

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ABU- ALI ABDUR' RAHMAN, :

4 Petitioner :

5 v. : No. 01-9094

6 RICKY BELL, WARDEN :

7 - - - - -X

8 Washington, D. C.

9 Wednesday, November 6, 2002

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:05 a.m

13 APPEARANCES:

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15 the Petitioner.

16 PAUL G. SUMMERS, ESQ., Attorney General, Nashville,

17 Tennessee; on behalf of the Respondent.

18 PAUL J. ZIDLICKY, ESQ., Washington, D. C. ; on behalf of

19 amici curiae, State of Alabama, et al.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 01-9094, Abu-Ali Abdur' Rahman versus Ricky Bell.

Mr. Liebman. I think the Court would like to hear argument on the questions we asked for supplemental briefing on, as well as your original petition.

ORAL ARGUMENT OF JAMES S. LIEBMAN

ON BEHALF OF THE PETITIONER

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

The question I'd like to take up first is why, in our view, the unusual circumstances of this case satisfy the two sets of demanding requirements that are on the petitioner here to succeed: 1) he has to show that this is not a successive petition, and 2) he then additionally has to get over the high hurdle that 60(b) imposes.

Let me, though, go first to the jurisdictional questions that Your Honor referred to. This case was in the court of appeals in three ways. It was there because Mr. -- the petitioner here went into the district court and he said, here's my 60(b) motion, I'd like to get 60(b) relief.

1 The district court -- and this is on pages 42
2 through 44 of the record, of the joint appendix -- said
3 very, very clearly that it was going to make two rulings.
4 First it said, this is not a Rule 60(b) motion, it is
5 something else, it's a successive petition. Because it's
6 a successive petition, you cannot get 60(b) relief in this
7 court, and I'm going to refer or --

8 QUESTION: That's the district court judge?

9 MR. LIEBMAN: Right. What I -- but what that
10 did, Your Honor, was to establish a final disposition. It
11 terminated all of the petitioner's rights under 60(b).
12 There were no rights left. He told the district court --

13 QUESTION: Couldn't he have moved to -- in the
14 Sixth Circuit -- to remand the case if he disagreed with
15 that?

16 MR. LIEBMAN: He did. He did, Your Honor.

17 QUESTION: Well, but that means that the
18 district court's decision was not final.

19 MR. LIEBMAN: Well, it was final for purposes of
20 the 60(b), because the -- for purposes of the district
21 court's view there could be, would be, never could be any
22 60(b) relief.

23 QUESTION: But it wasn't a final judgment in the
24 sense that an appeal could be sought from that, because it
25 was transferred. The district court judge transferred it.

1 He didn't dismiss the 60(b) motion, which I would have
2 thought the district court might have done, and then it
3 perhaps could have been appealable.

4 MR. LIEBMAN: Well, Your Honor, all of that's
5 right, and if the belts don't work, let's go to the
6 suspenders. He -- the case was transferred to the court
7 of appeals. The court of appeals, however, could not take
8 jurisdiction over the case unless the prerequisite for its
9 jurisdiction was established, and if you look at
10 2244(b)(3), which is in our appendix to our brief at
11 page 1a --

12 QUESTION: Page 1a of the blue brief?

13 MR. LIEBMAN: 1a of the blue brief, it's very
14 clear under (b)(3)(A) that it has to be a second or
15 successive application before the court of appeals has any
16 jurisdiction to do anything with it, so its jurisdiction
17 turns on the question whether it was a successive petition
18 or not. If it wasn't one, it could not act under this
19 statute and would have to remand back to the district
20 court. That's exactly what happened in the Martinez-
21 Villareal case.

22 QUESTION: Well, what -- what does the statute,
23 the AEDPA statute contemplate? That somebody in this
24 defendant's position could have applied to the court of
25 appeals for permission to file a successive petition?

1 Could that have been done here?

2 MR. LIEBMAN: Yes.

3 QUESTION: That was not done?

4 MR. LIEBMAN: It was not done here because he
5 was saying all along this was not a successive petition,
6 if it was, he would not satisfy it. He --

7 QUESTION: Go ahead.

8 MR. LIEBMAN: He was saying that he did satisfy
9 the requirements of 60(b), that the statute recognizes a
10 difference between certain --

11 QUESTION: Well, then, to get an appeal on
12 that -- it sounds so complicated, because the law has
13 gotten so complicated with AEDPA, but maybe he should have
14 sought transfer back to the district court so the district
15 court could dismiss it and give something from which an
16 appeal could be taken.

17 MR. LIEBMAN: Oh but, Your Honor, in Martinez-
18 Villareal, I think it's very clear this case is exactly
19 the same as Martinez-Villareal, which this Court ruled
20 expressly on the -- the first question it took up was the
21 jurisdictional question. What happened there is that the
22 petitioner went to the district court, the district court
23 said, this is a successive petition, I'm transferring, you
24 can't be in this court.

25 He then took an appeal, and he went up on a

1 transfer saying, okay, you've got the transferred motion
2 in front of you.

3 The court of appeals actually dismissed the
4 appeal saying, we don't have that, but it decided in the
5 context of the transfer -- and this is very standard
6 procedure here now under AEDPA -- it decided, first
7 question first, do we have jurisdiction, and it said, you
8 know what, we figured out that we don't have jurisdiction
9 because this is not a successive petition, so we remand
10 back to the district court.

11 This Court then took cert on that question, and
12 the first question it asked was, do we have cert here
13 because of subsection (e) here, and it said, we do have
14 cert here because (e) is very clear. The grant or denial
15 of authorization can't come to the Court.

16 QUESTION: Well, let's go back to (3)(A) for a
17 minute, Mr. Liebman. It says -- as you point out --
18 before a second or successive application permitted by
19 this section is filed in the district court. You say all
20 of that is a prerequisite, I take it, for the court of
21 appeals acting, but supposing it's a second or successive
22 application that is not permitted by this section. That
23 wouldn't deprive the court of appeals of the jurisdiction
24 to say no, would it?

25 MR. LIEBMAN: Absolutely. In fact, it has the

1 obligation, not just the jurisdiction, to decide whether
2 it is a successive petition, because if it isn't, it can't
3 decide the case, because then it's got to start with the
4 district --

5 QUESTION: Well, but -- so then the first,
6 the -- the first clause of (3)(A) is not really, strictly
7 speaking, entirely jurisdictional.

8 MR. LIEBMAN: Oh, well I -- I'm not actually
9 sure it's the first clause. It says that the applicant
10 shall move in the appropriate court for an order
11 authorizing that. That's what essentially gives the court
12 the jurisdiction, but it's got to be for an order
13 authorizing what qualifies under the statute as a second
14 and successive application. This was not a second and
15 successive application. Therefore, as in ~~Martinez-~~
16 Villareal --

17 QUESTION: Well, that's, of course, part of the
18 issue in the case.

19 MR. LIEBMAN: Right, but that -- his position
20 was it was not, and therefore the court needed to dismiss
21 that case, and it had two options at that point. It could
22 either remand it back, which is the majority approach, or
23 it could simply have dismissed, and then he could have
24 gone back and filed in the district court again, which is
25 what a few courts do.

1 QUESTION: Mr. Liebman, initially in this case,
2 when the district judge transferred -- I think it got one
3 on the State's recommendation that that's how you handle
4 these cases. On behalf of the defendant, did anyone ever
5 say, please enter judgment against me under 60(b), I want
6 to make this -- test whether this is a 60(b) case or a
7 habeas case?

8 MR. LIEBMAN: That did not happen, Your Honor,
9 although petitioner understood the court's decision, if
10 you look on pages 41 and 42, to say this -- it expressly
11 says, you cannot file 60(b) here in this court because
12 it's automatically successive. You cannot do it. You
13 will never get any rights under 60(b).

