE RADIO + ELECS.) INC. VS. (MONTGOMERY WARD + CO.)
804 F.2d 787, 795-94 (2d CIR. 1986)
 - 1) EVANS VS. FULCOMER, NO 89-4999, 1990, U.S. DIST. LEXIS 12447 7160 (ED. Pa. JUNE 13TH, 1990)
 - 1) FELKER VS. TURPIN, 518 U.S. 651 (1996)
 - 2) FORD VS. WAINWRIGHT, 477 U.S. 399 (1986) 523 U.S. AT 643
 - 3) GENERALLY HORN VS. UNITED STATES, 28 U.S.C. 2244 (b) 524 U.S. 236 (1998) FED. R. CIV. P. 60 (b)
 - 4) GONZALES VS. CROSBY 545 U.S. 524, 28 (2005)
 - 5) GORDON VS. RICHMOND, PUB. SCH. 2013 WL 432994, AT 2 [C.E.D. Va. SEPT. 10, 2013]
 - 6) HERNANDEZ VS. RESULTS STAFFING, INC. 907 F.3d 354, 364 (5TH CIR. 2018)

HOROWITZ VS. FED. INS. CO., WL 5624789, AT 1 D.M.A
Nov. '22, 2017, AFFD 733 F. App. 105 (4TH CIR. 2018)

- 1) INS VS. ST. CYR., 533 U.S. 289, 121 S. Ct. 2271, 2279
n. 13 (2001)
- 2) JORDAN VS. UNITED STATES, 2019 WL 229753, AT 1 (D.S.C MAY 30
(2019)
- 3) LINDH VS. MURPHY, 521 U.S. 320 (1997)
- 4) LUMA VS. BELL, 887 F. 3d 290, 292-93 (4TH CIR. 2018)
- 5) MATHENIA VS. DELO, 521 U.S. 1123 (1997), 99 F. 3d 1476 (C.A. 8 1996,
(CERT DENIED)
- 6) MAY VS. COLLINS, 961 F. 2d 74 (C.A. 8 1992) (PER CURIAM)
- 7) MOBLEY VS. HEAD, 306 F. 3d 1096, 1100-1105 (C.A. 11 2002)
- 8) NATL CREDIT UNION ADMIN Bd. v. GREG, 1 F. 3d 262, 264
(4TH CIR 1993)
- 9) RE BURNLEY, 988 F. 2d 1, 3 (4TH CIR 1992)
- 10) RODRIGUEZ VS. MITCHELL, 252 F. 3d 191 (2001) 252 F. 3d
AT 194 - 252 F. 3d AT 198
- 11) RUFF VS. INMATES OF SUFFOLK COUNTY JAIL, 502 U.S. 367, 384
(1992). 1
U.S. 3847 (1988) — UNITED STATES VS. BEGGARLY, 524
- 12) SLACK VS. MCDANIEL, 529 U.S. 473 (2000)
529 U.S. AT 485-86
537 U.S. 88 (2002)
- 13) STEWART VS. MARTINEZ-VILLAREAL, 523 U.S. 637 (1998)
- 14) A. UNITED STATES VS. BROWN, 179 F.R.D. 323 (D. KAN 1998)
B. UNITED STATES VS. RICH, 141 F. 3d 550, 553 (C.A. 5 1998)
- 15) UNITED STATES VS. MACDONALD, NO 97-7297, 1998 U.S. APP.
LEXIS 22673 (CA 4 SEPT. 8, 1998) B B

3) UNITED STATES VS. WILLIAMS, 674 F.2d 310, 313
(4TH CIR. 1982)

4) WAYE VS. TOWNLEY, 884 F.2d 762 (CA 4 1989) (PER CURIAM)
(DENYING RELIEF)

5) WENGER VS. O'BRIEN, NO. 00-1103, 2000 U.S. App LEXIS 15487
(CA 7 JUNE 28, 2000)

6) WARNER VS. CARBO, 731 F.3d 204, 207 (4TH CIR 1984)

7) ^AWHITMORE VS. AVERY, 179 F.R.D 252, 258-60 (D. NEB 1998)
^BQUOTING PAC INS. CO., VAM. NAFL FIRE INS. CO. 148 F.3d 396-
403 (4TH CIR 1998)

- STATUTES -

28 U.S.C. 1254 (1).

28 U.S.C. 1254 (1).

28 U.S.C. 2244 Cb

11 CHARLES ALLEN WRIGHT et. al.

FEDERAL PRACTICES AND PROCEDURE 2854 n.12 (3d ed.

FED. R. CIV. 60 (a)

FED. R. CIV. RULE 59 (b)

FED. R. CIV. P. 60 (4)

IN THE SUPREME COURT OF THE UNITED STATES
De ANORA L. STEPHENSON (- PETITIONER)
vs.

UNITED STATES OF AMERICA
DEXTER PAYNE, DIRECTOR - ARKANSAS DEPT. OF CORRECTION
(- RESPONDENT -)

- ON PETITIONER FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT
COURT OF APPEALS, RENDERED IN THESE PROCEEDINGS ON ~~APRIL 12, 2023~~
MARCH 29, 2023

OPINIONS BELOW-

THE OPINION OF THE COURT OF APPEALS DENYING PETITIONER'S
SUGGESTION FOR REHEARING EN BANC, THE ORDER OF THE DISTRICT
COURT DENYING PETITIONER'S RULE 60 B 2 MOTION.

JURISDICTION

THE JUDGEMENT OF THE COURT OF APPEALS WAS
ENTERED ON ~~4-12-2023~~ 3-29, 2023. A PETITION FOR
REHEARING WAS DENIED ON 5-10-2023. THE
JURISDICTION OF THIS COURT IS INVOKED 28 U.S.C 1254 (1).
PETITIONER SEEKS REVIEW OF THE EIGHTH CIRCUIT'S DENIAL OF
REHEARING, AND REHEARING EN BANC, EMBODIED IN THE SAME
5-10-2023 ORDER, TO REMAND PETITIONER'S PRIOR APPEAL. SEE
24 App 132. Cf. Calderon V. Thompson, 523 U.S. 538 (REVIEWING
COURTS OF APPEALS DECISION TO GRANT SUCH RELIEF.) THIS
COURT HAS JURISDICTION OVER THE SIXTH CIRCUIT'S JUDGEMENT
AND ORDER PURSUANT TO 28 U.S.C 125 b 4 (1). SEE GENERALLY
HOWN V. UNITED STATES 524 U.S. 236 (1998) DESCRIBING THE
BROAD CATEGORIES OF CASES REVIEWABLE IN THIS COURT.

STATUTE AND RULE INVOLVED

28 U.S.C. 2244(b) AS AMENDED BY THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, PROVIDES:

1) A CLAIM PRESENTED IN A SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION UNDER SECTION 2254 THAT WAS PRESENTED IN A PRIOR APPLICATION SHALL BE DISMISSED.

2) A CLAIM PRESENTED IN A SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION UNDER SECTION 2254 THAT WAS NOT PRESENTED IN A PRIOR APPLICATION SHALL BE DISMISSED, UNLESS -

A) THE APPLICANT SHOWS THAT THE CLAIM RELIES ON A NEW RULE OF CONSTITUTIONAL LAW, MADE RETRO-ACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT, THAT WAS PREVIOUSLY UNAVAILABLE; OR

B)(i) THE FACTUAL PREDICATE FOR THE CLAIM COULD NOT HAVE BEEN DISCOVERED PREVIOUSLY THROUGH THE EXERCISE OF DUE DILIGENCE; AND

(ii) THE FACTS UNDERLYING THE CLAIM, IF PROVEN AND REVIEWED IN LIGHT OF THE EVIDENCE AS A WHOLE, WOULD BE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE. THUS, BUT FOR CONSTITUTIONAL ERRORS NO REASONABLE FACT FINDER WOULD HAVE FOUND THE APPLICANT GUILTY OF THE UNDERLYING OFFENSE.

3) (A) BEFORE A SECOND OR SUCCESSIVE APPLICATION PERMITTED BY THIS SECTION IS FILED IN THE DISTRICT COURT, THE APPLICANT SHALL MOVE IN THE APPROPRIATE COURT OF APPEALS FOR AN ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER THE APPLICATION.

(B) A MOTION IN THE COURTS OF APPEALS FOR AN ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER A SECOND OR SUCCESSIVE APPLICATION SHALL BE DETERMINED BY A THREE JUDGE PANEL OF THE COURT OF APPEALS.

