

COMMENTS

GONZALEZ V. CROSBY AND THE USE OF FEDERAL RULE OF CIVIL PROCEDURE 60(b) IN HABEAS PROCEEDINGS

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I. INTRODUCTION

The Supreme Court's decision in *Gonzalez v. Crosby*¹ creates a framework in which state prisoners who are denied federal habeas relief may invoke Rule 60(b) of the Federal Rules of Civil Procedure to seek review of the decision without impermissibly circumventing 28 U.S.C. § 2244(d)'s restrictions on second or successive habeas petitions ("SSHPs"). *Gonzalez* creates a more concrete analysis based on the nature of the relief sought by the petitioner, while also addressing some of the concerns of equity raised by an overly broad interpretation of the restrictions that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") places on successive petitions for federal habeas relief.

In 1963, the Supreme Court wrote that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."² The notion now seems almost quaint. On April 24, 1996, a year after the April 19th bombing of the Alfred P. Murrah Federal Building in Oklahoma City, President Clinton signed AEDPA into law.³ As an attempt by Congress to address the dual threats of foreign and domestic terrorism, the bill was widely recognized as a failure: before approving the measure by a narrow majority, the House of Representatives stripped the bill of several counterterrorism provisions, particularly those that sought to expand the authority of the Federal Government to use

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¹ 545 U.S. 524 (2005).

² *Sanders v. United States*, 373 U.S. 1, 8 (1963).

³ See Alison Mitchell, *Clinton Signs Measure on Terrorism and Death Penalty Appeals*, N.Y. TIMES, Apr. 25, 1996, at A18; see also David Johnston, *Clues Are Lacking: U.S. Officials Scurry for Answers—Reno to Ask Death Penalty*, N.Y. TIMES, Apr. 20, 1995, at A1 (describing the initial investigation into the Oklahoma City bombing).

wiretaps.⁴ At the same time, the families of crime victims (particularly the families of the victims of the Oklahoma City bombing) celebrated the bill's passage. Believing that AEDPA would ensure swift justice for the accused bombers and other prisoners convicted of capital crimes, these families had pressured Congress over the course of the bill's development.⁵

AEDPA greatly restricts the ability of state prisoners to proceed with a successive habeas petition, even if the successive petition raises a new claim or introduces evidence not presented in an initial petition for habeas relief.⁶ State prisoners who wish to submit an SSHP must first seek the permission of the court of appeals, and the appellate court may grant permission only under certain narrowly defined conditions.⁷ Some state prisoners have attempted to circumvent these restrictions by relying on Federal Rule of Civil Procedure 60(b), which allows parties to seek relief from a final judgment on grounds such as clerical error, fraud or misrepresentation by government agents, or the discovery of new evidence not previously discoverable with "reasonable diligence."⁸ While the plain language of 28 U.S.C. § 2244 bars the use of SSHP under most circumstances, the applicability of Rule 60(b) to habeas proceedings has not received quite as much focus.

This Comment addresses the question in three parts. The first section briefly reviews the statutory framework surrounding the use of Rule 60(b) in habeas proceedings. The second section looks at cases through which the federal courts had tried to develop a workable standard for applying Rule 60(b) to the habeas process: while some

4 Stephen Labaton, *House Passes Narrow Counterterrorism Bill Unlike Senate's*, N.Y. TIMES, Mar. 15, 1996, at A18; *see also* 142 CONG. REC. 7554 (1996) (statement of Sen. Biden) (arguing that AEDPA's restrictions on habeas corpus were less likely to deter potential terrorists than the expanded investigative powers that the House had stripped from the bill); *id.* at 7558 (statement of Sen. Hatch) (commiserating with Sen. Biden's frustration regarding the absence of certain provisions while advocating for the bill's passage).

5 *See, e.g.*, Julie DelCour, *Victims' Survivors Speak out to Urge Curbs on Appeals*, TULSA WORLD (Okla.), Feb. 1, 1996, at A1 (discussing victims' relatives mission to "stop lengthy inmate death-row appeals"). The rapidly approaching anniversary of the attack was very much on the minds of the Senators as they gathered to discuss the conference report. *Compare* 142 CONG. REC. 7548 (1996) (statement of Sen. Hatch) (noting that Senate consideration of the conference report on AEDPA coincided with the one-year anniversary of the Oklahoma City bombing), *with id.* at 7552 (statement of Sen. Biden) (observing that Congress had not felt any urgency to address these questions in the months prior to the pending anniversary).

6 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) § 106(b), 28 U.S.C. § 2244(b)(2) (2006).

7 *Id.*

8 FED. R. CIV. P. 60(b).

circuits concluded that the rule had no place in the habeas process, and treated a motion under the rule as an attempt by state prisoners to circumvent the provisions of AEDPA, others believed that a petitioner filing a Rule 60(b) motion sought a form of relief entirely different from a petitioner who filed an SSHP. These courts held a much broader view of the rule's use in the context of habeas proceedings.