14 QUESTION: But he could have asked to test that.
15 He could have said, please don't transfer. .

16 MR. LIEBMAN: He could have, but in -- Your
17 Honor, in the Martinez-Villareal case, there was no such
18 question, no -- no --

19 QUESTION: -- see what Martinez-Real has to do
20 with it. I may be missing it, but I thought that in -- in
21 this case, the reason that you cannot appeal from the
22 court of appeals order refusing to give you permission to
23 file a second habeas is because there's a statute that
24 says you can't come to this court when a court of appeals
25 refuses to give permission on second habeas, and none of

1 that was involved, to my knowledge, in Martinez-Real.

2 MR. LIEBMAN: Oh, yes --

3 QUESTION: That was a question about whether or

4 not there was a premature decision, or whatever it was,

5 and they sent -- the court of appeals sent it back for

6 adjudication on this issue.

7 MR. LIEBMAN: No, Your Honor.

8 QUESTION: No, it's -- I'm not right?

9 MR. LIEBMAN: The provision (e) here says that

10 the grant or denial of an authorization cannot come up to

11 the Court on cert, so the fact that the court there in --

12 QUESTION: You mean, Martinez-Real was a grant

13 of a petition for second or successive?

14 MR. LIEBMAN: No. It was --

15 QUESTION: Well, then, what has that statute to

16 do with it?

17 MR. LIEBMAN: What it said was -- and this is

18 what the Court said in Martinez-Villareal quite clearly.

19 There's a threshold question. The threshold question is,

20 do we have in front of us a second or successive petition.

21 QUESTION: In Martinez-Real?

22 MR. LIEBMAN: Yes. Yes, yes, yes. That was the

23 question there, because Martinez-Villareal filed a request

24 to --

25 QUESTION: And what did the court of appeals say

1 was the answer?

2 MR. LIEBMAN: It said, the answer is, this is
3 not a second or successive petition.

4 QUESTION: Fine, so then the statute doesn't
5 apply, I guess --

6 MR. LIEBMAN: Oh -- but here the court said --
7 if I can be clear about this -- the court said two things,
8 and it said them actually in different orders. January 18
9 order, it said, this is a successive petition, so now
10 we've got to go to the gateway question of whether you can
11 get into court. And then a couple of weeks later,
12 actually almost a month later, February 11, it said, you
13 don't meet the gateway requirement.

14 QUESTION: I -- I just don't see how you get
15 around the statute that says that you can't come here
16 after a court of appeals either grants or denies the
17 second or successive.

18 MR. LIEBMAN: Well, that's what I'm --

19 QUESTION: Which wasn't at issue, I take it, in
20 the other case.

21 MR. LIEBMAN: That's what I'm trying to say.
22 The very first thing that our cert petition says in this
23 case is, we are not asking for cert from the question of
24 whether or not we meet the gateway requirement.

25 QUESTION: Yes, but you -- one doesn't really

1 ask for cert from -- from a question. One asks for cert
2 to review an order, and the order of the court of appeals
3 is an order granting or denying.

4 MR. LIEBMAN: This order had multiple parts,
5 Your Honor. It was actually divided up into multiple
6 parts, and what he said was, we are asking for cert from
7 some parts of the order, segmented out and given
8 paragraphs. We are not asking for cert from other parts
9 of that decision.

10 QUESTION: But I think the question is whether
11 you can ask for cert for any -- from any -- part of it in
12 view of the provision of the statute that it's not -- I
13 just don't -- I'm not sure you can bifurcate the order and
14 say, we're not challenging the denial, we're challenging,
15 in effect, the reason for the denial.

16 MR. LIEBMAN: Well, this was not a denial. What
17 the statute says -- and I think that's really important --
18 is the grant -- I'm reading (e), as we go over from (1)(A)
19 to (2)(A). The grant or denial of an authorization by a
20 court of appeals to file a second or successive
21 application shall not be appealable, but he was not
22 appealing the grant or denial. He was appealing the
23 preliminary question whether it even was, whether the
24 court even could have taken jurisdiction of that because
25 it had a second or successive --

1 QUESTION: That's not a judgment. You -- you
2 appeal judgments, you appeal orders, you appeal
3 dispositions of the lower court. You -- you don't appeal
4 statements or -- or expressions. You -- you appeal
5 dispositions. The only disposition here was the denial of
6 the -- of the application.

7 MR. LIEBMAN: Well, Your Honor, then let me go
8 to the garter if the belts and suspenders haven't worked
9 here. Petitioner filed a motion in the court of appeals
10 on his original appeal, and he said, in this appeal, what
11 we would like you to do is, rather than issuing the
12 mandate on the judgment that you issued before, which went
13 up on cert, we would like you to remand this case in order
14 for the court below to take up these issues, whether on
15 60(b) or in other ways, and the court denied that motion.

16 It didn't say why, but it denied that motion
17 without, expressly in regard to that, doing any kind of
18 gatewaying. It just said, we deny it.

19 Now, it gives the reason in the earlier January
20 18 order that it thought that any post judgment motion in
21 one of these cases was automatically successive, and
22 that's our first question --

23 QUESTION: All right, but --

24 MR. LIEBMAN: -- which is, that was a mistake --

25 QUESTION: -- on that -- now, this will get to

1 the merits, which I'm sure you'd like to get to --

2 MR. LIEBMAN: Yes.

3 QUESTION: -- but I thought that the argument
4 that what the court of appeals did was right is roughly
5 the following, that what your client should have done, or
6 the way it should have worked is that the district court
7 initially dismissed -- dismissed on the ground that there
8 was a procedural default -- his initial parts of the
9 initial petition, because, said the district court, he
10 didn't exhaust those, and he can't do it now because the
11 time is up, and your client never appealed that ruling
12 in -- the first time.

13 What he should have done is appealed it. Then,
14 when he asked for cert and the Tennessee statement came
15 down, he would simply have amended his cert petition and
16 allowed us to GVR in light of our case in Tennessee, but
17 he couldn't do that, because he hadn't appealed that in
18 the first place, and therefore he had a final ruling, a
19 final judgment against him on that issue, and -- and
20 that's why -- that's why what the court of appeals did was
21 right, and that's also why it really is a second and
22 successive, because after all, you -- it's -- you want a
23 district judge to reopen a judgment where he made a
24 mistake but you didn't appeal it.

25 MR. LIEBMAN: Your Honor, you're absolutely

1 right, the premise, which is that Rule 60(b) or related
2 motions in the court of appeals cannot be used to fill the
3 office of an appeal, but there's a very established
4 doctrine there. It came up in the Muniz case, in the
5 Blackmon v. Money remand that this Court made, and the
6 question there is whether it was reasonably available to
7 him at that moment to make an appeal. If it was, 60(b)
8 doesn't come into play, and that's perhaps the most
9 important question in this case.

10 As of the time Mr. Abdur' Rahman filed his
11 brief, his first brief, opening brief in the Tennessee --
12 I mean, in the Sixth Circuit on August 5, 1999, this
13 Court's O'Sullivan decision had come down two months
14 earlier. O'Sullivan read a rule of Illinois procedure
15 establishing a discretionary review process that is
16 identical in terms. The State of Alabama has actually
17 gone through the terms in its brief and shown that they're
18 identical.

19 This Court said, and I quote, without more,
20 those words are not sufficient to tell us that that
21 discretionary procedure is outside the ordinary post-
22 conviction review process in that State. In this State of
23 Tennessee at the time, there was that rule, identical to
24 the rule in O'Sullivan, and nothing more in the law. In
25 fact, the State concedes in its brief that there was

1 nothing in Tennessee law at the time besides the rule.