(C) THE COURT OF APPEALS MAY AUTHORIZE THE FILING OF A SECOND OR SUCCESSIVE APPLICATION ONLY IF IT DETERMINES THAT THE APPLICATION SATISFIES THE REQUIREMENTS OF THIS SUB-SECTION.

(D) THE COURT OF APPEALS SHALL GRANT OR DENY THE AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE APPLICATION NOT LATER THAN 30 DAYS AFTER THE FILING OF THE MOTION.

(E) THE GRANT OR DENIAL OF AN AUTHORIZATION BY A COURT OF APPEALS TO FILE A SECOND OR SUCCESSIVE APPLICATION SHALL NOT BE APPEALABLE AND SHOULD NOT BE THE SUBJECT OF A PETITION FOR WRIT OF HABEAS CORPUS, OR FOR A WRIT OF CERTIORARI.

FED. R. CIV. P. 60(b) PROVIDES IN RELEVANT PART: ON MOTION AND UPON SUCH TERMS AS ARE JUST, THE COURT MAY RELIEVE A PARTY OR A PARTY'S LEGAL REPRESENTATIVE FROM A FINAL JUDGEMENT, ORDER, OR PROCEEDING FOR THE FOLLOWING REASONS... (1) MISTAKE, SURPRISE, OR EXCUSABLE NEGLIGENCE; (2) NEWLY DISCOVERED EVIDENCE WHICH BY DUE DILIGENCE COULD NOT HAVE BEEN DISCOVERED

IN TIME TO MOVE FOR A NEW TRIAL UNDER 59(b)(3) FRAUD
WHETHER HERETOFORE DENOMINATED INTRIN OR EXTRIN SIC), MIS-
INTERPRETATION, OR OTHER MISCONDUCT OF AN ADVERSE PARTY; (4) THE
JUDGEMENT IS WORD: (5) THE JUDGEMENT HAS BEEN SATISFIED,
RELEASED OR DISCHARGED, OR A PRIOR JUDGEMENT UPON WHICH
IT IS BASED HAS BEEN REVERSED OR OTHERWISE VACATED, OR IF I
IS NO LONGER EQUITABLE THAT THE JUDGEMENT SHOULD HAVE PROSPECTIVE
APPLICATION; OR (6) ANY OTHER REASON JUSTIFYING RELIEF FROM
THE OPERATION OF THE JUDGEMENT.

STATEMENT OF THE CASE

THE DISTRICT COURT IN THIS CASE DENIED PETITIONER
RULE 60(b)(2).

PURSUANT TO A MOTION FOR RELIEF FROM JUDGE-
MENT UNDER FED. R. CIV. P. 60(b)(2). OR BY REMANDING THE
CASE, THE EIGHTH CIRCUIT HOWEVER, REFUSED TO PERMIT THE
DISTRICT COURT TO APPLY [a] PURSUANT TO A MOTION FOR RELIEF
FROM JUDGEMENT UNDER FED. R. CIV. P. 60(b). SEE... PET. APP.
A1 A2

A FEDERAL RULE OF CIVIL PROCEDURE 60

FIRST PREMULGATE IN 1937, RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE AUTHORIZES RELIEF FROM FINAL JUDGEMENTS FOR A WIDE VARIETY OF REASONS.

RULE 60(a) AUTHORIZED DISTRICT COURTS TO CORRECT CLERICAL MISTAKE OR A MISTAKE ARISING FROM OVER-SIGHT, OMISSION WHENEVER ONE IS FOUND IN A JUDGEMENT, ORDER, OR OTHER PART OF THE RECORD.

FOR EXAMPLE, DISTRICT COURTS CAN GRANT RULE 60(a) RELIEF WHEN THEY ACCIDENTALLY SWAP TWO DIGITS AWARDED DAMAGES ON THE VERDICT FORM OR MAKE A MATH ERROR. (SQUIRE RADIO & ELECS.), INC. vs. (MONTGOMERY WARD & CO.), 4 F. 2d 787, 795-96 (2d CIR. 1984). 11 CHARLES ALLEN WRIGHT JR., FEDERAL PRACTICES AND PROCEDURE § 2854 & N. 12 (3d ed. 2020) (WRIGHT & MILLER). "THE COURT MAY CORRECT SUCH MISTAKES ON ITS OWN, WITH OR WITHOUT NOTICE" OR THE PARTIES CAN FILE A MOTION FED. R. CIV. 60(a). TIMING IS NOT EXISTENT! THE COURT CAN PROVIDE RELIEF WHENEVER THE MISTAKE IS FOUND, ALTHOUGH LEAVE FROM THE COURT OF APPEALS IS REQUIRED IF AN APPEAL IS PENDING. *Id.*

RULE 60(b), IN TURN, LETS A PARTY "SEEK RELIEF FROM A FINAL JUDGEMENT, AND REQUEST RE-OPENING OF HIS CASE UNDER A LIMITED SET OF CIRCUMSTANCES". (GONZALES VS. LOSBY) 545 U.S. 524, 528 (2005). PARTIES MUST FILE A MOTION, WHICH COURTS WILL GRANT ON JUST TERMS FOR THE FOLLOWING REASONS!

60(b)(1) COVERS "MISTAKES, INADVERTANCE, SURPRISE, OR CUSABLE NEGLECT. FOR EXAMPLE, IF PARTIES "NO-SHOW" CAUSE their

AWYER MISUNDERSTOOD WHAT DAY THE JUDGE SAID THE TRIAL WOULD BEGIN, THAT MISTAKE OR EXCUSABLE NEGLECT WARRANTS RELIEF. *ELLINGSWORTH V. CHRYSLER*, 665 F. 2d 180, 184 & n.3. 7th CIR. 1981)

60(b)(2) AUTHORIZES RELIEF FOR NEWLY DISCOVERED EVIDENCE THAT, WITH REASONABLE DILIGENCE, COULD NOT HAVE BEEN DISCOVERED IN TIME TO MOVE FOR A NEW TRIAL UNDER RULE 59(b). FOR EXAMPLE, WHERE A PRISON WARDEN ORIGINALLY PREVAILED AGAINST FAILURE TO TRAIN CLAIM, RULE 60(b)(2) PROVIDED RELIEF WHEN NEW EVIDENCE OF INADEQUATE TRAINING EMERGED MONTHS AFTER JUDGEMENT. *LUNA V. BELL*, 887 F. 3d 290, 292-93 (6th CIR. 2018).

60(b)(3) AUTHORIZES RELIEF IN CASES OF FRAUD..., MISREPRESENTATION, OR MISCONDUCT BY AN OPPOSING PARTY. FOR INSTANCE, WHEN A PLAINTIFF TESTIFIED AT TRIAL THAT HE WAS LONGFULLY TERMINATED BASED ON HIS BACK INJURY, BUT THE INJURY WAS FICTITIOUS. *HERNANDEZ V. RESULTS STAFFING, INC.* 7 F. 3d. 354, 364, (5th CIR. 2018)

60(b)(4) PERMITS RELIEF IF THE JUDGEMENT IS VOID. FOR INSTANCE, BECAUSE THE COURT LACKED PERSONAL JURISDICTION. *ARMUTJAN AM. LLC Vs. RAIN TRADING, INC.*, 787 F. 3d 1161, 1163 4th CIR 2015).

60(b)(5) PROVIDES FOR RELIEF IF "THE JUDGEMENT HAS BEEN SATISFIED, RELEASED, OR DISCHARGED. IF THE JUDGEMENT IS BASED ON AN EARLIER JUDGEMENT THAT HAS BEEN REVERSED OR VACATED." OR IF APPLYING, [THE JUDGEMENT] PROSPECTIVELY IS NO LONGER EQUITABLE. THUS, IF PARTIES REACH SEPERATE SETTLEMENTS PARTS MAY APPLY RULE 60(b)(5)

TO REDUCE THE TOTAL DAMAGES AWARDED BECAUSE THE JUDGE WAS "PARTIALLY SATISFIED". *BUC INT'L CORP. VS. INT'L YACHT CLUB D.*, 517 F.3d 1271, 1275 (11th CIR 2008). THIS PROVISION CAN BE JUSTIFIED RELIEF, IF FOR INSTANCE, A COURT ENTERS A COURT DECREE RESTRUCTURING A PRISON SYSTEM AND CHANGING ACTUAL CONDITIONS OR UN-FORESEEN OBSTACLES "RENDER THE TRIAL IMPRACTICABLE" (*RUFFIN VS. INMATES OF SUFFOLK COUNTY JAIL*) 517 U.S. 367, 384 (1992)

60(b)(6) IS A CATCH ALL PROVISION, AUTHORIZING RELIEF FOR ANY OTHER REASON THAT JUSTIFIES RELIEF. BUT RULE 60(b) DEMANDS AN ADDITIONAL STEP: THE MOVANT MUST ALSO SHOW EXTRAORDINARY CIRCUMSTANCES JUSTIFYING THE REOPENING OF A FINAL JUDGEMENT. *GONZALES*, 545 U.S. AT 535 (QUOTING *BERGMANN VS. UNITED STATES*, 340 U.S. 193, 199 (1950)).