Ultimately, a synthesis doctrine emerged out of the Eleventh Circuit that reconciled these conflicting policies. First articulated by Judge Gerald Tjoflat in a dissent to an Eleventh Circuit opinion, this doctrine distinguishes between Rule 60(b) motions that seek to advance a claim which are barred as successive attempts by State prisoners to attack their trial court convictions, and true Rule 60(b) motions which seek review of the habeas process itself. The Supreme Court affirmed this doctrine in *Gonzalez*, and the Court's decision provides a basis for courts to examine a Rule 60(b) motion seeking review of a decision to deny habeas relief.

The final section of this comment discusses the impact of *Gonzalez*, relying on a 2009 decision in the Ninth Circuit to demonstrate how the application of Rule 60(b) to the habeas process addresses fears that an overly broad reading of AEDPA may restrict the ability of state prisoners to raise legitimate issues regarding the process by which a district court denied their original applications for habeas relief.

II. THE STATUTORY FRAMEWORK

A. *The Availability of Habeas Relief to State Prisoners*

Habeas corpus is one of the fundamental privileges outlined in the Constitution.⁹ In its original incarnation, however, federal habeas relief was contemplated only for prisoners who were “in custody, under or by colour of the authority of the United States, or . . . [who were] committed for trial before some court of the same.”¹⁰ In 1867,

9 “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless where in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2. There was little debate over whether a guarantee of habeas corpus should be included in the Constitution; most discussion focused on how broadly the guarantee should be granted. *Compare* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 438 (Max Farrand ed., 1911) (debating whether the suspension of habeas corpus should only be permitted “on the most urgent occasions,” or whether the right of habeas corpus should be held “inviolable”) *with id.* at 345–50 (deliberating over the nature, scope and wording of the Constitution's provisions addressing treason).

10 *Felker v. Turpin*, 518 U.S. 651, 659 (1996) (quoting Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (establishing the United States judicial courts)).

Congress expanded the doctrine of habeas corpus to include “all cases where any person may be restrained of his or her liberty in violation of the [C]onstitution, or of any treaty or law of the United States,” thereby providing State prisoners an opportunity to seek relief at the federal level.¹¹

B. Federal Habeas Relief for State Prisoners (28 U.S.C. § 2254)

The statutory procedures by which a state prisoner may seek habeas relief in the federal courts are described in 28 U.S.C. § 2254.¹² A prisoner convicted in the state courts must exhaust all potential remedies at the state level before a federal district court may entertain a petition for habeas relief.¹³ There is a presumption at the federal level that a state court decision is correct, and the burden rests on the petitioner to rebut this presumption by clear and convincing evidence.¹⁴ A § 2254 petitioner may not appeal a final order in a habeas proceeding unless “a circuit justice or judge issues a certificate of appealability,” finding that the applicant “has made a substantial showing of the denial of a constitutional right.”¹⁵ The Supreme Court later clarified that a § 2254 petitioner may seek an appeal of a final judgment in a habeas proceeding by showing “at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”¹⁶ In clarifying this burden, the Supreme Court referenced both a claim relying on the denial of a “constitutional

¹¹ Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, *quoted in Felker*, 518 U.S. at 659. *But see Ex parte Hawk*, 321 U.S. 114, 118 (1944) (requiring that a petitioner seeking habeas relief in the federal courts exhaust state proceedings as a threshold matter). Supreme Court affirmation of the exhaustion requirement was later codified by statute in 1948. *See* 28 U.S.C. § 2254 (1952).

¹² “The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus . . . [for a prisoner held pursuant to a State court judgment] only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

¹³ *See* 28 U.S.C. § 2254(b)(1)(A). Of course, if no corrective remedies are available at the state level, or if “circumstances exist that render such process ineffective to protect the rights of the applicant,” a federal district court may still entertain an application for a writ of habeas corpus. *Id.* § 2254(b)(1)(B).

¹⁴ 28 U.S.C. § 2254(e)(1).

¹⁵ *Id.* § 2253(c).

¹⁶ *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a . . . [Certificate of Appealability] under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.” *Id.* at 483.

right,” and a challenge raised against the underlying integrity of the habeas process. This distinction became important as courts began to consider the application of Rule 60(b) motions to habeas proceedings.

C. AEDPA’s Bar on Successive Habeas Petitions (28 U.S.C. § 2244)

By enacting, and later amending, 28 U.S.C. § 2244, Congress voiced its specific concerns about abuse of the writ of habeas corpus by state prisoners.¹⁷ Under this provision, habeas claims previously raised before the district court are, on their face, dismissed.¹⁸ If a claim was not raised previously, the petitioner must show that the claim “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable” to the district court.¹⁹ Alternatively, the petitioner must show that the underlying facts of the claim could not have been discovered through due diligence, and that they show, by clear and convincing evidence, that “no reasonable factfinder” could have convicted the petitioner but for the asserted constitutional error.²⁰ Because § 2244(b)(2) explicitly contemplates the use of previously unavailable evidence by a petitioner submitting an SSHP, the absence of such a provision in § 2244(b)(1) suggests that the “mere” discovery of new evidence is insufficient to allow a federal court to review a previously presented habeas claim.

