IN THE SUPREME COURT OF THE UNITED STATES

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AURELIO O. GONZALEZ, :

Petitioner :

v. : No. 04-6432

JAMES V. CROSBY, JR., :

SECRETARY, FLORIDA :

DEPARTMENT OF CORRECTIONS. :

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Washington, D.C.

Monday, April 25, 2005

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

APPEARANCES:

PAUL M. RASHKIND, ESQ., Assistant Federal Public Defender, Miami, Florida; on behalf of the Petitioner.

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

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

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

Mr. Rashkind.

ORAL ARGUMENT OF PAUL M. RASHKIND

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

MR. RASHKIND: Yes.

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

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

category six as one that requires extraordinary circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

MR. RASHKIND: Well, I would --

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

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

JUSTICE BREYER: No, but that's --

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

First, that there has to be good cause and good

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

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

JUSTICE SCALIA: It's pretty flabby.

MR. RASHKIND: -- one procedurally defaulted.

JUSTICE SCALIA: It's pretty flabby. Potentially meritorious? Not probably, potentially.

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

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

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

The third point would be that there be timeliness.

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

MR. RASHKIND: We are.

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

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

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

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

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

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

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

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

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

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

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

MR. RASHKIND: No.

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

MR. RASHKIND: Correct.

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

MR. RASHKIND: Correct.

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

MR. RASHKIND: And it's never been.

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

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

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

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

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

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

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

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

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

MR. RASHKIND: That's right.

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

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

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

MR. RASHKIND: Yes, sir.

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

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

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

MR. RASHKIND: Correct.

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

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

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

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

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

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

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

MR. RASHKIND: Yes.

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

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

JUSTICE BREYER: Thank you.

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

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Well, we're not

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

MR. RASHKIND: Correct.

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

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

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

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

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

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

MR. RASHKIND: If it is time --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

JUSTICE BREYER: -- make us --

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

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

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

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

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

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

May I reserve the balance of my time?

CHIEF JUSTICE REHNQUIST: Very well, Mr. Rashkind.

MR. RASHKIND: Thank you.

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

ORAL ARGUMENT OF CHRISTOPHER M. KISE

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Well, that depends --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Well, what -- what Congress was

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

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

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

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

JUSTICE BREYER: So that's the --

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

but that's what district courts are there for.

MR. KISE: But -- but the Congress intended to take that discretion away from the district courts. 2244(b)(1) says you will not look at it again, and 2244(b)(3) says, in fact, that when you do go back to potentially revisit an issue, when you do go back to potentially look at a second or successive, that it's not even the same district judge that makes that determination. As in 60(b), you go back to the same judge. 2244(b)(3) says, no, a three-judge panel of a circuit court of appeals must first determine whether or not you even have a right to get in --

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

MR. KISE: Yes, Your Honor --

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

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

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

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

JUSTICE BREYER: Correct, though you're alone on

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

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

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

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

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

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

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

MR. KISE: Perhaps I --

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

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

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

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

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

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

JUSTICE BREYER: Yes.

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

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

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

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

MR. KISE: Well --

JUSTICE BREYER: Does that not count too?

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

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

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

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

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

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

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

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

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

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

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

know that we have the actual language.

JUSTICE GINSBURG: But you said --

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

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

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

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

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

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

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

exception.

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: Yes, yes.

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

JUSTICE GINSBURG: Yes.

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

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

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

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

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

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

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

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

that is -- that is under siege.

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

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

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kise.

Ms. Millett, we'll hear from you.

ORAL ARGUMENT OF PATRICIA A. MILLETT

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

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

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

MS. MILLETT: Okay.

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

MS. MILLETT: It's very --

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

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

JUSTICE BREYER: My question would be why.

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

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

JUSTICE O'CONNOR: Would you say that again?

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

Justice Souter --

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

MS. MILLETT: It --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. MILLETT: With Judge?

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

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

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

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

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

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

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

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

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

MS. MILLETT: 10 --

(Laughter.)

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

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

(Laughter.)

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

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

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

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

JUSTICE SOUTER: Well, maybe --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. MILLETT: Right.

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

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

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Millett.

Mr. Rashkind, you have 4 minutes left.

REBUTTAL ARGUMENT OF PAUL M. RASHKIND

ON BEHALF OF THE PETITIONER

MR. RASHKIND: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rashkind.

The case is submitted.

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