TIMING RULE 60(b) SETS DIFFERENT DEADLINES FOR DIFFERENT MOTIONS. MOVANTS HAVE A NON-EXTENDABLE ONE YEAR DEADLINE TO FILE MOTION UNDER 60(b)(1) FOR MISTAKE, INVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT, MOTIONS UNDER 60(b)(2) FOR NEWLY DISCOVERED EVIDENCE, AND MOTIONS UNDER 60(b)(3) FOR IDENTIFYING FRAUD. FED. R. CIV. P. 6(b)(2), 60(c)(1). BY CONTRAST, MOVANTS CAN FILE ALL OTHER RULE 60(b) MOTIONS WITHIN A REASONABLE TIME. FED. R. CIV. P. 60(c)(1).

OTHER BASIS OF RELIEF FINALLY, RULE 60 "ABOLISHED" VARIOUS COMMON-LAW AND EQUITABLE FORMS FOR SEEKING RELIEF FROM FINAL JUDGEMENTS, I.E., BILLS OF REVIEW, BILL IN THE NATURE OF BILLS OF REVIEW, AND WRITS OF COR-AM NOBIS, COR-AM NOBIS AND

NOTA QUECELA. FED. R. CIV. P. 60(e). THERE WAS NO NEED
PRESERVE THESE SEPERATE WRITS, BECAUSE RULE 60(b)
INCORPORATED ALL OF THE GROUNDS THESE WRITS COVERED. FED.
CIV. P. 60(b) ADVISORY COMMITTEES NOTE TO 1946 AMENDMENT
INVERSELY, RULE 60 DOES NOT AFFECT COURTS AUTHORITY TO
GRANT CERTAIN OTHER TERMS OF RELIEF, SUCH AS AN IN-
DEPENDENT ACTION TO RELIEVE A PARTY FROM A JUDGEMENT
PREVENT GRAVE INJUSTICE FED. R. CIV. P. 60(d)(1)
UNITED STATES V. BEGGERLY 524 U.S. 38. 47 (1988).

IN SUM, A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION,
LIKE ALL HABEAS CORPUS PETITIONS, IS MEANT TO REMEDY CONSTI-
TUTIONAL VIOLATIONS (ALBEIT) ONES WHICH ARISE OUT OF FACTS
DISCOVERED OR LAWS EVOLVED AFTER AN INITIAL HABEAS CORPUS
PROCEEDING, WHILE A RULE 60(b) MOTION IS DESIGNED TO CURE
PROCEDURAL VIOLATIONS IN AN EARLIER PROCEEDING, HERE, A HABEAS
CORPUS PROCEEDING THAT RAISE QUESTIONS ABOUT THAT PROCEEDINGS
INTEGRITY.

AS A FINAL NOTE, I WOULD ADD THAT THIS RULE IS NOT
JUST CONSISTENT WITH CASE LAW, BUT IT ALSO COMPORTS WITH THE
FAIR AND EQUITABLE ADMINISTRATION OF JUSTICE. IF, FOR EXAMPLE, A
4TH ROW INMATE COULD SHOW THAT THE STATE INDEED COMMITTED
AND UPON THE DISTRICT COURT DURING HIS HABEAS CORPUS PROCEEDINGS
WOULD BE A MISCARriage OF JUSTICE IF THIS COURT TURNED A BLIND
EYE TO SUCH ABUSE OF THE JUDICIAL PROCESS. NEVERTHELESS, THIS IS
THE RESULT THAT WOULD OCCUR IF HABEAS CORPUS PETITIONER'S RULE
60(b) MOTIONS WERE ALWAYS CONSIDERED SECOND OR SUCCESSIVE
HABEAS CORPUS PETITIONS. AFTER ALL, A CLAIM OF PROSECUTORIAL FRAUD
DOES NOT RELY ON A NEW RULE OF CONSTITUTIONAL LAW AND MAY
BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT... NO
REASONABLE FACT-FINDER WOULD HAVE FOUND THE APPLICANT GUILTY
OF THE UNDERLYING OFFENSE. 28 U.S.C. 2244(b)(2) IT IS A
PRINCIPLE THAT NONETHELESS

THE CONSIDERATION OF RULE 60(b) MOTION PRECEEDS IN TWO STAGES. NAT'L CREDIT UNION ADMIN Bdr. GREG, 1 F.3d 264 (4TH CIR 1993); HOROWITZ V. FED. INS. CO., 2017 WL 5624789, A.D. MA NOVEMBER 22, 2017, AFF'D 733 F. APP. 105 (4TH CIR 2018). THE MOVANT MUST FIRST ESTABLISH TIMELINESS, A MERITORIOUS CLAIM] A LACK OF UNFAIR PREJUDICE TO THE OPPOSING PARTY, AND EXCEPTIONAL CIRCUMSTANCES. DOWELL V. STATE FARM FIRM CAS. LTD INS. CO., 993 F. 2d 46, 48 (4TH CIR 1993). QUOTING WERNER V. CARBO, 731 F31 F. 2d 204, 207 (4TH CIR 1984). ONLY THE MOVANT AS MET THE THRESHOLD SHOWING, HE MUST SATISFY ONE OF THE SIX ENUMERATED GROUNDS FOR RELIEF UNDER RULE 60(b) NAT'L CREDIT UNION ADMIN BD, 1 F.3d AT 266.

PLAINTIFF INVOKES RULE 60(b)(2); WHICH GOVERNS THE STANDARDS FOR RELIEF FROM JUDGEMENT ON THE BASIS OF NEWLY DISCOVERED EVIDENCE. FED R. CIV. PROC. 60(b)(2) TO BE GRANTED RELIEF UNDER RULE 60(b)(2) THE MOVANT MUST DEMONSTRATE... (1) THE EVIDENCE IS NEWLY DISCOVERED SINCE THE JUDGEMENT WAS ENTERED; (2) DUE DILIGENCE ON THE PART OF THE MOVANT TO DISCOVER THE NEW EVIDENCE HAS BEEN EXERCISED; (3) THE EVIDENCE IS NOT MERELY CUMULATIVE OR IMPEACHING; (4) THE EVIDENCE IS MATERIAL; AND (5) THE EVIDENCE IS SUCH THAT IS LIKELY TO PRODUCE A NEW OUTCOME IF THE CASE WAS RETRIED, OR IS SUCH THAT WOULD REQUIRE THE JUDGEMENT TO BE AMENDED. BORGIAN V. UNITED STATES, 2019 WL 229753, AT 1 (D.S.C MAY 30, 2019). THESE GROUNDS "MUST BE CLEARLY SUBSTANTIATED BY ADEQUATE PROOF." IN Burn Lq, 988 F. 2d 1, 3, (4TH CIR. 1992)

MUST BE RECOGNIZED. MOBLEY V. HARRIS, 304 U.S. 463 (1938), 12 F.3d 1011 (11th Cir. 1997), 2002 WL 112002 (11th Cir. 2002) (DISSENTING OPINION).

JUDGE TROFLATS REASONING IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN STEWART V. MARTINEZ - VILLAREAL, 523 U.S. 637 (1998), AND SLACK V. MCDANIEL, 529 U.S. 473 (2000). APPLYING THAT REASONING TO THE PRESENT CASE, IT IS PERFECTLY CLEAR THAT THE PETITIONER FILED A PROPER RULE 60(b) MOTION. THE MOTION DID NOT PURPORT TO SET FORTH THE BASIS FOR A SECOND OR SUCCESSIVE CHALLENGE TO THE STATE COURT JUDGEMENT OF CONVICTION. IT DID, HOWEVER, SEEK RELIEF FROM THE FINAL ORDER ENTERED BY THE FEDERAL COURT IN THE HABEAS PROCEEDING; AND IT RELIED ON GROUNDS THAT ARE EITHER DIRECTLY OR INDIRECTLY IDENTIFIED IN RULE 60(b) AS POSSIBLE BASIS FOR SUCH RELIEF. ESSENTIALLY IT SUBMITTED THAT THE DISTRICT COURT ERRORED RULING BASED ON A MISTAKEN PREMISE IN PETITIONER'S VIEW, THAT THE NEWLY DISCOVERED EVIDENCE CONSTITUTED A REASON JUSTIFYING RELIEF FROM THE OPERATION OF THE JUDGEMENT WITHIN THE MEANING OF RULE 60(b)(2).