Permission to present an SSHP must be granted by a court of appeals.²¹ Even if a court of appeals grants authorization to a petitioner to submit his successive petition for habeas relief to the district court, the district court must dismiss the successive prayer “unless the applicant shows that the claim satisfies the requirements of [28 U.S.C. § 2244].”²²

1. Enactment of 28 U.S.C. § 2244

In 1948, citing the growing threat of “repetitious, meritless requests for relief,” Congress drafted 28 U.S.C. § 2244, which stated

¹⁷ See 28 U.S.C. § 2244(a) (exempting federal prisoners who seek habeas relief under 28 U.S.C. § 2255 from the restrictions imposed by 28 U.S.C. § 2244).

¹⁸ *Id.* § 2244(b)(1).

¹⁹ *Id.* § 2244(b)(2)(A).

²⁰ *Id.* § 2244(b)(2)(B)(ii).

²¹ See *id.* § 2244(b)(3)(A). The specific procedure for reviewing a request to submit an SSHP is also outlined within this provision. See *id.*

²² See 28 U.S.C. § 2244(b)(4).

that a federal court was not “required to entertain an application for a writ of habeas corpus” from a state or federal prisoner if an SSHP restated claims that the court had resolved in the original petition.²³ An attached Reviser’s Note asserts “[t]his section makes no material change in existing practice. . . . [since] the courts have consistently refused to entertain successive ‘nuisance’ applications for habeas corpus.”²⁴

2. 1966 Amendments

In 1966, the statute was amended with the introduction of 28 U.S.C. § 2244(b), which allowed the federal courts to make a determination of the petitioner’s good faith when deciding whether to entertain an SSHP.²⁵ If the court believed that a petitioner had deliberately withheld an otherwise novel argument from the original habeas petition, 28 U.S.C. § 2244(b) gave the court the authority to dismiss the petition.²⁶ The new amendments were designed to relieve the perceived burden on the federal courts caused by the state prisoners who “fil[e] applications either containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds obviously well known to them when they filed the preceding application.”²⁷ Legislative history accompanying the 1966 amendments still explicitly contemplated the good-faith discovery of new evidence “relating to an alleged denial of a [f]ederal right,” and observed that, in such a case, “the court would be obliged to entertain the writ.”²⁸

23 See 28 U.S.C. § 2244 Reviser’s Note (1952) (originally enacted as Act of June 25, 1948, ch. 646, § 2244, 62 Stat. 869, 965). The fact that Congress codified the state exhaustion requirement at the same time as implementing the first restrictions on successive state petitions for habeas relief suggests that the state process has always been a specific point of concern for the Legislature.

24 *Id.*

25 Habeas Corpus Act of 1966 § 1, 28 U.S.C. § 2244(b) (1970). The 1966 amendments to 28 U.S.C. § 2244 also introduced a provision which codified the district court’s deference to conclusions of fact or law reached by the Supreme Court during the petitioner’s initial round of appeals. See *id.* § 2244(c).

26 *Id.* § 2244(b).

27 S. REP. NO. 89-1797, at 2 (1966); see also *id.* at 1 (“The number of applications by State prisoners for writs of habeas corpus has been steadily increasing [from 134 in 1941 to 3,773 in the first 9 months of fiscal year 1966]. . . . More than 95 percent of these applications were held to be without merit.”).

28 *Id.* at 2.

3. 1996 Amendments (AEDPA)

During the 1996 Senate debates over AEDPA, the question of habeas reform seemed to take priority over discussion regarding any of the provisions of the bill that were explicitly designed to prevent terrorist attacks. Earlier, the House of Representatives had removed a number of counterterrorism provisions from AEDPA, particularly those involving surveillance by intelligence agencies.²⁹ In the absence of these provisions, both AEDPA's supporters and detractors agreed that habeas reform was the primary purpose of the bill.³⁰ AEDPA's supporters traced narratives of murderers who had delayed their executions through repeated meritless petitions for habeas relief.³¹ The bill's supporters also invoked the wishes of the families of the victims of the Oklahoma City bombing, who were vocal in their desire for the expedient execution of the accused bombers.³² Based on the legislative record accompanying 28 U.S.C. § 2244, there was a clear and targeted intent by Congress to close off certain paths to state prisoners seeking habeas relief under 28 U.S.C. § 2254.

D. Habeas Rule 11

Habeas Rule 11 states that the Federal Rules of Civil Procedure may be used with respect to habeas proceedings “to the extent that

²⁹ See Labaton, *supra* note 4 (discussing that the Senate has “historically resisted approving legislation that merely limited habeas corpus appeals by state and Federal inmates”). This modification was a source of consternation for the Senate. See, e.g., 142 CONG. REC. 7548–51 (1996) (statement of Sen. Hatch) (commiserating with Sen. Biden's frustration regarding the state of the bill); see also *id.* at 7567 (statement of Sen. Biden) (“That is what this is about—35 folks in the House who do not like [a proposed wiretap provision]. That is why we are going to vote against our interest probably in the next couple of hours.”).