2 So it was not available to him at that point for
3 the very reason that if he had made that argument, it
4 would have been a frivolous argument because it would have
5 run foursquare into the precise holding of a decision of
6 this Court but two months before. It was only when Rule
7 39 came down after the appeal was over, while the case was
8 on cert, that it said no, no, no, no, the law of Tennessee
9 has been since 1967 that our discretionary review
10 procedure in Rule 11 has never been part of the regular
11 and routine State post-conviction review process that we
12 have --

13 QUESTION: Mr. Liebman, we've decided a couple
14 of cases, one about 30 years ago, Harris against Nelson,
15 and then another case called Pitchess, in maybe -- that
16 indicate that the Federal Rules of Civil Procedure, and
17 particularly 60(b), do not apply if they conflict at all
18 with the habeas regulations. Now, you don't cite
19 either -- either of those cases in your brief.

20 MR. LIEBMAN: Yes, we do. We cite --

21 QUESTION: I'm sorry. I --

22 MR. LIEBMAN: We cite both of them on --

23 QUESTION: I didn't see them in the index.

24 MR. LIEBMAN: Well, I believe that they are
25 cited in our -- well, I guess you're right. I thought we

1 had cited them in the reply brief, but we make reference
2 to them where we point out, if I can find it here -- yes,
3 we do, Your Honor. On page 3 of our reply brief, the
4 yellow brief, we cite Pitchess and Browder.

5 QUESTION: You didn't cite them in your opening
6 brief.

7 MR. LIEBMAN: We didn't. The State raised them,
8 and we responded to them, and the point is that we
9 actually think that Martinez-Villareal and Slack stand on
10 top of Pitchess and Browder, so that they were obviously
11 decided in that same context, and so we cited the more
12 recent case, but in any event in our reply brief, what we
13 point out is, this Court has been very clear to say, is
14 there a conflict between a Federal Rule of Civil Procedure
15 and the habeas jurisprudence?

16 If so, the civil rule doesn't apply. If not, it
17 does apply, and as almost all of the courts of appeals
18 have held, there are certain very limited circumstances
19 when a 60(b) motion does not interfere with the policies
20 of the habeas jurisprudence, and in those limited number
21 of cases, which includes this one, it is appropriate to
22 use 60(b).

23 QUESTION: Well, I thought the Second Circuit
24 was the only case that really supported you --

25 MR. LIEBMAN: Oh, no.

1 QUESTION: -- in this area as to whether a 60(b)
2 rule can be used as a substitute.

3 MR. LIEBMAN: No, Your Honor. We don't at all
4 stand on the Second Circuit approach to this. The
5 majority rule is that it is a case-by-case analysis.
6 It's -- for example -- the Dunlap case where Judge Posner
7 recently cited all of the lower court opinions, and what
8 he said was, the majority rule is that you have to look.
9 You have to say, is this the kind of 60(b) that avoids the
10 problems that successive petitions are -- cause that we
11 have a rule for? If they do, decide the 60(b) motion. If
12 not --

13 QUESTION: How -- how long after the district
14 court ruled that your claims were not -- not exhausted,
15 how much time elapsed between then and the time you filed
16 your Rule 60 motion?

17 MR. LIEBMAN: We filed the Rule --

18 QUESTION: 3-1/2 years, wasn't it?

19 MR. LIEBMAN: But it was the key point --

20 QUESTION: Just answer my question.

21 MR. LIEBMAN: Yes. Yes. Yes, Your Honor --

22 QUESTION: It was 3-1/2 years?

23 MR. LIEBMAN: -- I think 3-1/2 years is the
24 right -- but the reason is that the trigger for the 60(b)
25 motion did not come down until June 2001.

1 QUESTION: That's true, but the -- now I'm
2 thinking, when I read the Sixth Circuit's opinion again,
3 they're not really saying anything different. I think
4 they must mean -- I grant you it can be read either way,
5 but I can't believe that they mean every 60(b) motion no
6 matter what is second or successive.

7 It seems to have arisen in cases where they had
8 good reason to think that the 60(b) motion in that case
9 was second or successive, as in your case they are looking
10 at the 60(b) motion as a substitute for a new petition for
11 the reason that it was dismissed the first time as a
12 procedural default, which is the end of this matter.

13 MR. LIEBMAN: Well --

14 QUESTION: And you didn't appeal it. Rather,
15 for whatever set of reasons, you wait -- I mean, not
16 saying it was your fault, but you wait and go back and do
17 this other thing.

18 MR. LIEBMAN: Well, Your Honor, two points.

19 QUESTION: So is there -- is there really a
20 minority rule at all?

21 MR. LIEBMAN: Well --

22 QUESTION: Is there some court that really meant
23 it, that no matter what, 60(b) is always second or
24 successive?

25 MR. LIEBMAN: That is the argument that the

1 State made here, and it's what the district court said,
2 and I can tell you the district court believed it, but it
3 doesn't matter here. I don't want to get off on that,
4 because we think that whatever the rule ought to be, this
5 is the kind of 60(b) motion that is not successive for two
6 reasons.

7 First of all, it is -- it relies upon legal and
8 factual issues that are entirely within the four corners
9 of the original proceeding. There's nothing new here.
10 The law, the facts, the evidence, everything is the same.

11 Secondly, so that means you're not getting
12 out --

13 QUESTION: Well, the law's new. I mean, that's
14 your whole point.

15 MR. LIEBMAN: Well, but it isn't new, Your
16 Honor. It was a declaration of the law as it existed all
17 the way back in 1967.

18 QUESTION: Well, all right, I'll --

19 MR. LIEBMAN: But it's like the Fiore case, Your
20 Honor, where the Pennsylvania Supreme Court said yes, we
21 came down with this interpretation of the State statute,
22 and it's true the lower courts had all seen it differently
23 up to that point, but we were telling you what the statute
24 meant all the way back, and this Court treated it as,
25 quote, old law.

1 QUESTION: But then you said you didn't need to
2 put it in your -- make a cross-appeal of it because you
3 didn't think it was a tenable argument, so you can't -- I
4 don't -- I don't see how you could have it both ways, to
5 say it was the law all along, but we didn't have to say
6 that that was the law because O'Sullivan --

7 MR. LIEBMAN: Well, because --

8 QUESTION: -- hadn't come down, or had just come
9 down.

10 MR. LIEBMAN: Well, Your Honor, what O'Sullivan
11 says is, if there is a clear statement of law by State
12 law, by rule or decision that says -- as the South
13 Carolina-Arizona provisions cited in this paragraph say --
14 that this particular discretionary review procedure,
15 quote, is not available, then the Supreme Court and
16 the Federal courts will respect it, but otherwise, if
17 we don't know what the law is, or it's not clear, then
18 we don't need to respect it, so that was --

19 QUESTION: But the appellate -- the appellate
20 brief in this case, the brief in the Sixth Circuit, when
21 the -- when the prosecutor was appealing on the
22 ineffective assistance of counsel, that was filed before
23 O'Sullivan came down, wasn't it?

24 MR. LIEBMAN: The State's brief was filed
25 before, petitioner's brief filed after.

1 QUESTION: But the point at which you could have
2 filed a cross-appeal was before.

3 MR. LIEBMAN: Oh, Your Honor, that's a very
4 important point. In our certificate of probable cause to
5 appeal we asked the district judge, starting with point 1,
6 the prosecutorial misconduct claims and the procedural
7 default ruling on them is what we want to take up to the
8 court of appeals on our appeal, and the district court
9 granted a CPC -- a certificate of probable cause -- on
10 that ground, so that was in the case, it was in the
11 appeal, and it was specifically in the mind -- well, it
12 was on the paper that this was the issue that the cross-
13 appeal was going to be focused on.

14 QUESTION: I thought you didn't appeal. I
15 thought you did not appeal the first time -- we're back in
16 the year 2000, or early 2001.