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED FOR 10 REASONS. FIRST, THE EIGHTH CIRCUITS HOLD THAT PETITIONER'S 60(b)(2) MOTION IS A PROHIBITED SECOND OR SUCCESSIVE HABEAS APPLICATION. CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON AN ISSUE THAT HAS THE POTENTIAL TO ARISE IN ESSENTIALLY ANY HABEAS CASE. SECOND, THE EIGHTH CIRCUITS DECISION CONFLICTS WITH THE COURTS' PRECEDENTS, WHICH HOLD THAT A PETITIONER IS "SUCCESSIVE" ONLY IF HE SEEKS TO RAISE NEW CLAIMS OR SEEKS AN ADJUDICATION OF CLAIMS THAT HAVE ALREADY BEEN DECIDED ON THE MERITS.

1. THE CIRCUITS ARE IRRECONCILABLY DIVIDED OVER WHETHER A RULE 60(b) MOTION CONSTITUTES A "SECOND OR SUCCESSIVE HABEAS APPLICATION."

THE EIGHTH CIRCUIT APPLIED A CATEGORICAL RULE THAT EVEN A RULE 60(b) MOTION FILED BY A HABEAS PETITIONER CONSTITUTES A SECOND OR SUCCESSIVE HABEAS APPLICATION AND THEREFORE IS SUBJECT TO THE EXTREME STRUCTURES OF 28 U.S.C. 2244(b), WHICH INTERPOSES THE COURT OF APPEALS AS A GATEKEEPER AND PERMITS SUCH APPLICATIONS TO BE FILED ONLY IN EXCEEDINGLY NARROW CIRCUMSTANCES. SEE, 28 U.S.C. 2244(b)(1) (A CLAIM PRESENTED IN A SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION UNDER SECTION 2254 THAT WAS PRESENTED IN A PRIOR APPLICATION SHALL BE DISMISSED.), 2244(b)(2) ("[a] SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION UNDER SECTION 2254 THAT WAS NOT PRESENTED IN A PRIOR APPLICATION SHALL BE DISMISSED UNLESS CERTAIN VERY NARROW EXCEPTIONS ARE SATISFIED. THE EIGHTH CIRCUIT HELD THAT THIS CASE DOES NOT SATISFY THE GATEKEEPING CRITERIA AND THEREFORE REFUSED TO PERMIT THE DISTRICT COURT TO CONSIDER PETITIONER'S 60(b) MOTION. Rule

THE EIGHTH CIRCUITS HOLDING IS THE SUBJECT OF AN UPCOMING DETERMINATIVE, THREE-WAY CIRCUIT CONFLICT. THE EIGHTH CIRCUIT.

THE ONLY COURT TO DEEM A RULE 60(b) MOTION A SECOND OR SUCCESSIVE HABEAS PETITION IN ALL CIRCUMSTANCES, INCLUDING THOSE OF THIS CASE. AS THIS PETITION EXPLAINS INFRA, OTHER CIRCUITS APPLY EITHER OF TWO APPROACHES:

- THE SECOND CIRCUIT HAS ADOPTED THE OPPOSITE CATEGORICAL HOLDING THAT A RULE 60(b) MOTION IS NEVER A SECOND OR SUCCESSIVE APPLICATION.

- NUMEROUS OTHER CIRCUITS HOLD THAT A RULE 60(b) MOTION MAY BE DEEMED A "SECOND OR SUCCESSIVE" APPLICATION IF IT IS THE FUNCTIONAL EQUIVALENT OF A SUCCESSIVE APPLICATION BECAUSE IT PRESENTS NEW CLAIMS OR SEEKS TO RELITIGATE CLAIMS THAT THE DISTRICT COURT HAS ALREADY DECIDED ON THE MERITS, EITHER OF WHICH IS TRUE IN THIS CASE.

OTHER CIRCUITS THUS RECOGNIZE THAT IT WOULD BE COMPLETELY ABSURD TO HOLD THAT EVERY RULE 60(b) MOTION IS A "SECOND OR SUCCESSIVE" APPLICATION. IMAGINE A CIRCUMSTANCE IN WHICH A DISTRICT COURT IS MISLED BY THE STATE INTO ENTERING JUDGEMENT AGAINST A HABEAS PETITIONER, WHETHER THROUGH "FRAUD OR MORE GENERALLY THROUGH "MISCONDUCT," BOTH WHICH ARE EXPRESSLY RECOGNIZED AS GROUNDS FOR RELIEF FROM JUDGEMENT UNDER RULE 60(b)(3). ON THE EIGHTH CIRCUIT: EVEN IF THE PETITIONER DISCOVERS THE NEWLY DISCOVERED EVIDENCE AND FILES A RULE 60(b)(2) MOTION, THAT MOTION IS SECOND OR SUCCESSIVE APPLICATION AS A MATTER OF LAW AND BECAUSE IT RAISES THE SAME CLAIMS AS THE INITIAL APPLICATION, IT CATEGORICALLY "SHALL BE DISMISSED" UNDER 28 U.S.C. 2244 (b)(1). THAT CANNOT CONCEIVABLY BE CORRECT. (F. UNITED STATES V. MACDONALD, NO 97-7297, 1998 U.S. APP. LEXIS 073 (CA4 SEPT. 8 1998) HOLDING THAT RULE 60(b) MOTION IS NOT A SECOND OR SUCCESSIVE APPLICATION WHEN MOTION ALLEGES THAT PRIOR PETITION HAD BEEN DENIED BASED ON FRAUD.) SEE SO INFRA AT 15-14

114 (CITING NUMEROUS CASES IN WHICH COURTS HAVE FOUND RULE 60(b) RELIEF APPROPRIATE IN HABEAS CASES). THE EIGHT CIRCUITS HOLDING ALSO LOGICALLY DEEMS EVERY MOTION UNDER RULE 59(e) (GOVERNING ANY ATTEMPT TO ALTER OR AMEND [JUDGEMENT]) TO BE A SECOND OR SUCCESSIVE APPLICATION WITHSTANDING THAT DISTRICT COURTS REGULARLY INVOKE RULE 59(e) TO CORRECT THEIR OWN ERRORS. NOTHING IN THE TEXT OF THE AEDPA, ITS LEGISLATIVE HISTORY, OR THE POLICE EMBODIES SUGGEST THAT CONGRESS WOULD INTEND SUCH AN UNHEARD-OF RESULT. AND FOR THE REASONS DISCUSSED INFRA, DECISIONS OF EVERY OTHER CIRCUIT AND THIS COURT FLATLY REJECT SUCH A SUGGESTION.

1. THE DECISION BELOW SQUARELY CONFLICTS WITH THE SECOND CIRCUITS DECISION IN RODRIGUEZ V. MITCHELL, 252 F. 3d 1 (2001) RODRIGUEZ HOLDS AS A MATTER OF LAW THAT A MOTION UNDER RULE 60(b) TO VACATE A JUDGEMENT DENYING HABEAS IS NOT THE EQUIVALENT OF A SECOND OR SUCCESSIVE HABEAS PETITION SUBJECT TO THE STANDARDS OF § 2244(b)." 252 F. 3d 194. SEE ALSO *id.* AT 198 (WE NOW RULE THAT A MOTION UNDER RULE 60(b) TO VACATE A JUDGEMENT DENYING HABEAS IS NOT A SECOND OR SUCCESSIVE HABEAS PETITION AND THEREFORE SHOULD BE TREATED AS ANY OTHER MOTION UNDER RULE 60(b).")