³⁰ Compare *id.* at 7550 (statement of Sen. Hatch) (“Most important, this conference bill contains the habeas corpus reform proposal contained in the Senate terrorism bill.”) with *id.* at 7552 (statement of Sen. Biden) (“This is a great habeas corpus bill. . . . This is a habeas corpus bill with a little terrorism thrown in.”).

³¹ E.g., 142 CONG. REC. 7573–75 (statement of Sen. Gorton) (outlining a 12-year process from conviction to execution for an accused murderer, and entering into the Record a chronology of “57 separate actions” taken in the Federal courts with respect to that process). But see *id.* at 7552 (statement of Sen. Biden) (contending that the vast majority of delays occur in the state courts, beyond the reach of the proposed Federal statute).

³² See 142 CONG. REC. at 7564 (statement of Sen. Nickles) (“The No. 1 provision that . . . [the victims' families] want in this bill is the so-called habeas corpus reform. They want an end to these endless appeals of people who have been convicted of atrocious crimes and murders.”). But see *id.* at 7552 (statement of Sen. Biden) (noting that the trial of the Oklahoma City bombers was under way in federal court, and that the application of these reforms to their case would require the district attorney to delay a federal conviction and execution to try the defendants again in a state court).

they are not inconsistent with any statutory provisions.”³³ Because of the limitations instituted by AEDPA, prisoners have invoked the Federal Rules of Civil Procedure in an effort to preserve or expand their access to habeas corpus; in practice, however, courts have been circumspect in applying the Federal Rules to habeas proceedings in such a manner.³⁴ This judicial restraint frustrates attempts to raise untimely claims for habeas relief, which seems consistent with Congress’s intent in enacting AEDPA, and suggests that the courts should take a somewhat narrow approach when faced with similar attempts to apply the Federal Rules to habeas proceedings.

III. RULE 60(B) AS IT APPLIES TO HABEAS PROCEEDINGS

A. *Conflicting Doctrines Regarding the Use of Rule 60(b) Motions in Habeas Proceedings*

In the wake of AEDPA’s passage, conflicting doctrines arose regarding Rule 60(b) should apply to habeas proceedings.³⁵ For example, the Second Circuit found that, while a petition for habeas corpus is a request for the court to declare a conviction invalid on Constitutional grounds, a Rule 60(b) motion “seeks only to vacate the federal court judgment dismissing the habeas petition,” and is “merely a step along the way” to habeas relief.³⁶ Because the Second Circuit concluded that a Rule 60(b) motion is distinguishable from an SSHP, the court recommended that petitioners be granted leave to file Rule 60(b) motions.³⁷ At the other extreme, several circuits resolved that a state prisoner could never invoke Rule 60(b) in response to a denied petition for habeas corpus because the ultimate goal of a Rule 60(b) motion is not a direct challenge to the habeas proceeding, but an in-

³³ See Rules Governing Section 2254 Cases in United States District Court, R. 11, 28 U.S.C. app. § 2254 (2006).

³⁴ See, e.g., *United States v. Duffus*, 174 F.3d 333, 337 (3d Cir. 1999) (holding that liberal grants of “relation back” under Rule 15 of the Federal Rules of Civil Procedure would undermine the intent of Congress in passing AEDPA); see also *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (holding that a trial may not serve as a common transaction for Rule 15 relation back); *Peterson v. Brennan*, 196 F. App’x 135, 140 (3d Cir. 2006) (refusing to treat a petitioner’s motion to supplement as an SSHP, but ultimately denying Rule 15 relation back and dismissing supplementary claims as untimely).

³⁵ See *Pridgen v. Shannon*, 380 F.3d 721, 725–26 (3d Cir. 2004) (discussing the circuit split on the issue).

³⁶ See *Rodriguez v. Mitchell*, 252 F.3d 191, 198–99 (2d Cir. 2001).

³⁷ This “always permitted” interpretation was not widely recognized, and was only advanced by the Second Circuit. See *Pridgen*, 380 F.3d at 725 (discussing that the “Second Circuit alone” has taken such a position).

direct challenge to the underlying conviction.³⁸ Because the motion seeks to overturn the conviction, circuits that universally denied Rule 60(b) motions in response to denied petitions for habeas corpus saw the effort as an attempt to circumvent the restrictions established by AEDPA.³⁹