17 MR. LIEBMAN: '99, actually.

18 QUESTION: '99?

19 MR. LIEBMAN: Yes.

20 QUESTION: All right. At that time I thought
21 you did not appeal the district court's ruling that you
22 had procedurally defaulted because you hadn't exhausted
23 claims X, Y, and Z, and the time had run.

24 MR. LIEBMAN: Well, all I would say --

25 QUESTION: Am I right about that?

1 MR. LIEBMAN: You're right, but they were in the
2 certificate of probable cause, which is -- you have to get
3 that first, but of course the court of appeals doesn't
4 reach your certificate of probable cause.

5 QUESTION: No, no, so I don't see how that helps
6 you.

7 MR. LIEBMAN: Well, I'm just saying -- well, it
8 does help in this sense, Your Honor, I think, which is
9 that until O'Sullivan came down and removed the argument
10 that petitioner thought he had, he was planning to raise
11 it, but when O'Sullivan came down, after the CPC, but
12 before he actually got to file his brief, now suddenly
13 the claim that he wanted to raise looked frivolous,
14 because there was not a declaration of State law on the
15 point.

16 There came to be a declaration of State law, and
17 when it came sua sponte, it happened to say, because the
18 court in Tennessee believed that this to be -- was the
19 case -- that the law of Tennessee has always been since
20 1967 that this was never part of the post-conviction
21 review process, so --

22 QUESTION: Hasn't the Sixth Circuit had an
23 opinion on that subject as to whether the rule promulgated
24 by the Tennessee Supreme Court was a change, or was it
25 not?

1 MR. LIEBMAN: No, it has not. The issue is
2 percolating in the lower courts and in the Sixth Circuit,
3 but it has not ruled yet.

4 QUESTION: But isn't the --

5 QUESTION: The Sixth Circuit did -- the Sixth
6 Circuit had held before in a case arising out of Kentucky
7 that if you don't go to the top court, you have not
8 exhausted.

9 MR. LIEBMAN: They said that in Kentucky based
10 upon a Kentucky Supreme Court decision in 1985.

11 QUESTION: Right.

12 MR. LIEBMAN: After that point, there are five
13 or six decisions of the Sixth Circuit saying that failure
14 to exhaust that remedy is failure to exhaust. There is no
15 similar decision in Tennessee at all in the court of
16 appeals before O'Sullivan came down, because the
17 understanding of practice there, and I know because I
18 practiced there at that time, was that this didn't need to
19 be exhausted.

20 QUESTION: All right, so isn't the right way to
21 do this, if you were writing it from scratch, we have the
22 statute, you simply say, look, this is what second and
23 successives are for. When the law changes just in the
24 middle of the case, bring a second and successive. That's
25 the rare case where it should be allowed.

1 MR. LIEBMAN: The law did not change.

2 QUESTION: I mean, I don't --

3 QUESTION: But I mean what happened to you.

4 Isn't that the case that they're there for?

5 MR. LIEBMAN: This -- the second and successive
6 is designed to avoid every change in the law being the
7 basis for a habeas petition, but this is not a change in
8 the law. It's exactly -- every petitioner literally
9 argued that not only is this discretionary, so it should
10 not be exhausted, but he also said the nature of this
11 discretionary process shouldn't be exhausted because it's
12 different from post-conviction.

13 QUESTION: Well, may I ask you one more
14 question? If it had merely been a change in Tennessee
15 law, that would not have been a predicate for a second and
16 successive habeas, would it?

17 MR. LIEBMAN: Absolutely. If it is a change
18 of law, it's preempted by the terms of the successive
19 statute which says, we've got a rule here for changes in
20 the law, but that's why this isn't successive, because
21 this is not a change in the law, it's within the four
22 corners --

23 QUESTION: But doesn't that foreclose you,
24 because when you're -- if it's not second and successive
25 as defined by AEDPA, that means those are the only kind

1 you can bring?

2 MR. LIEBMAN: No, Your Honor --

3 QUESTION: Not that you can pull something else

4 in under Rule 60.

5 MR. LIEBMAN: No, Your Honor.

6 QUESTION: No --

7 MR. LIEBMAN: The State agrees if it's fraud,

8 if -- Martinez-Villareal, where you've got some State

9 court decision that changes everything --

10 QUESTION: Well --

11 MR. LIEBMAN: -- it's got to be --

12 QUESTION: -- are you suggesting there was fraud

13 here?

14 MR. LIEBMAN: No, no, no, I'm saying, Your

15 Honor, that there are certain circumstances where

16 something that is literally second in time does not

17 qualify as a second or successive petition that triggers

18 2244, and so we need to know what that is, and the two

19 standards are when it is within the four corners of the

20 first petition and it completely undermines --

21 QUESTION: Now, what's -- what's the authority

22 for that statement?

23 MR. LIEBMAN: The authority is Martinez-

24 Villareal, Slack, and Calderon, and a huge body of lower

25 court law that establishes those very, very narrow

1 circumstances where it's so tied into the first petition
2 because it's the same facts, and it so undermines that
3 first judgment that there's no judgment left, that you
4 need something to substitute for it, but you don't have a
5 successive petition.

6 QUESTION: Thank you, Mr. Liebman. I take it
7 you're reserving your time?

8 MR. LIEBMAN: Yes, I am.

9 QUESTION: General Summers.

10 ORAL ARGUMENT OF PAUL G. SUMMERS

11 ON BEHALF OF THE RESPONDENT

12 GENERAL SUMMERS: Thank you, Mr. Chief Justice,
13 and may it please the Court:

14 This Court lacks jurisdiction of this case and
15 the writ should be dismissed, but if this Court concludes
16 that it does have jurisdiction, then the alleged 60(b)
17 motion was a prohibited second or successive application
18 because it attempted to revisit a prior final adjudication
19 based upon alleged error of fact or law.

20 Turning to the jurisdictional issue, the court
21 of appeals did not have jurisdiction to review the
22 transfer order. The transfer order was not a final order.
23 It had no jurisdiction in the district court. The
24 district court had no jurisdiction over the -- over the
25 motion because it considered it as what it was. It was a

1 second or successive application.

2 QUESTION: Doesn't the jurisdictional issue
3 really turn on whether or not it was a second or
4 successive?

5 GENERAL SUMMERS: No, Your Honor, it does not.
6 Under the gatekeeping authority of 2244(b)(3) of AEDPA,
7 then the sole province as to determine whether or not a
8 second or successive application should be granted or
9 should be denied is in the province of the Sixth Circuit.

10 QUESTION: But is it strictly in the province of
11 the Sixth Circuit to determine that what it has before it
12 is a request for something that should be called a second
13 or successive petition within the meaning of the statute?
14 If it is, they've got the final word, but whether it is is
15 a separate question.

16 GENERAL SUMMERS: Your Honor, our position is
17 that you can't separate these two functions. Under AEDPA,
18 and under the clear enactment of Congress, when Congress
19 gave the court of appeals the exclusive and sole
20 jurisdiction as to whether or not a -- an application or
21 leave for application for a second or successive should be
22 granted or denied, it also gave them the exclusive
23 authority to determine whether it was --

24 QUESTION: Well, it didn't do so in so many
25 words. I mean, is your argument that if we split this

1 question into a) jurisdictional fact, b) the authority of
2 the court if the jurisdictional fact is present, if we
3 split those two questions that there's going to be
4 constant litigation over the jurisdictional fact, and
5 that's why we ought to read the statute your way, or is
6 there some point of text that is not occurring to me that
7 supports you?

8 GENERAL SUMMERS: Absolutely, Your Honor.

9 QUESTION: Well, it's one or the other.

10 GENERAL SUMMERS: Well --

11 (Laughter.)