THE SECOND CIRCUIT RESTED IF CATEGORICAL RULE ON TWO GROUNDS, FIRST, [A] MOTION UNDER RULE 60 AND A PETITION FOR HABEAS HAVE DIFFERENT OBJECTIVES: THE HABEAS MOTION UNDER 28 U.S.C. 2254 SEEKS TO INVALIDATE THE STATE COURTS JUDGEMENT OF CONVICTION, IN CONTRAST TO A RULE 60(b) MOTION, WHICH (ALTHOUGH A STEP ON THE ROAD TO THE ULTIMATE OBJECTIVE OF INVALIDATING THE JUDGEMENT OF CONVICTION). SEEKS ONLY TO VACATE THE FEDERAL COURT JUDGEMENT DISMISSING THE HABEAS PETITION. 252 F. 3d AT 194. A SUCCESSFUL RULE 60(b) MOTION WOULD NOT INVALIDATE [E] THE STATE CONVICTION, BUT INSTEAD

WILL MERELY REINSTATE THE PREVIOUSLY DENIED PETITION FOR HABEAS, OPENING THE WAY FOR FURTHER PROCEEDINGS SEEKING ULTIMATELY TO VACATE THE CONVICTION. I.D. SECOND, THE GROUNDS ASSERTED IN SUPPORT OF THE MOTION UNDER RULE 60(b) MAY HAVE NOTHING TO DO WITH THE ALLEGED VIOLATIONS OF FEDERAL RIGHTS DURING THE STATE CRIMINAL TRIAL THAT WERE ASSERTED AS A BASIS FOR THE HABEAS. I.D. AT 199,

OF PARTICULAR NOTE, THE SECOND CIRCUIT SPECIFICALLY ACKNOWLEDGED THAT IT WAS EXPANDING A SPLIT IN THE CIRCUITS. WE ARE AWARE THAT THE MAJORITY OF CIRCUIT COURTS THAT HAVE CONSIDERED THIS ISSUE HAVE HELD THAT A RULE 60(b) MOTION TO VACATE A JUDGEMENT DENYING HABEAS EITHER MUST OR MAY BE TREATED AS A SECOND OR SUCCESSIVE HABEAS PETITION," 252 F.3D AT 199-200 (EMPHASIS ADDED) (COLLECTING CASES) THE SECOND CIRCUIT EXPLICITLY REJECTED THOSE DECISIONS. THESE COURTS, HOWEVER, HAVE OFFERED LITTLE EXPLANATION IN SUPPORT OF THEIR REASONING. THEIR OPINIONS DEPEND LARGELY ON CONCLUSORY STATEMENTS AND CITATIONS TO ONE ANOTHER. IN SUPREME COURT VIEW, BETTER REASONS SUPPORT THE CONCLUSION THAT A RULE 60(b) MOTION TO VACATE JUDGEMENT DENYING HABEAS IS NOT A SECOND PETITION UNDER 2244(b). I.D. AT 200.

THE SECOND CIRCUIT SPECIFICALLY REJECTED THE VIEW OF OTHER CIRCUITS THAT A RULE 60(b) MOTION "MAY OR MUST" BE DEEMED A SECOND OR SUCCESSIVE PETITION BECAUSE SUCH A MOTION CONTEMPLATES ULTIMATELY THE VACATING OF THE CONVICTION. 2 F.3D AT 198. THAT OBJECTIVE, THE COURT EXPLAINED, IS ACHIEVED WITH EVERY MOTION THE PETITIONER MIGHT MAKE IN THE COURSE OF PURSUING HIS HABEAS. ALL SUCH MOTIONS, LIKE THE MOTION UNDER RULE 60(b), SEEK TO ADVANCE THE ULTIMATE OBJECTIVE OF VACATING THE CRIMINAL CONVICTION. BUT EACH PROVIDES RELIEF THAT IS MERELY A STEP

ONLY THE WAY. ID. AT 148-49

OF NOTE, EVEN BEFORE RODRIGUEZ, DISTRICT COURTS IN THE SECOND CIRCUIT REGULARLY GRANTED RULE 60 (b) MOTIONS TO REOPEN HABEAS PROCEEDING, REJECTING THE ARGUMENT THAT SUCH MOTIONS ARE SUCCESSIVE APPLICATIONS. PARTICULARLY NOTEWORTHY IS A SERIES OF DISTRICT COURT CASES GRANTING RULE 60 (b) RELIEF TO INDIVIDUALS WHO'S HABEAS PETITIONS HAD BEEN DISMISSED ANTIMELY PRIOR TO THE SECOND CIRCUIT'S ADOPTION OF A RULE GRANTING INMATES WHO'S CONVICTIONS BECAME FINAL PRIOR TO AEDPA A ONE YEAR GRACE PERIOD FOLLOWING AEDPA'S EFFECTIVE DATE TO FILE PETITIONS.

PLAINLY, PETITIONER WOULD PREVAIL IN THE SECOND CIRCUIT ON A MATTER LAW. UNDER THE SQUARE HOLDING OF RODRIGUEZ, THE PETITIONER'S RULE 60 (b) MOTION IS NOT A SECOND OR SUCCESSIVE HABEAS APPLICATION AND THE DISTRICT COURT WOULD BE OBLIGATED TO CONSIDER THE MOTION.

2. PETITIONER ALSO WOULD PREVAIL IN THE MANY CIRCUITS THAT REJECT THE EIGHTH CIRCUIT'S CATEGORICAL RULE THAT EVERY RULE 60 (b) MOTION IS A "SECOND OR SUCCESSIVE" APPLICATION IN APPROPRIATE CIRCUMSTANCES. AS EXPLAINED BY THE EN BANC NINTH CIRCUIT, [i]T SUFFICES TO SAY THAT A BRIGHT LINE RULE GRANTING ALL RULE 60 (b) MOTIONS WITH SUCCESSIVE HABEAS PETITIONS WOULD BE IMPROPER. THOMPSON V. CALDERON, 151 F.3d 8, 921 n.3 (1998). THE RULE IN THE FOURTH, FIFTH, SIXTH, SEVENTH, NINTH AND ELEVENTH CIRCUIT IS THUS THAT A RULE 60 MOTION "MAY" IN CERTAIN SPECIFIC CIRCUMSTANCES, BE DEEMED "SECOND OR SUCCESSIVE" APPLICATION. THOSE COURTS FOCUS ON WHETHER THE RULE 60 (b) MOTION SEEKS TO EVADE THE BAR ON SUCCESSIVE APPLICATION BY (i) RAISING NEW CLAIMS OR EVIDENCE.

(11) RECONSIDERATION CLAIMS THAT HAVE BEEN PREVIOUSLY DECIDED ON THE MERITS. SEE, THOMPSON V. CALDERON, SUPRA, 151 F.3d 921 (WHEN PETITIONER RELIES ON NEWLY DISCOVERED EVIDENCE REGARDING ALREADY DECIDED CLAIM, THE FACTUAL PREDICATE FOR RULE 60 (b) MOTION ALSO STATES A CLAIM FOR A SUCCESSIVE PETITION AND SHOULD BE TREATED AS SUCH)." UNITED STATES V. CH. 141 F.3d 550, 553 (CA5 1998) (DISTRICT COURT "MAY" PERMIT A RULE 60 (b) MOTION SUCCESSIVE PETITION IF THE FUNCTIONAL EQUIVALENT OF A MOTION UNDER § 2255: IN THAT CASE, THE PETITIONER SOUGHT RECONSIDERATION OF CLAIM PREVIOUSLY DECIDED ON THE MERITS). FELTER V. TURPIN, 101 F.3d 657, 660 (CA11 1997) (SEEMING RULE 60 (b) MOTION TO BE A PROHIBITED APPLICATION BECAUSE IT WOULD BE TANTAMOUNT TO A SECOND OR SUCCESSIVE PETITION AND RULE 60 (b) CANNOT BE USED TO CIRCUMVENT RESTRAINTS ON SUCCESSIVE PETITIONS) MATHENIA V. DELO, 99 F.3d 1476 (CA8 1996), CERT DENIED, 521 U.S. 1123 (1997) (HOLDING THAT CLAIMS FOR A RULE 60 (b) MOTION WERE SUCCESSIVE BECAUSE THEY RAISED GROUNDS IDENTICAL TO GROUNDS HEARD AND DECIDED ON THE MERITS IN [THE PETITIONER'S] PREVIOUS PETITION)." (QUOTING SAWYER V. WHITLEY, 505 U.S. 333, 338 (1992): HUNT V. MYTH, 57 F.3d 1327, 1327 (CA4 1995) (DISTRICT COURT "MAY" TREAT 60 (b) MOTION AS SUCCESSIVE AND PROPERLY DID SO WHEN MOTION SOUGHT CONSIDERATION OF CLAIMS OMITTED FROM ORIGINAL PETITION AND CLAIMS WERE EQUIVALENT TO ADDITIONAL HABEAS CLAIMS.)"