Most courts that flatly denied the use of Rule 60(b) in habeas proceedings relied on the holding of the Court of Appeals for the Eleventh Circuit in *Felker v. Turpin*.⁴⁰ *Felker* appeared before the Eleventh Circuit on remand from a Supreme Court case in which the Court affirmed the constitutionality of AEDPA's restrictions on the writ of habeas corpus.⁴¹ In a unanimous decision, the Supreme Court held that AEDPA's restrictions on SSHP constitute a "modified res judicata rule" which restrain "abuse of the writ" but do not suspend habeas corpus in violation of the Suspension Clause.⁴² The Supreme Court also dismissed *Felker*'s petition for certiorari, holding that 28 U.S.C. § 2244 (b) (3) prevented the Court from reviewing a lower court's decision to deny a petitioner leave to file an SSHP.⁴³

Denied review by the Supreme Court, *Felker* filed two additional petitions for habeas relief—both of which were denied by the district court.⁴⁴ After the district court denied his fourth application for habeas relief, *Felker* filed a Rule 60(b) motion in the district court, invoking subsections (1), (2), (3), and (6).⁴⁵ On appeal, the Eleventh Circuit panel held that "the established law of this circuit . . . forecloses . . . [petitioner's] position that Rule 60(b) motions are not constrained by successive petition rules."⁴⁶ With the Supreme Court's refusal to review the Eleventh Circuit's decision, *Felker* became an important precedent in habeas jurisprudence.⁴⁷

³⁸ See, e.g., *Felker v. Turpin (Felker II)*, 101 F.3d 657, 661 (11th Cir. 1996) (per curiam) ("Rule 60(b) cannot be used to circumvent restraints on successive habeas petitions."), cert. denied, 519 U.S. 989 (1996).

³⁹ Cf. *Duffus*, 174 F.3d at 337 (affirming the denial of a prisoner's untimely amendment to a habeas petition because granting leave to amend would frustrate the intent of AEDPA's one-year statute of limitations).

⁴⁰ *Felker II*, 101 F.3d at 658.

⁴¹ *Felker v. Turpin (Felker I)*, 518 U.S. 651, 651–52 (1996).

⁴² *Felker II*, 518 U.S. at 664 (internal quotation marks omitted).

⁴³ *Id.* at 658–59. The Court also denied a direct prayer made to them for an original habeas petition. *Id.* at 665.

⁴⁴ *Felker I*, 101 F.3d at 659–60.

⁴⁵ *Id.* at 660. Respectively, subsections (1), (2), (3), and (6) address claims of: mistake; newly discovered evidence; fraud or misconduct by the opposing party; and "any other reason that justifies relief." FED. R. CIV. P. 60(b).

⁴⁶ *Felker I*, 101 F.3d at 661.

⁴⁷ See, e.g., *Lopez v. Douglas*, 141 F.3d 974, 975–76 (10th Cir. 1998) (per curiam) (citing *Felker I* to deny Petitioner's Rule 60(b) (6) motion as an SSHP under AEDPA).

Between these two extremes a third plurality view has emerged. This plurality view distinguishes between “true” Rule 60(b) motions that are designed to address procedural issues within the habeas proceeding, and masked attempts to “collaterally attack” the underlying conviction through a Rule 60(b) motion.⁴⁸ This interpretation represents a valid synthesis of the two extremes: legitimate Rule 60(b) motions do have an ultimate goal that is distinct from that of an initial or successive petition for habeas corpus, while attempts to disguise an SSHP as a Rule 60(b) motion serve only to frustrate the intent of Congress in enacting AEDPA. Drawing a distinction between “legitimate” Rule 60(b) motions and masked successive habeas petitions allows for the broad use of the rule, while ensuring that it is only used for its legitimate intended purpose—to vacate the prior final judgment from which the motion originates, and not to overturn an underlying criminal proceeding.

B. Development of a Doctrine of Distinction

In an early attempt to distinguish between legitimate Rule 60(b) motions and masked successive habeas petitions, the Ninth Circuit held in 1998 that a petitioner’s Rule 60(b) motion was an SSHP but suggested that, under certain circumstances, a Rule 60(b) motion filed in response to a denied petition for habeas relief could evade the restrictions of AEDPA.⁴⁹ For example, if state misconduct pre-

48 *See* *Pridgen v. Shannon*, 380 F.3d 721, 727 (3d Cir. 2004) (affirming a lower court’s dismissal of portions of petitioner’s Rule 60(b) motion which directly attacked state conviction); *see also* *Banks v. United States*, 167 F.3d 1082, 1084 (7th Cir. 1999) (per curiam) (“Rule 60(b) is, however, an appropriate means to bring a claim that the conduct of counsel affected the integrity of the court’s habeas proceeding.”).