12 QUESTION: Is it text or policy?

13 GENERAL SUMMERS: It's the first one, Your
14 Honor.

15 QUESTION: Okay.

16 GENERAL SUMMERS: If you were to split those two
17 decisions that the court of appeal has jurisdiction over,
18 then there would be a proliferation of appeal of that
19 first predicate decision. The decision, the first --

20 QUESTION: Well, is it going to be -- I mean, is
21 it going to be a difficult question in most cases? I
22 mean, this is an extraordinary case. You can see how the
23 jurisdictional fact question gets raised here, but you
24 know, in most cases is this going to be even a colorable
25 issue?

1 GENERAL SUMMERS: Your Honor, I don't -- I would
2 not -- I don't think this is, frankly, an extraordinary
3 case to determine whether or not it was a second or
4 successive. That is to say that when the Sixth Circuit
5 got the transfer order, they saw just what it was, and
6 that it was a second or successive application --

7 QUESTION: Yes, you say that, but the relief
8 sought in the 60(b) motion was not relief from the State
9 court judgment. It was relief from the final judgment in
10 the habeas proceeding because of the Tennessee rule, so
11 they asked to reopen the habeas proceeding, not to file a
12 second habeas proceeding, and they asked to reopen it, and
13 just to have a claim which was undecided in that
14 proceeding decided, which had never been decided, so there
15 was not asked for second consideration of a claim, just
16 for the first consideration.

17 GENERAL SUMMERS: Yes, Your Honor. What they
18 asked for was the relitigation of a claim that had been --
19 that -- that --

20 QUESTION: Not of a claim, a first litigation of
21 a claim

22 GENERAL SUMMERS: They -- they asked for -- they
23 asked for the relitigation of a prior final determination,
24 which we -- we submit and we -- our position is that this
25 was, in fact, a second --

1 QUESTION: Did they ask in the 60(b) motion for
2 relief from the State court judgment which would be the
3 relief requested in the habeas proceeding?

4 GENERAL SUMMERS: They asked -- I'm sorry.

5 QUESTION: Did they ask for relief from the
6 State court judgment in the 60(b) motion, or just from the
7 habeas court judgment?

8 GENERAL SUMMERS: They asked for relief from
9 the -- from the habeas judgment in the -- in the district
10 court --

11 QUESTION: So then it was a 60(b) motion,
12 because that's what 60(b) is directed at, where the second
13 or successive petition would have asked for relief from
14 the State court judgment.

15 GENERAL SUMMERS: Well, they alleged that it was
16 a 60(b) motion, but when the district court received the
17 motion, the district court put substance over form and saw
18 clearly that it was a second or successive --

19 QUESTION: Well, you call it that, but supposing
20 instead of the -- the Tennessee rule, they had been able
21 to demonstrate it -- very improbable, just to give the
22 hypothesis out -- that a waiver of the claim for the
23 prosecutorial misconduct had been executed and the waiver
24 was false, that there was a fraud on the court in -- in
25 having that issue precluded from review. Would a 60(b)

1 motion have been permissible then?

2 GENERAL SUMMERS: It would be the inherent

3 authority of the -- of the district court to take care of

4 a situation of fraud on the court.

5 QUESTION: By granting a 60(b) motion?

6 GENERAL SUMMERS: Well, we don't think it would

7 even have to be a 60(b) motion.

8 QUESTION: Well, wouldn't that be the office of

9 a 60(b) motion, to correct that very fraud?

10 GENERAL SUMMERS: Fraud on the court that would

11 impugn the very integrity of the prior final adjudication

12 would, in fact, be -- be --

13 QUESTION: Well, you go on a different section

14 of Rule 60, wouldn't you --

15 QUESTION: That's correct.

16 GENERAL SUMMERS: Yes.

17 QUESTION: -- the section of Rule 60 that

18 specially deals with fraud.

19 GENERAL SUMMERS: That's right.

20 QUESTION: But in that situation a 60(b) motion

21 would be permissible under that section?

22 GENERAL SUMMERS: If there was a fraud on the

23 court.

24 QUESTION: Right.

25 GENERAL SUMMERS: But that -- but the fraud on

1 the court would undermine the complete efficacies of the
2 proceedings, and that the final judgment wouldn't even be
3 final, because it would be a sham

4 QUESTION: Well, but you have to file a motion
5 and have those facts developed in order to do it, and
6 60(b) is the avenue for doing that.

7 GENERAL SUMMERS: That -- I mean, that could be
8 a possible avenue, but that -- but that would only go as
9 to the fraud on the integrity --

10 QUESTION: And here, the relief requested is
11 precisely the same, namely that one claim was not heard
12 which was in the case, for a reason that was -- turned out
13 to be a gross mistake of the law. They thought the law
14 was exhaustion because of a rule of law, and it turns out
15 they were wrong, so you have -- instead of fraud, you have
16 a mistake of law.

17 Now, maybe that doesn't -- doesn't justify 60(b)
18 relief, but it certainly is a classic case of what 60(b)
19 is directed to -- to solve.

20 GENERAL SUMMERS: Well --

21 QUESTION: Directed at the final judgment in the
22 habeas proceeding as opposed to the final judgment in the
23 State proceeding.

24 GENERAL SUMMERS: Of -- of course, Your Honor,
25 that argument would fly in the face of the finality

1 requirements of AEDPA, which only -- which only gives
2 us -- which only gives us limited circumstances to
3 relitigate --

4 QUESTION: But that's true of my fraud case,
5 too.

6 GENERAL SUMMERS: Well, but in the fraud case,
7 Your Honor, the fraud on the court means that the original
8 judgment is a complete sham, is a complete sham, and there
9 was no --

10 QUESTION: And here it isn't a sham, it was just
11 a mistake. They misread the law.

12 GENERAL SUMMERS: Well, they want it both ways,
13 if it please the Court. They either say that it was a new
14 rule or an -- or an old rule that clarified Tennessee law.
15 If it was a new rule, then that would contravene 2244(b)
16 under AEDPA.

17 QUESTION: But that --

18 QUESTION: What is the right way to do it? That
19 is, in your opinion, how -- suppose we had a -- we have a
20 defendant, a petitioner, a convicted person, and he has a
21 whole lot of claims, and there he is in Federal court and
22 he brought all of his claims up to the State supreme court
23 but for three, then he suddenly thinks, oh my God, I wish
24 I'd brought those up, too, and the district judge says,
25 well, you sure had to, so you lost them, because it's too

1 late now. Procedural default. It seems obviously right,
2 doesn't even appeal that part of the case.

3 But while the case is on appeal, this Court
4 says, he didn't have to go to the State supreme court with
5 those three claims if the State supreme court agrees, and
6 then State supreme court then does.

7 All right. Now, there he is. Under the law as
8 it is right now, he can make his three points. He can
9 make his three claims, and yet as it was before, he
10 couldn't, and it's right on the case, it's still ongoing.
11 What's supposed to happen?

12 GENERAL SUMMERS: When the --

13 QUESTION: In your opinion is there just -- is
14 there no way a person could say, judge, please read the
15 supreme court and the Tennessee court, and you'll see that
16 your ruling was wrong, and believe me, that's right, so
17 what is he supposed to do?

18 GENERAL SUMMERS: A prior final determination --
19 a prior final determination by the district court as to
20 the procedural default should be conclusive.

21 QUESTION: So you're saying he's just out of
22 luck, nothing?

23 GENERAL SUMMERS: Yes, sir, because --
24 because --

25 QUESTION: It seems terribly unfair --

1 GENERAL SUMMERS: Well, but we -- yes, Your
2 Honor, but under the provisions of AEDPA there are two
3 circumstances where he could file a second or successive,
4 which we say is what he has, in fact, done here. One, of
5 course, is if it's a new claim involving a constitutional
6 law that's made retroactive by this very Court, or newly-
7 discovered evidence to show factual innocence, but when
8 that court -- when that district court -- makes a final, a
9 prior final adjudication, then that is -- that should
10 be -- that should be final. He should appeal that
11 decision. He should appeal that decision --

12 QUESTION: General Summers --

13 GENERAL SUMMERS: -- through the normal
14 appellate process.

15 QUESTION: General Summers -- .

16 GENERAL SUMMERS: He did not in this case.

17 QUESTION: You -- are you -- you're making the
18 general point that's not peculiar to AEDPA? I -- tell me
19 if my understanding is correct -- that 60(b) is not
20 supposed to do service in place of an appeal.