THIS CASE-BY-CASE APPROACH IS ILLUSTRATED BY DECISIONS APPLYING IT TO GRANT HABEAS RELIEF TO PETITIONER UNDER RULE 60 (b). SEE, E.G., UNITED STATES V. BROWN, 179 F.3d 323 (CD KAN 1998) (GRANTING RULE 60 (b) RELIEF TO REENTER PRISON BECAUSE PETITIONER DID NOT RECEIVE NOTICE UNTIL ONE YEAR LATER AND THUS COULD NOT OTHERWISE APPEAL):

ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION: DISTINGUISHING
PRECEDENT DENYING RULE 60(b) RELIEF AS SECOND OR
SUCCESSIVE AS TURNING ON FACTS IN WHICH THE PETITIONER
UGHT BY HIS MOTION TO PRESENT CLAIMS WHICH EITHER HAD
IT BEEN PRESENTED BEFORE IN HIS EARLIER PETITION, OR HAD
BEEN PRESENTED AND DECIDED ON THE MERITS; GRANTING
RULE 60(b) RELIEF BECAUSE ORDER DENYING PRIOR APPLICATION
AS "ERRONEOUS").

THE DISTRICT COURT PLAINLY WOULD HAVE BEEN PERMITTED
CONSIDER PETITIONERS RULE 60(b) MOTION IN THE FOURTH,
FIFTH, SIXTH, NINTH AND ELEVENTH CIRCUITS. PETITIONER DOES
NOT SEEK TO RAISE ANY CLAIMS NOT PRESENTED IN HIS INITIAL
HABEAS PETITION, NOR DOES HE SEEK TO RELITIGATE ANY CLAIM
THAT HAD BEEN DECIDED ON ITS MERIT. RATHER, HE SEEKS TO
OPEN THE DISTRICT COURT'S EARLIER JUDGEMENT TO HAVE THE
NEWLY DISCOVERED EVIDENCE HEARD AS RULE 60(b)(2) REQUIRES.

3. THIS CIRCUIT CONFLICT FURTHERMORE MERITS REVIEW
OF THIS COURT BECAUSE OF ITS UNQUESTIONABLE IMPORTANCE.
ALTHOUGH THE SIGNIFICANCE OF THIS PARTICULAR CASE IS HEIGHT-
ENED BECAUSE PETITIONER IS SUBJECT TO AN IMMINENT SENTENCE
OF LIFE WITHOUT PAROLE. THE PROPER TREATMENT OF RULE 60(b)
MOTIONS BY HABEAS PETITIONERS CAN ARISE IN ANY CAPITAL OR
NON-CAPITAL PROCEEDING UNDER SECTION 2254 OR SECTION 2255
THE NUMEROUS CASES CITED IN THIS PETITION TO ILLUSTRATE
THE LOWER COURT'S TREATMENT OF RULE 60(b) MOTIONS DEMONSTRATE
THAT THE QUESTION PRESENTED RECURS FREQUENTLY. INDEED,
EVEN THAT BOTH DISTRICT COURTS AND COURTS OF APPEALS
REGULARLY RULE ON HABEAS PETITIONERS RULE 60(b) MOTIONS
WITHOUT CONSIDERING THE IMPLICATION OF

COMPARE TODD V. STEGALL, NO. 98-72656, 2000 U.S. DIST. LEXIS 12997 (E.D. MICH. AUG. 1, 2000) GRANTING RELIEF), AND EVANS V. FULCOMER, NO. 89-4999, 1990, U.S. DIST. LEXIS 711 (E.D. Pa. JUNE 13 1990) (SAME) WITH WAYE V. TOWNLEY, 884 F.2d 762 (CA4 1989) (PER CURIAM) (DENYING RELIEF): MAY V. COLLINS 161 F.2d 74 (CA5 1942) (PER CURIAM) (SAME): WENGER V. O'BRIAN 10. 00-1103, 2000 U.S. APP. LEXIS 15487 (CA7 JUNE 28, 2000) (SAME). ONLY A DECISION BY THIS COURT CAN BRING NEEDED UNIFORMITY TO THE LAW.

BECAUSE THE DISTRICT COURT WOULD HAVE CONSIDERED PETITION RULE 60 (b) MOTION UNDER EITHER THE CATEGORICAL RULE OF THE SECOND CIRCUIT OR THE CASE-BY-CASE APPROACH OF THE FOURTH, FIFTH, SIXTH, EIGHTH, NINTH AND ELEVENTH CIRCUITS, AND BECAUSE THE QUESTION PRESENTED IS IMPORTANT AND RECURS FREQUENTLY, CERTIORARI SHOULD BE GRANTED.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

1. CERTIORARI ALSO IS WARRANTED BECAUSE THE EIGHTH CIRCUIT'S DETERMINATION THAT THE RULE 60(b) MOTION IN THIS CASE CONSTITUTES A "SECOND OR SUCCESSIVE" HABEAS APPLICATION CONFLICTS WITH THIS COURT'S PRECEDENTS. CALDERON V. THOMPSON, 523 U.S. 538 (1998), HELD THAT THE NINTH CIRCUIT ABUSED ITS DISCRETION IN RECALLING ITS MANDATE ON THE FACTS OF THAT CASE. BEFORE REACHING THAT QUESTION, HOWEVER, THE COURT FIRST REJECTED THE STATES CONTENTION THAT THE COURT OF APPEALS HAD ACTED ON THE BASIS OF A SECOND OR SUCCESSIVE APPLICATION FOR PURPOSES OF 2244 (b), "BUT MADE CLEAR THAT THE PROPER CHARACTERIZATION OF THE MOTION DEPEND[S] ON THE UNDERLYING BASIS OF THE COURTS ACTION 523 U.S. AT 553-54 (EMPHASIS ADDED). THE COURT ANNOUNCED THE FOLLOWING STANDARD: IF "THE COURT CONSIDERS NEW CLAIMS OR EVIDENCE PRESENTED IN A SUCCESSIVE APPLICATION FOR HABEAS RELIEF,

IS PROPER TO RE-OPEN THE COURT'S ACTION IS BASED ON THAT APPLICATION. Id. AT 554 (EMPHASIS ADDED). BECAUSE THE COURT APPEALS IN CALDRON "WAS SPECIFIC IN RECITING THAT IF IT RESTED ON THE EXCLUSIVE BASIS OF [THE PETITIONER'S] FIRST FEDERAL HABEAS PETITION," AND THAT RECITATION WAS ACCURATE, THIS COURT HELD THAT THE NINTH CIRCUIT'S DECISION DID NOT REST ON "SECOND OR SUCCESSIVE" APPLICATION. Id. INDEED, THE COURTS HOLDING IN THAT REGARD WAS UNANIMOUS. SEE, id. AT 566 BUTLER, J. DISSERTING

JUST A FEW WEEKS LATER, STEWART V. MARTINEZ-VILLAREAL, 137 U.S. 637 (1998), HELD (BY A SEVEN-TO-TWO MAJORITY) THAT A MOTION TO REOPEN CLAIMS THAT THE DISTRICT COURT HAD PREVIOUSLY HELD TO BE UNRIPE IS NOT A SECOND OR SUCCESSIVE APPLICATION. THE DISTRICT COURT IN THAT CASE INITIALLY GRANTED THE PETITIONER HABEAS CORPUS RELIEF ~~ONE~~ ON ONE CLAIM BUT DISMISSED ANOTHER CLAIM - THAT HE WAS INCOMPETENT TO BE EXECUTED UNDER FORD WARNWRIGHT, 477 U.S. 399 (1986) - AS PREMATURE. THE COURT OF APPEALS REVERSED THE GRANT OF RELIEF. SUBSEQUENTLY, THE PETITIONER FILED A MOTION IN THE DISTRICT COURT "TO RE-OPEN HIS CLAIM WHICH THE DISTRICT COURT DEEMED AN IMPERMISSABLE SECOND OR SUCCESSIVE PETITION.

THIS COURT REJECTED THE DISTRICT COURT'S CONCLUSION. PARTICULAR, THE COURT REJECTED THE STATES ARGUMENTS THAT HABEAS PETITIONER "IS ENTITLED TO ONLY ONE MERIT'S JUDGMENT ON HIS FEDERAL HABEAS CLAIM." AND THAT, BECAUSE THE PETITIONER IN THAT CASE HAD "ALREADY HAD ONE" FULLY-LITIGATED HABEAS PETITION, THE PLAIN MEANING OF § 2244(b) AS AMENDED REQUIRES HIS NEW PETITION TO BE TREATED AS SUCCESSIVE." 523 S. AT 643 (QUOTING BETT. BR. 121). THE STATE'S ERROR, THE COURT EXPLAINED WAS ITS FAILURE TO RECOGNIZE THAT THE ONLY CLAIM ON WHICH RESPONDENT NOW SEEKS RELIEF IS THE FORD CLAIM THAT HE PRESENTED TO

THE DISTRICT COURT ALONG WITH A SERIES OF OTHER CLAIMS IN [THIS PREVIOUS APPLICATION] Id. at 643-44 (EMPHASIS ADDED). THE COURT THUS NOW DISTINGUISHES THE CASE BEFORE IT FROM THE SITUATION WHERE A PRISONER RAISES A FORD CLAIM FOR THE FIRST TIME IN A PETITION FILED AFTER THE FEDERAL COURTS HAVE ALREADY REJECTED THE PRISONER'S INITIAL HABEAS APPLICATION." AT 645 n.