49 *See* *Thompson v. Calderon*, 151 F.3d 918, 921 n.3 (9th Cir. 1998), *remanded from* 523 U.S. 538, 540 (1998). *But see id.* at 927 (Kleinfeld, J., concurring) (“I doubt there could be any form of papers seeking . . . federal relief from a state conviction and sentence, after federal relief had previously been denied, that would not fall within the statutory provisions governing second or successive applications.”). Petitioner Thompson was convicted on November 4, 1983 of first-degree murder and forcible rape. *Calderon v. Thompson*, 523 U.S. 538, 544 (1998). Petitioner’s convictions and death sentence were affirmed in the California State Supreme Court on April 28, 1988. *Id.* From the time that his convictions were affirmed, Thompson filed three consecutive applications for habeas relief. *Id.* at 544–45. In 1995, Petitioner’s third application was granted relief as to his rape conviction and to a rape special circumstance (which made his death sentence invalid), but was denied relief as to his murder conviction. *Id.* at 545.

On June 19, 1996, a three-judge panel of the court of appeals reversed the district court’s ruling, reinstating the rape conviction, the special circumstance, and the death penalty; subsequently, Thompson filed a fourth habeas petition. *Calderon*, 523 U.S. at 545–46. On July 22, 1997, Thompson filed a motion with the court of appeals to recall its mandate denying habeas relief. On July 23, he filed an additional motion in district court

vented a Petitioner from discovering evidence which might provide a factual predicate for a permissible SSHP under 28 U.S.C. § 2244(b)(2), the court observed that it would be “incongruous” to treat a Rule 60(b) motion raising that claim as an SSHP: a petition under 28 U.S.C. § 2244 would be insufficient, because (a) the petitioner would not be in possession of the evidence in question; and (b) the State would have an incentive to shirk its disclosure obligations.⁵⁰

Four years after *Calderon v. Thompson* suggested that a court might entertain a Rule 60(b) motion in the context of a habeas proceeding, a dissenting opinion in the Eleventh Circuit outlined a more workable framework by which to determine whether Rule 60(b) motions should be treated as SSHP subject to the restrictions of 28 U.S.C. § 2244. In *Mobley v. Head*,⁵¹ the majority stayed the execution of a petitioner pending the Supreme Court’s decision in *Abdur’Rahman v. Bell*.⁵² Notwithstanding the pending Supreme Court decision, the ma-

seeking relief from judgment pursuant to Rule 60(b). *Id.* at 546. The district court denied this Rule 60(b) motion as an SSHP. *Id.* at 547. The court of appeals first denied Thompson’s motion to recall its mandate, but reversed its decision, *sua sponte*, two days before the scheduled date of Thompson’s execution. *Id.* at 547–48. The court of appeals also affirmed the district court’s earlier grant of habeas relief, vacating Thompson’s death sentence. *Id.* at 549.

In a 5-4 decision, the Supreme Court held that the recall of the mandate did not conflict with the provisions of AEDPA, because the court of appeals had “acted on the exclusive basis of Thompson’s first federal habeas petition.” *Id.* at 554 (citing 28 U.S.C. § 2244 (b) (Supp. II 1994)). The Court ultimately held, however, that the court of appeals had abused its discretion since the “miscarriage of justice” standard was not met in Thompson’s case. *Id.* at 566 (“Thompson’s evidence does not meet the ‘more likely than not’ showing necessary to vacate his stand-alone conviction of rape, much less the ‘clear and convincing’ showing necessary to vacate his sentence of death.”).

On remand, the Ninth Circuit reinstated the mandate, but also granted Thompson’s motion to reinstate the appeal of his Rule 60(b) motion, which had been dismissed as moot after the mandate had initially been recalled. *Thompson v. Calderon*, 151 F.3d at 920.

⁵⁰ See *Thompson*, 151 F.3d at 921 n.3.

⁵¹ 306 F.3d 1096 (11th Cir. 2002).

⁵² 535 U.S. 1016 (2002) (granting certiorari), *cert. dismissed*, 537 U.S. 88 (2002). In *Abdur’Rahman*, the petitioner had filed a petition for habeas relief raising claims of ineffective counsel and prosecutorial misconduct. The district court granted habeas relief on the ineffective counsel claim, but denied as procedurally barred his claim of prosecutorial misconduct. *Abdur’Rahman v. Bell*, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting) (withdrawing certiorari). The Sixth Circuit reversed the district court’s order granting habeas relief (petitioner did not appeal denial of relief on the second claim). *Id.* (citing 226 F.3d 696 (6th Cir. 2000)). Petitioner then filed a Rule 60(b) motion, claiming that the procedural bar ruling of the district court was based on a mistaken premise, citing TENN. SUP. CT. R. 39. See *id.* at 92. The district court held that the Rule 60(b) motion represented a “second or successive application,” and the Sixth Circuit affirmed the lower court’s decision. *Id.* at 93–94. The Supreme Court granted certiorari, but later withdrew it as improvidently granted. See *id.*

jority opined that the lower court had “fairly read” *Felker’s* absolute prohibition on the use of Rule 60(b) motions in the context of habeas proceedings.⁵³