21 GENERAL SUMMERS: Yes, Your Honor.

22 QUESTION: So if a district court rules
23 incorrectly, and you didn't appeal that, and then there's
24 a clarifying decision by some other court that really
25 shows the district court was incorrect on the procedural

1 default, you can't then say, ah, give me the relief under
2 60(b) that I could have gotten if I had taken a timely
3 appeal.

4 GENERAL SUMMERS: Yes, Your Honor. If the --

5 QUESTION: And that's wholly apart from AEDPA.

6 GENERAL SUMMERS: Yes, Your Honor, that's
7 correct. If this petitioner had decided that instead, the
8 district court found that he had improperly exhausted his
9 remedies under State law, that he'd showed no cause of
10 prejudice or fundamental miscarriage of justice, that he
11 had procedurally defaulted, and that he, his claim was --
12 it was conclusive that he had no habeas relief, if the
13 petitioner had wanted to appeal that -- had wanted to find
14 out whether or not the district court was wrong -- he
15 should have appealed that case. He did not. Under --
16 under the case law but also under 60(b) doctrine a 60(b)
17 motion is not a substitute for an appeal. He did not
18 appeal that adjudication by the district judge. He's out
19 of business so far as that's concerned.

20 What he filed in the district court, the
21 district judge got that document, he looked at substance,
22 and the district court said, this is a second or
23 successive. The only jurisdiction in the world to
24 determine whether to grant or deny second or successive is
25 the court of appeals. When that court of appeals got that

1 transfer order, there was no termination. They got what
2 was --

3 QUESTION: Is it conceivable that a district
4 judge might erroneously in some case call something second
5 or successive and it really wasn't? Is it ever possible
6 for him to do -- make that?

7 GENERAL SUMMERS: Well, human beings, it's
8 certainly possible.

9 QUESTION: And if he does make a mistake, what's
10 the remedy for it?

11 GENERAL SUMMERS: There could be a motion to
12 transfer in the court of appeals. The court of appeals
13 if, in fact, finds that it was improvidently transferred,
14 could transfer it back. That would be that remedy, Your
15 Honor.

16 QUESTION: But what if instead -- I gave you a
17 fraud example -- instead of that it was a mistake. The
18 judge thought that the petitioner had waived the case.
19 They thought there was a document in the file waiving this
20 issue and he was just dead wrong, and he said, then the --
21 after the decision -- the final decision in the habeas
22 case, the judge -- the litigant finds out that the judge
23 incorrectly relied on a mistaken representation of fact.
24 Could he not file a 60(b) to correct that?

25 GENERAL SUMMERS: No, Your Honor. If it was a

1 mistake of fact, if it did not go to -- to undermine the
2 integrity of that being a final adjudication, no.

3 QUESTION: Well, it -- it undermines it in the
4 sense that it denied the litigant a hearing on a claim
5 asserted in the habeas proceeding, namely, the
6 prosecutorial misconduct. He just never got a hearing on
7 that.

8 GENERAL SUMMERS: If he were -- if it were
9 something of the nature of -- of denying him the
10 opportunity to have a hearing, or if, in fact --

11 QUESTION: That's exactly what it was here, too.

12 GENERAL SUMMERS: Well, no, sir. He did -- he
13 received a hearing. He received a hearing, Your Honor,
14 that -- and in that hearing it was determined by the court
15 that he had improperly --

16 QUESTION: He failed to exhaust.

17 GENERAL SUMMERS: -- Failed to exhaust --
18 improperly, that he --

19 QUESTION: And that ruling was wrong.

20 GENERAL SUMMERS: -- failed to show cause of
21 prejudice, that there was no miscarriage of justice, and
22 that he was conclusively entitled to no habeas relief in
23 the district court, and that was a conclusive final
24 determination, and if he had felt like the court was
25 wrong, he should have filed an appeal in the Sixth

1 Circuit.

2 QUESTION: Well, I understand that argument, but
3 if -- but I don't understand your position if it was based
4 on a mistake of fact, rather than a mistake of law. Here
5 was just a clear mistake of law. The parties all
6 misunderstood what the law, as later explained by the
7 Tennessee court, was. It was -- he did not -- he had, in
8 fact, exhausted.

9 GENERAL SUMMERS: Your Honor, if he had thought
10 the judge had made a mistake, he should have appealed.

11 QUESTION: He didn't think so. He didn't know
12 that 'til Tennessee adopted its rule --

13 GENERAL SUMMERS: Well --

14 QUESTION: -- which was 2 years later.

15 GENERAL SUMMERS: Well, his argument that
16 Tennessee adopted a rule that either is a new rule or an
17 old rule is not of much import as far as we're concerned,
18 because the Rule 39 that he relies upon changed nothing in
19 Tennessee law --

20 QUESTION: Right.

21 GENERAL SUMMERS: -- so far as appellate
22 process.

23 QUESTION: But they changed the understanding of
24 the district judge and the litigants. They thought the
25 law was otherwise.

1 GENERAL SUMMERS: Well, I think -- I think the
2 district court knew what the law was when he made that
3 decision, but certainly the Sixth Circuit knew what the
4 law was.

5 QUESTION: You think he knew what the Tennessee
6 court was later going to decide?

7 GENERAL SUMMERS: Well, actually, the --

8 QUESTION: Because what he did is flatly
9 inconsistent with what the Tennessee court decided.

10 GENERAL SUMMERS: What the Tennessee court later
11 decided, Your Honor, did not change Tennessee law so far
12 as discretionary review at all -- at all.

13 QUESTION: But it did demonstrate, did it not,
14 that the district judge was wrong in his ruling on
15 exhaustion?

16 GENERAL SUMMERS: The district judge was exactly
17 correct on his decision.

18 QUESTION: That's the question. That's the
19 ultimate question that I think this Court granted cert to
20 decide, but then we discovered that there are all these --
21 this procedural -- the question whether a Tennessee court
22 saying you don't have to exhaust does service for the
23 Federal courts. That is, the Federal courts could say
24 it's an open question.

25 You have to exhaust the remedies that are

1 available to you. You could have requested review. You
2 didn't request review. We don't care if Tennessee says,
3 ah, you don't have to, because that's -- that ruling would
4 be made only for purposes of saying, let's get into the
5 Federal court. I take it that's your position.

6 GENERAL SUMMERS: The decision as to the
7 availability of a remedy is a State decision. The
8 decision as to what has been exhausted is a Federal
9 decision, Your Honor.

10 QUESTION: Yes.

11 GENERAL SUMMERS: The Rule 39 that the
12 petitioner relies upon did not change discretionary review
13 in Tennessee one iota. As a matter of fact, the Tennessee
14 Rule of Appellate Procedure 11 says in its comment that
15 Rule 39 does not change TRAP -- as we call it, TRAP 11 --
16 whatsoever. Discretionary review was in '95, when he did
17 not appeal to the supreme court, as well as in June 28,
18 2001, an absolute available remedy under the normal
19 appellate processes in Tennessee.

20 QUESTION: So on your view, the district court
21 was right when the district court said the first time
22 around, sorry, you didn't exhaust.

23 GENERAL SUMMERS: Your Honor, our view is that
24 the district court was right in 1998 when he ruled that
25 the claims were procedurally defaulted, and if this

1 case -- if this case were to go back to the district court
2 today, he would rule that the claims had been
3 procedurally --

4 QUESTION: Well, that -- we don't know that
5 because I think it's an open question whether -- after
6 O'Sullivan -- the position taken in O'Sullivan would apply
7 when the State court says you don't have to exhaust.