THE COURT FOUND PARTICULARLY PERSUASIVE AN ANALOGY TO THE PROPER TREATMENT OF HABEAS APPLICATIONS THAT ARE DISMISSED FOR FAILURE TO EXHAUST STATE REMEDIES, BUT ARE SUBSEQUENTLY REFILED. IN THAT CIRCUMSTANCE, THE SUBSEQUENTLY REFILED PETITION IS NOT SUCCESSIVE. 523 U.S. AT 644. THE COURT INCLUDED THAT A CLAIM PREVIOUSLY DISMISSED ON PROCEDURAL GROUNDS "SHOULD BE TREATED IN THE SAME MANNER AS THE CLAIM OF THE PETITIONER WHO RETURNS TO A FEDERAL HABEAS COURT AFTER EXHAUSTING STATE REMEDIES." THE CRITICAL FACTOR IN THE COURT WAS THAT "IN BOTH SITUATIONS, THE HABEAS PETITIONER DOES NOT RECEIVE AN ADJUDICATION OF HIS CLAIM. TO HOLD OTHERWISE WOULD MEAN THAT A DISMISSAL OF A FIRST HABEAS PETITION FOR TECHNICAL PROCEDURAL REASONS WOULD BAR THE PRISONER FROM EVER OBTAINING FEDERAL HABEAS REVIEW." Id. AT 645 (EMPHASIS ADDED)

THIS COURT SUBSEQUENTLY APPLIED MARTINEZ-VILLAREAL HOLD (BY THE SAME SEVEN-TO-TWO MAJORITY) IN SLACK V. DANIEL, 529 U.S. 473 (2000), THAT A RE-FILED PETITION FOR HABEAS CORPUS RAISING CLAIMS THAT WERE PREVIOUSLY DISMISSED FOR FAILURE TO EXHAUST IS NOT A "SECOND OR SUCCESSIVE" HABEAS PETITION." 529 U.S. AT 485-86 (EMPHASIS ADDED) OF COURSE, EVEN THE TWO DISSENTERS IN SLACK THOUGHT IT "QUITE PLAUSIBLE" TO READ THIS COURT'S PRECEDENTS NOT TO DEEM HABEAS PETITIONERS ATTEMPT TO PERSUE THE SAME CLAIMS AT THE DISTRICT

ONCE PREVIOUSLY REFUSED TO CONSIDER IN THE MERITS
"SECOND OR SUCCESSIVE PETITION" BECAUSE SUCH A STEP "IS
JUST A RENEWAL OF THE FIRST PETITION" *Id.* AT 491. THE
ESSENTERS BELIEVED IT IMPERMISSABLE, HOWEVER, TO PERMIT
THE PETITIONER TO PROCEED ON CLAIMS THAT WERE NOT
AISED IN HIS INITIAL APPLICATION. *Id.*

2. THE EIGHTH CIRCUITS HOLDING THAT PETITIONER'S
RULE 60(b) MOTION WAS A PROHIBITED "SECOND OR SUCCE-
SSIVE" APPLICATION IS TOTALLY IRRECONCILABLE WITH THE
COURTS DECISIONS IN CALDERON V. THOMPSON, MARTINEZ-
VILLAREAL, AND SLACK V. MCDANIEL. THOSE DECISIONS CANNOT
POSSIBLY BE SAID TO TURN ON THE PARTICULAR PROCEDURAL
MISTAKES, THAT THE PETITIONERS IN THOSE CASES EMPLOYED
TO SECURE A RULING ON THE MERITS OF CLAIMS. THIS COURTS
DECISION THUS ESCHIEW RELIANCE ON THE LABEL ATTACHED TO
THE FILING SAID TO BE SUCCESSIVE. E.G., CALDERON V.
THOMPSON, 523 U.S. AT 553-54. INDEED, IN BOTH MARTINEZ-
VILLAREAL AND SLACK, THE PETITIONERS LITERALLY FILED
A "SECOND" APPLICATION (IN THE SENSE THAT EACH FILED AN
APPLICATION FOR A SECOND TIME), BUT THIS COURT NONE-THE-
LESS HELD THAT THE APPLICATION WAS NOT "SECOND OR SUCCESSIVE"
FOR PURPOSES OF SECTION 2244, IT WOULD TAKE AN EXTRA-
ORDINARY RHETORICAL STRETCH TO NONE-THE-LESS CONVERT
PETITIONERS RULE 60(b) MOTION, WHICH CONTAINS NO AFFIRMATION
OF CLAIMS FOR RELIEF AT ALL. INTO A "SUCCESSIVE" APPLICATION.
THUS, IT IS CLEAR THAT IF A HABEAS PETITIONER FILES A RULE
60(b) MOTION TO SEEK CONSIDERATION OF THESE CLAIMS THAT THE
DISTRICT COURT PREVIOUSLY DEEMED UNRIPE (AS IN SLACK) OR UN-
HAUSTED (AS IN MARTINEZ-VILLAREAL), THAT MOTION IS NOT A
"SECOND OR SUCCESSIVE" APPLICATION!

THE PROPER INQUIRY UNDER THIS COURTS PRECEDENTS IS
ACCORDINGLY WHETHER (a) THE PETITIONER SEEKS TO PRESENT NEW
CLAIMS OR EVIDENCE AND, IF NOT, (b) WHETHER THE DISTRICT COURT
EVIDENTLY CONSIDERED THOSE

ESSENTS NO CLAIM SEEKING RELIEF. PETITIONER PRESENTS NEWLY
DISCOVERED EVIDENCE PURSUANT TO RULE 60 (b) (2). TO THE DISTRICT
COURT. PETITIONER DID NOT RECEIVE AN ADJUDICATION ON HIS
MOTION. THE "SUCCESSIVE APPLICATION" PROVISIONS ARE INAPPLICABLE.
HOWARD V. MARTINEZ 523 U.S. AT 643, 645 ALSO SEE, 537 U.S. 88
(2002). IN THIS CASE, IT IS UNDISPUTED THAT NEITHER OF THOSE
CRITERIA APPLIES. MOREOVER, THE ANALOGY THAT THIS COURT FOUND
IMPELLING IN 53 U.S. 88 (2002) HAS EVEN GREATER FORCES IN
THESE CIRCUMSTANCES. 537 U.S. 88 (2002) 537 U.S. 88 (2002), EX-
PLAINED THAT A PETITION WHICH IS DENIED FOR BEING CHARACTER-
ED AS A SECOND OR SUCCESSIVE WAS IN ERROR AND IS NOT
SUCCESSIVE, THEN CONCLUDED A MOTION FOR RELIEF UNDER RULE
60 (b) (2). THE FEDERAL RULES OF CIVIL PROCEDURE CONTESTS THE INTEGRITY
OF THE PROCEEDING THAT RESULTED IN THE DISTRICT COURT'S JUDGEMENT.
NOTING 537, U.S. 88 (2002) IS A FINAL NOTE, I WOULD ADD THAT
THIS RULE IS NOT JUST CONSISTENT WITH CASE LAW, BUT IT ALSO
IMPORTS WITH FAIR AND EQUITABLE ADMINISTRATION OF JUSTICE. IF,
FOR EXAMPLE, A DEATH ROW INMATE COULD SHOW THAT THE STATE INDEED
COMMITTED FRAUD UPON THE DISTRICT COURT DURING HIS HABEAS CORPUS
PROCEEDINGS, IT WOULD BE A MISCARRIAGE OF JUSTICE IF WE TURNED
A BLIND EYE TO SUCH ABUSE OF THE JUDICIAL PROCESS. NEVERTHELESS
THIS IS THE RESULT THAT WOULD OCCUR IF HABEAS CORPUS PETIT-
ITIONER'S RULE 60 (b) MOTION WERE ALWAYS CONSIDERED SECOND OR
SUCCESSIVE HABEAS CORPUS PETITIONS. AFTER ALL, A NEWLY DIS-
COVERED EVIDENCE DOES NOT RELY ON A NEW RULE OF CONSTITUTION
LAW. IT IS A CLAIM THAT NONE-THE-LESS MUST BE RECOGNIZED.
HOWARD V. HEAD, 304 F. 3d 1090, 1100 - 1105 (CAH 2002)
DISSENTING OPINION