In his dissent, Judge Gerald Tjoflat argued that the majority was wrong to rely on *Felker* because *Felker* involved an attempt to introduce new constitutional claims into a habeas corpus petition.⁵⁴ Judge Tjoflat read *Felker’s* conclusion that Rule 60(b) motions are barred unconditionally by 28 U.S.C. § 2244(b) within the context of that court’s interest in preventing the circumvention of AEDPA’s restrictions on successive habeas petitions.⁵⁵ “True” Rule 60(b) motions, Judge Tjoflat argued, do not implicate these concerns.⁵⁶ Judge Tjoflat observed that an SSHP will either cite claims arising from an intervening rule of constitutional law, or claims arising from the discovery of evidence previously unavailable through the exercise of due diligence: neither type of claim “challenges the district court’s previous denial of relief under 28 U.S.C. § 2254.”⁵⁷ A petitioner seeking relief under Rule 60(b), however, “impugn[s] . . . the integrity of the district court’s judgment rejecting his petition Asserting this claim is quite different from contending, as the petitioner would in a successive habeas corpus petition, that his conviction or sentence was obtained [unconstitutionally pursuant to 28 U.S.C. § 2254].”⁵⁸

The impact of Judge Tjoflat’s reasoning in the *Mobley* dissent was felt almost immediately, as his analysis was quoted approvingly by Justice Stevens in his dissent from the Supreme Court’s withdrawal of certiorari in *Abdur’Rahman*.⁵⁹

53 *Mobley*, 306 F.3d at 1096 (citing *Felker v. Turpin*, 101 F.3d 657 (11th Cir. 1996) as a “bright-line rule” applying § 2244 (b) restrictions to all Rule 60(b) motions filed in response to a denial of habeas relief).

54 *See id.* at 1098 (Tjoflat, J., dissenting).

55 *Id.* at 1102.

56 *Id.*

57 *Id.* at 1100–01 (citing 28 U.S.C. § 2244 (b)(2)).

58 *Id.* at 1101.

59 *Abdur’Rahman v. Bell*, 537 U.S. 88, 95–96 (2002) (Stevens, J., dissenting) (quoting *Mobley*, 306 F.3d at 1100–05). In his dissent, Justice Stevens asserted that Judge Tjoflat’s reasoning was “fully consistent” with earlier Supreme Court decisions. *See Abdur’Rahman*, 537 U.S. at 96 (citing *Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998)).

C. *The Eleventh Circuit Decision in Gonzalez v. Secretary for the Department of Corrections*

After the Supreme Court withdrew certiorari in *Abdur'Rahman*, the Eleventh Circuit joined *Mobley* with two other cases for rehearing en banc.⁶⁰ The first joined case, *Lazo v. United States*, was a 2002 decision in which a federal prisoner invoked Rule 60(b) in an attempt to vacate the denial of his request for relief under 28 U.S.C. § 2255.⁶¹ After this motion was denied, he attempted to file an appeal with the Eleventh Circuit. Distinguishing between a habeas petition that sought to overturn a conviction or sentence and a Rule 60(b) motion that sought only to narrowly attack some defect in the actual habeas proceeding, the panel concluded that the petitioner's motion, as presented, was "the functional equivalent of a successive § 2255 motion."⁶² Accordingly, the panel required that Lazo obtain a certificate of appealability before challenging his denied Rule 60(b) motion.⁶³

The second joined case involved Aurelio Gonzalez, a Florida state prisoner serving ninety-nine years for robbery with a firearm.⁶⁴ Citing an intervening Supreme Court decision, Aurelio Gonzalez filed a Rule 60(b) motion in 2001 seeking relief from a district court decision dismissing his habeas petition as time-barred.⁶⁵ The district court denied Gonzalez's Rule 60(b) motion in 2002.⁶⁶ Although the district court denied Gonzalez a certificate of appealability, the Eleventh Circuit agreed to review the district court's decision.⁶⁷ The appellate court concluded that Gonzalez's appeal sought relief not from the dismissal of his habeas petition, but from the denial of his Rule 60(b) motion; accordingly, the court held that Gonzalez needed a certificate of appealability properly directed to any issues arising from the 2002 order before the court could review that decision.⁶⁸ Reviewing Gonzalez's Rule 60(b) motion as a prayer for relief from the district

60 See *Gonzalez v. Sec'y for the Dep't of Corr. (Gonzalez I)*, 366 F.3d 1253, 1253 (11th Cir. 2004).

61 *Lazo v. United States*, 314 F.3d 571, 575 (11th Cir. 2002) (denying a certificate of appealability), *vacated for reh'g en banc sub nom. Gonzalez v. Sec'y for the Dep't of Corr.*, 326 F.3d 1175 (11th Cir. 2003).

62 *Lazo*, 314 F.3d at 573, *cited in Gonzalez I*, 366 F.3d at 1260.

63 *Gonzalez I*, 366 F.3d at 1260.

64 *Id.* at 1260–61.

65 *Id.* at 1261. The district court had originally granted Gonzalez a certificate of appealability; the certificate was denied on review after the court of appeals vacated and remanded for clarification. *Id.*

66 *Gonzalez I*, 366 F.3d at 1261.