8 GENERAL SUMMERS: But there's no question
9 that -- there is no question that in 1998, when the
10 district court found that the -- that the issues had been
11 procedurally defaulted, and that there had been no showing
12 of cause in prejudice, no miscarriage of justice, that
13 that was a conclusive final determination.

14 What this -- what this petitioner attempts to do
15 is to -- under the guise of a post-judgment pleading --
16 avoid or evade the second or successive restriction. This
17 flies in the face of AEDPA, would be a mockery of the
18 finality requirements of AEDPA, and we would submit to the
19 Court that the transfer to the court of appeals was a
20 proper transfer, and that the court of appeals properly
21 determined the gatekeeping criteria was satisfied, the
22 writ should be dismissed or, in the alternative, the
23 decision of the court of appeals should be affirmed.

24 QUESTION: Thank you, General Summers.

25 Mr. Zidlicky, we'll hear from you.

1 ORAL ARGUMENT OF PAUL J. ZIDLICKY
2 ON BEHALF OF AMICI CURIAE, STATE OF ALABAMA, ET AL.

3 MR. ZIDLICKY: Mr. Chief Justice, and may it
4 please the Court:

5 I'd like to start by first responding to Justice
6 Stevens' question, in which he said that the Rule 60(b)
7 motion didn't seek the relief of granting of Federal
8 habeas. It actually did. In the joint appendix in 170,
9 the court -- the petitioner sought relief from the State
10 court judgment in bullet point -- I believe it's five, but
11 in any event, I think underlying that is the question of
12 whether there had been a prior --

13 QUESTION: You say the 60(b) motion was directed
14 at the State court judgment, is that what you're telling
15 me?

16 MR. ZIDLICKY: Yes. Yes, Justice Stevens.

17 QUESTION: And not at the habeas -- not asking
18 the habeas court to vacate the ruling on the -- on --
19 denying habeas and setting it down for a ruling on the --
20 on the prosecutorial misconduct?

21 MR. ZIDLICKY: For both. For both, Justice
22 Stevens. He asked for both of those, and I think -- he
23 sought to reopen the judgment, and he also sought -- he
24 sought in bullet point 5 to -- or, relief from the State
25 court judgment, and that's in the joint appendix.

1 The question --

2 QUESTION: But 60(b) just gets him the first
3 step, and if he succeeds in the first step, then he goes
4 further and says, okay, relieve me from the State court
5 judgment.

6 MR. ZIDLICKY: Well, I was just responding just
7 to Justice Stevens' point that he didn't seek that relief
8 in his Rule 60(b) motion. He actually did, but the -- but
9 the underlying question is --

10 QUESTION: But he's doing it simply because he
11 is saying, I guess, that's where I'm trying to get to
12 ultimately.

13 MR. ZIDLICKY: What he's trying to do is, he's
14 trying to relitigate a claim that had been adjudicated
15 against him through Rule 60(b), and this Court said in
16 Calderon that you can't -- that the requirements of
17 2244(b) can't be evaded, and one of those requirements is,
18 you can't relitigate a claim that has been adjudicated.

19 QUESTION: Well, he's not relitigating a claim
20 that's been adjudicated, he's relitigating -- he wants to
21 litigate a claim that had not been adjudicated. He wanted
22 a ruling on the merits of his claim, which he never got.

23 MR. ZIDLICKY: No, Justice Stevens, there was an
24 adjudication of his claim. There was an adjudication of
25 his claim by the district court which said his claim was

1 procedurally defaulted --

2 QUESTION: Yes.

3 MR. ZIDLICKY: -- and that he had failed to

4 establish cause and prejudice, and that --

5 QUESTION: Correct, but they didn't get a ruling

6 on the merits of the claim

7 MR. ZIDLICKY: No, he --

8 QUESTION: They just ruled that it was

9 procedurally defaulted because it had not been exhausted.

10 MR. ZIDLICKY: Well, that's -- but I don't think

11 that's right, Justice Stevens. In this Court's cases in

12 Stewart and Slack, the Court made clear that in

13 determining whether there had been a prior -- the language

14 that the Court had used was whether there had been a prior

15 adjudication of the claim. Here, there was a prior

16 adjudication of the claim. This Court's precedent, going

17 back to *Wainwright v. Sykes*, *Coleman v. Thompson*, and --

18 QUESTION: But the adjudication to which you

19 refer is a holding that it was procedurally defaulted

20 because the -- they had not been exhausted in the Supreme

21 Court of Tennessee. Is that not correct?

22 MR. ZIDLICKY: That's correct, Justice Stevens.

23 QUESTION: And that amounts to an adjudication

24 on the merits, but in fact, the merits had never been

25 decided.

1 MR. ZIDLICKY: No, it is -- it's an adjudication
2 for purposes of -- it's -- for purposes of determining
3 whether he can come back and file to relitigate the issue,
4 come back and --

5 QUESTION: Right, it's an adjudication that has
6 finality, which merits adjudications usually do, but it's
7 a finality adjudication that does not rest upon any
8 finding about the underlying merits of the claim that he
9 wanted to bring for relief. Isn't that clear?

10 MR. ZIDLICKY: That's not the test that this
11 Court has adopted in --

12 QUESTION: I'm not asking you whether it's --
13 I'm just asking you as a descriptive matter --

14 MR. ZIDLICKY: I don't -- you're right, Justice
15 Souter, he didn't make a determination regarding the
16 underlying merit of the constitutional claim, but --

17 QUESTION: Okay, and we use the term, I think --
18 correct me if I'm wrong, we use the term, merits
19 determination, to refer to a determination that is
20 binding, i.e., he can't do something back in the State
21 court and then come back and try again here. We call that
22 a determination on the merits, but there are two kinds of
23 merits determinations.

24 One is a finding of default which cannot be
25 cured. Second is a finding which may involve default, but

1 may involve a determination on the merits of the
2 underlying claim, and this is just a default kind of
3 merits, not an underlying claim kind of merits finality,
4 isn't that correct, just as a descriptive matter?

5 MR. ZIDLICKY: I think it's correct as a
6 descriptive matter to -- but with one qualification. What
7 you're saying is that there is an exception for -- I think
8 in substance what you're saying is, you can continue to
9 relitigate claims of procedural default because they're,
10 quote, not on the merits, but I think the way --

11 QUESTION: Well, maybe you can and maybe you
12 can't. His argument here is, this is one that I ought to
13 be allowed to relitigate, i.e., to litigate despite a
14 finality judgment, because of something very unusual that
15 happened as a result of the supreme court's rule change.

16 What he's saying is, this is a special kind
17 of -- third kind of case in the middle, and you want to
18 treat this one for 60(b) purposes like a non-final
19 determination. I think that's the argument.

20 MR. ZIDLICKY: Justice Souter, and perhaps
21 this -- this is -- I don't think this is an exceptional
22 case in this regard. When he went back --

23 QUESTION: Well, he may be wrong that it's an
24 exceptional case, but that's the argument that he's
25 making, isn't it?

1 MR. ZIDLICKY: Well, the argument that he's
2 making is, he's entitled to relitigate a claim that has
3 been adjudicated against the --

4 QUESTION: No, he's not making that blanket
5 statement. He's saying that in a case like this, in which
6 the finality which is claimed does not rest on a merits
7 determination, I ought to have a chance under 60(b).

8 MR. ZIDLICKY: Well, I do think that this is --
9 this case is fundamentally different than the case in
10 Stewart and Slack. In those cases, what the court had
11 determined was, it wasn't a second or successive habeas
12 petition. You weren't seeking to relitigate, and the
13 reason was because you'd never received an adjudication of
14 the case at all. The court didn't say no to your habeas
15 claim. It said, not yet.