JUDGE TSOPLAKIS REASONING IS FULLY CONSISTENT WITH THIS COURT DECISION IN STEWART V. MARTINEZ-VILLAREAL, 23 U.S. 637 (1998) AND SLACK V. MCDANIEL, 529 U.S. 473 (2000). APPLY THAT REASONING TO THE PRESENT CASE, IT IS PERFECTLY CLEAR THAT THE PETITIONER ~~APPLIED~~ FILED PROPER RULE 60 (b)(2) MOTION. THE MOTION DID NOT PURPORT TO SET FORTH THE BASIS FOR A SECOND OR SUCCESSIVE CHALLENGE TO THE STATE COURT JUDGEMENT OF CONVICTION. IT DID, HOWEVER SEEK RELIEF FROM THE FINAL ORDER ENTERED BY THE FEDERAL COURT IN THE HABEAS PROCEEDING, AND IT RELIED ON GROUNDS THAT ARE DIRECTLY IDENTIFIED IN RULE 60(b)(2) AS POSSIBLE BASIS FOR SUCH RELIEF. ESSENTIALLY IT SUBMITTED NEWLY DISCOVERED EVIDENCE PURSUANT TO RULE 60(b)(2) APP.

3. THE EIGHTH CIRCUITS HOLDING SHOULD BE REJECTED FOR THE FURTHER REASON THAT IT RAISES A GRAVE QUESTION UNDER THE CONSTITUTION'S SUSPENSION CLAUSE, ART. I, § 9, d.2. HERE, AS IN INS V. ST. CYR. 533 U.S. 289, 121 S. CT. 2271, 279 N. 13 (2001). THE FACT THAT THIS COURT WOULD BE REQUIRED TO ANSWER THE DIFFICULT QUESTION OF WHAT THE SUSPENSION CLAUSE PROTECTS IS IN AND OF ITSELF A REASON TO AVOID ANSWERING THE CONSTITUTIONAL QUESTIONS THAT WOULD BE RAISED BY CONCLUDING THAT REVIEW WAS BARRED ENTIRELY. "BECAUSE A DETERMINATION THAT CONGRESS INTENDED TO REPEAL THE AUTHORITY OF FEDERAL COURTS TO CONSIDER THE MERITS OF A FEDERAL CONSTITUTIONAL CLAIM ON HABEAS CORPUS WOULD RISE "A SERIOUS AND DIFFICULT CONSTITUTIONAL ISSUE," THIS COURT REQUIRES CLEAR AND UNAMBIGUOUS STATEMENT OF CONGRESSIONAL INTENT. 121 S. CT. AT 2282.

SECTION 2244(b)(1) DIRECTLY IMPLICATES THE EXCLUSION CLAUSE BECAUSE IT NOT ONLY CATEGORICALLY PRECLUDES ANY DISTRICT COURT FROM CONSIDERING THE MERITS OF PETITIONER'S CLAIM. IT SIMILARLY WOULD APPEAR TO PROHIBIT ANY COURT OF APPEALS AND EVEN THIS COURT FROM CONSIDERING THEM AS WELL. IN ORDER WORDS, ON THE EIGHTH CIRCUIT'S VIEW, SECTION 2244 PREVENTS PETITIONERS FROM SEEKING RELIEF IN ANY FORUM THE BAR TO CONSIDERING "SUCCESSIVE PETITIONS" THIS APPEARS TO APPLY TO ALL WRITS OF HABEAS CORPUS, INCLUDING THOSE ISSUED BY THIS COURT AND ITS JUSTICES. BECAUSE THOSE WRITS ARE ISSUED PURSUANT TO 28 U.S.C. 2254. E 28 U.S.C. 2244 (b) (1) (ANY SECOND OR SUCCESSIVE PETITION UNDER SECTION 2254 PRESENTING SAME CLAIMS AS INITIAL PETITION MUST BE DISMISSED. THE EIGHTH CIRCUIT'S DECISION THUS CROSSSES THE LINE DRAWN BY THIS COURT IN FELKER V. TURPIN, 78 U.S. 651 (1994). FELKER SUSTAINED AEDPA'S SUCCESSIVE PETITION PROVISIONS AS APPLIED IN THAT CASE TO INTERPOSE THE COURT OF APPEALS AS A GATEKEEPER, LEAVING THIS COURT POWER TO GRANT ORIGINAL WRIT OF HABEAS CORPUS INTACT, AS WITHIN THE COMPASS OF [THE] EVOLUTIONARY PROCESS OF THIS COURT'S USE OF THE WRIT JURISPRUDENCE. 518 U.S. AT 664. BY CONTRAST, AUTHORITATIVELY CONSTRUED BY THE EIGHTH CIRCUIT IN THIS CASE AEDPA REPRESENTS A COMPLETE BREAK FROM THE ABUSE OF THE WRIT DOCTRINE PROHIBITING CONSIDERATION ON HABEAS OF CLAIMS THAT WE NEVER BEEN ADDRESSED ON THE MERITS." COMPARE RULE 9(b), RULES GOVERNING HABEAS CORPUS PROCEEDINGS (PRE-AEDPA) (A SECOND OR SUCCESSIVE PETITION MAY BE DISMISSED IF THE JUDGE FINDS THAT IT FAILS TO ALLEGE NEW OR DIFFERENT GROUNDS FOR

RELIEF AND THE PRIOR DETERMINATION WAS ON THE MERITS.

(EMPHASIS ADDED)

FOR SIMILAR REASONS, THE EIGHTH CIRCUIT'S HOLDINGS
RAISES SERIOUS QUESTION UNDER THE DUE PROCESS CLAUSE
OF ARTICLE III OF THE CONSTITUTION, INCLUDING THE EXCEPTIONS
CLAUSE. PETITIONER ALSO MAINTAIN THAT, IF HE IS NOT PERMITTED
TO PURSUE ANY OF THE AVENUES OF RELIEF HE ASSERTS - A
RULE 60(b) MOTION, A REMAND BY THE COURT OF APPEALS, OR
AN EXTRAORDINARY WRIT FROM THIS COURT - THEN THE PROVISION
OF THE AEO PA RELATING TO SECOND OR SUCCESSIVE HABEAS
CORPUS APPLICATIONS VIOLATE THE SUSPENSION AND DUE PRO-
CESS CLAUSES FOR THE CONSTITUTION.

BECAUSE THE EIGHTH CIRCUIT'S HOLDING THAT PETITIONER'S
RULE 60(b)(2) MOTION IS A "SECOND OR SUCCESSIVE" APPLICATION
CONFLICTS WITH THIS COURT'S PRECEDENTS, CERTIORARI SHOULD BE
GRANTED.

EVEN IF PETITIONERS RULE 60(b) MOTION WERE A SECOND OR SUCCESSIVE HABEAS APPLICATION, THE EIGHTH CIRCUIT ONE-THE-LESS ERRED IN FURTHER HOLDING THAT IT WAS PROHIBITED UNDER AEDPA SEE. QUESTION 2) THE PROCEEDINGS V APBAL IN THIS CASE WERE GOVERNED BY AEDPA. SEE SLACK V MCDANIEL, SUPRA BUT THE PROCEEDINGS IN THE DISTRICT COURT, WHERE THE MOTION WAS FILED, WERE GOVERNED BY PRE-AEDPA LAW BECAUSE AEDPA IS NOT RETROACTIVE. SEE... EVDA V. MURPHY, 521 U.S. 320 (1997); SEE ALSO CASS V. ACKAWANNA COUNTY, DA, 204 F.3d 453, 461 (CA 32000) N BANC) (WHEN ALL THE CLAIMS APPLICATION WERE ASSERTED V A PETITION FILED PRIOR TO AEDPA'S EFFECTIVE DATE, "E - AEDPA REQUIREMENTS GOVERN)" REV'D ON OTHER GROUNDS, 32 U.S. 394 (2001)

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITIONER FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

RESPECTFULLY SUBMITTED...

De ANDRA STEPHENSON
P.O. BOX 970
MARIANNA, AR.
72360

CERTIFICATE OF SERVICE

THE UNDER SIGNED HEREBY CERTIFIES THAT A COPY OF THE FOREGOING WAS MAILED, POSTAGE PRE-PAID, THIS 5 DAY OF 19, 2023 TO Tim Griffin ATTORNEY GENERAL, 323 Center Street Little Rock AR 72201
PETITIONER