16 In Slack, the court said, go -- go exhaust. In
17 Stewart, the court said, the case is not ripe. Here what
18 the court -- here what the court -- the district court
19 told him was, they didn't say not yet, the court said no,
20 you're going to lose, and you're going to lose based on
21 precedent from this Court starting with Wainwright v.
22 Sykes.

23 Really what they're asking is for an -- a
24 loophole to this -- to the requirement for second and
25 successive petitions for procedurally defaulted cases, and

1 if that's the loophole, then there's no way to distinguish
2 that from abuse of -- abuse of the writ cases, because in
3 both instances, you can make the argument that there
4 wasn't any ruling on the substantive merits, but there was
5 a ruling, and the one that's important was, he received an
6 adjudication, and if he disagreed with that adjudication
7 he should have --

8 QUESTION: Could you describe for me what
9 portion of Rule 60(b) is still operative with reference to
10 mistakes, given AEDPA? Does AEDPA completely supersede
11 Rule 60(b) with reference to the category of mistakes and,
12 if not, how would you characterize or describe for us what
13 remains of Rule 60(b)?

14 MR. ZIDLICKY: I think what -- the analysis that
15 the Court would have to determine is whether there had
16 been an adjudication. If later on there's a claim, after
17 the court has decided the issue, that there was a mistake
18 of fact or a mistake of law, the question is, are you
19 trying to relitigate the issue, and if that's the case
20 then 60(b) wouldn't apply.

21 But if you're saying that there was never
22 adjudication in the first place for the example of a judge
23 who had been bribed in the first Federal habeas
24 proceedings, you would say, well, that's not a second or
25 successive habeas application --

1 QUESTION: As to anything that's been
2 adjudicated, the category of mistakes is removed from Rule
3 60(b) when AEDPA is in the picture?

4 MR. ZIDLICKY: I think if there's been an
5 adjudication, and I think that's the sense that -- in your
6 decision in Slack -- that's the underlying issue.

7 Now, it -- that doesn't mean that there's no
8 relief. You can -- you can try to seek to file a second
9 or successive habeas application, but this Court in Davis
10 versus Pitchess made clear that Rule 60(b) is not a way of
11 circumventing the requirements of AEDPA, and you in
12 Calderon made clear that what AEDPA prohibits is the
13 relitigation of a claim that had been adjudicated, and
14 that's exactly what we have in this case. There had been
15 an adjudication. He claims that it was wrong.

16 QUESTION: I think -- I think you're saying that
17 if there's an adjudication, there's no room for a 60(b)
18 motion predicated on a mistake. That's your submission?

19 MR. ZIDLICKY: That is my submission. I don't
20 think there was a mistake here. I --

21 QUESTION: I understand, but that's your
22 submission. In construing Rule 60(b), it simply does not
23 apply if there's been an adjudication, but my suggestion
24 to you is that the only time 60(b) applies is when you've
25 got a judgment you want to reopen.

1 MR. ZIDLICKY: Well, Your Honor -- and the
2 reason that 60(b) -- you know, one of the arguments that
3 petitioner makes here is, they say that, well, these
4 claims will rarely be granted so you don't have to worry
5 about it, but the -- but what AEDPA requires is, it says
6 these claims are -- the -- if you're trying to relitigate
7 a second or successive habeas application, what it does
8 is, it takes that away from the district court completely,
9 the delay in the costs that are associated with that
10 relitigation.

11 QUESTION: I agree with everything you say if
12 you are correct in classifying a particular judgment -- I
13 mean, a particular claim as a second or successive claim

14 MR. ZIDLICKY: Right.

15 QUESTION: There are some cases, I think, when
16 that classification does not fit the facts.

17 MR. ZIDLICKY: But I think, though, a
18 determination of procedural default falls in the heartland
19 of habeas jurisprudence, and it's the heartland of a
20 determination that you're not entitled to relief. In
21 Slack and in Stewart --

22 QUESTION: So in your view, 60(b) necessarily
23 has a much more narrow application in AEDPA cases than in
24 other cases, or in habeas cases than in other cases?

25 MR. ZIDLICKY: Yes, Justice -- Justice Kennedy,

1 I think that's right, and I think the reason why is
2 because, as this Court explained in Davis versus Pitchess,
3 you can't use 60(b) to circumvent the substantive
4 requirements of --

5 QUESTION: Well, what do they really intend in
6 Congress if, for example, the court comes up with an
7 interpretation of a statute that shows the defendant
8 didn't commit a crime, and there he is in habeas. He's
9 got a final ruling, denied. Lo and behold the Supreme
10 Court comes up with a case to say, you never committed a
11 crime. He looks at AEDPA. He can't find it's a second or
12 successive because it says, constitutional ruling. What's
13 he supposed to do? Nothing? And do you think Congress
14 meant that there was no remedy at all?

15 MR. ZIDLICKY: I think -- I think what Congress
16 did was, it -- it did identify the criteria that -- that a
17 district court would look to in determining -- it defined
18 that criteria, but the one -- the one place that you could
19 look to is, you could then go back to this Court's
20 original jurisdiction under 2241 for those exceptional
21 circumstances.

22 QUESTION: Thank you. Thank you, Mr. Zidlicky.

23 Mr. Liebman, you have 3 minutes remaining.

24 REBUTTAL ARGUMENT OF JAMES S. LIEBMAN

25 ON BEHALF OF THE PETITIONER

1 MR. LIEBMAN: I would like to direct the Court's
2 attention to pages 12 and 13 of our reply brief, the
3 yellow brief. On those pages, in the footnote in the text
4 there are a number of cases that are cited. Every single
5 one of those cases is a 60(b) case in a habeas or 2255
6 situation where 60(b) was granted, relief was granted and
7 it was determined that this was not a second or successive
8 petition.

9 In each one of those cases, the reason was
10 mistake of law, the U.S. Supreme Court or some other court
11 came down with a new decision, and in every one of those
12 cases, that issue was not raised on direct appeal to the
13 court of appeals. It came back on a 60(b). In each case
14 they had to adjudicate the question of whether it was
15 reasonable for them not to have raised it in the court of
16 appeals at that time, and in each case they did on the
17 ground that the new decision that came down changed
18 everything, and it suddenly made what looked like a
19 frivolous claim at that time into what was not a frivolous
20 claim, but, indeed, one on which there was at least a
21 right to adjudication on the merits.

22 In some cases they won, in some they lost when
23 they went to the merits after they got their 60(b) relief,
24 but the fact is that those cases, including this Court's
25 GVR in *Blackmon v. Money*, which was a 60(b) case on a

1 successive, or a second, not a successive but a second
2 habeas petition, were cases where they had not been raised
3 on appeal, but they -- they were determined to be at least
4 potentially ones where there was a reasonable basis for
5 not having done it, and frivolousness, not making
6 frivolous claims is such a basis. This Court in Gomez and
7 other cases has been particularly emphatic that habeas
8 petitioners should not -- especially in capital cases --
9 should not be raising frivolous claims.

10 The second thing I want to point to is that the
11 2244(b) (3) (E), which says that there is no -- it not only
12 says the Supreme Court can't take a cert petition, it says
13 that rehearing petitions can't be held in the court of
14 appeals, but the court of appeals are unanimous in saying,
15 if the question is whether this is a second or successive
16 petition, that can be reheard. That's not governed by
17 2244(b) (3) (E).

18 We can separate that question out, and we can
19 decide that, and it's exactly the same thing here. The
20 key case there is Mancuso in the Second Circuit, 166 F.3d
21 97, so the courts have been separating out those
22 questions, saying if it's a question of jurisdiction --

23 CHIEF JUSTICE REHNQUIST: Thank you,
24 Mr. Liebman. The case is submitted.

25 (Whereupon, at 12:04 p.m., the case in the

1 above-entitled matter was submitted.)

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