67 *Id.*

68 *Id.*

court's dismissal of his habeas petition, the Eleventh Circuit panel concluded that the intervening Supreme Court decision was not a valid ground for Rule 60(b) relief.⁶⁹ Unlike *Lazo*, in which the court had read the petitioner's Rule 60(b) motion as a "masked" SSHP, the panel in *Gonzalez v. Secretary for the Department of Corrections (Gonzalez I)* relied on *Mobley* to assert that "in the post-AEDPA era all Rule 60(b) motions are to be treated as second or successive petitions," and therefore subject to the blanket prohibition championed by *Felker*.⁷⁰

En banc, the Eleventh Circuit affirmed that "[d]espite the clothing Lazo put on it," his Rule 60(b) motion was, in fact, a successive habeas petition since "it does not concern a defect in the earlier § 2255 proceeding . . . [but] attacks the underlying judgment of conviction and sentence itself on grounds not asserted in the prior § 2255 proceeding."⁷¹ By contrast, motions which properly seek to set aside the prior denial of habeas corpus "on a traditional Rule 60(b) ground for relief from a prior judgment" were not held to be successive habeas petitions.⁷² For the purpose of appellate review, however, the distinction was moot: the panel concluded that 28 U.S.C. § 2253 (c)(1) required that a petitioner obtain a certificate of appealability before seeking review of *any* final judgment in a habeas context, including a denial of a Rule 60(b) motion.⁷³

The court then attempted to reframe the debate, holding that Rule 60(b), in its complete form, was inconsistent with the provisions of 28 U.S.C. § 2244 (b).⁷⁴ The court first affirmed that the primary intent of Congress in drafting AEDPA "was to ensure greater finality of state and federal court judgments in criminal cases," in part through the restrictions placed on SSHP.⁷⁵ A broad application of Rule 60(b), they argued, would effectively undermine Congress's in-

⁶⁹ *Id.* at 1262.

⁷⁰ *Id.* (emphasis added). The panel also argued that, under existing pre-AEDPA circuit law, *Gonzalez's* motion would have been denied, even in the absence of *Mobley*. *Id.*

⁷¹ *Id.* at 1263 (citing *Lazo v. United States*, 314 F.3d 571, 572–73 (11th Cir. 2002)). The court of appeals in *Gonzalez* held that their decision regarding the application of Rule 60(b) motions to habeas proceedings should be applied equally to petitions originally made under 28 U.S.C. § 2255, as well as those made under § 2254. *Id.* at 1262.

⁷² *Gonzalez I*, 366 F.3d. at 1263.

⁷³ "By its plain terms the § 2253(c)(1) certificate of appealability requirement applies to 'the final order' in a § 2254 or § 2255 proceeding, and Rule 60(b) motions have been considered final orders for appellate purposes in other types of proceedings." *Id.* at 1263 (citations omitted).

⁷⁴ *Id.* at 1270; *see also* Rules Governing Section 2254 Cases in United States District Court, R. 11, 28 U.S.C. app. § 2254 (2006).

⁷⁵ *Gonzalez I*, 366 F.3d at 1269.

tent in passing these restrictions.⁷⁶ The solution to this inconsistency, in the opinion of the Eleventh Circuit panel, was to restrict the authority of the courts to consider Rule 60(b) motions in habeas proceedings to situations where the motion “is filed to correct a clerical mistake (meaning that it is really a Rule 60(a) motion),” or where the motion asserts claims of fraud, misrepresentation, or misconduct by the state pursuant to Rule 60(b)(3).⁷⁷

Judge Tjoflat, concurring in part and dissenting in part, first observed that under the majority’s formulation the courts would treat “any motion based on . . . [Rule 60(b) grounds other than a 60(b)(3) claim of prosecutorial fraud or misconduct] as an . . . [SSHP] *even if the motion contains no constitutional claim at all.*”⁷⁸ The majority opinion would also require an applicant to seek a certificate of appealability in order to appeal the denial of a Rule 60(b)(3) motion.⁷⁹ “[R]ather than adopting a flexible rule that would permit district courts to honor AEDPA’s aims without punishing the true Rule 60(b) movants,”⁸⁰ the court had failed to recognize that Rule 60(b) had been implemented, in part, to establish a method of relief distinct from independent actions (such as habeas petitions).⁸¹ The majority had ignored that history, Judge Tjoflat argued, and had therefore undermined the intended distinction between the relief sought under a Rule 60(b) motion and the relief sought through a petition for habeas corpus.⁸² Instead, Judge Tjoflat relied on his dissent in *Mobley* to demand that a distinction be drawn between authentic Rule 60(b) motions and attempts to disguise SSHP as Rule 60(b) motions:

An SSHP, “like all habeas corpus petitions, is meant to remedy constitutional violations (albeit ones which arise out of facts discovered or laws evolved after an initial habeas corpus proceeding), while a Rule 60(b) motion is designed to cure procedural violations in an earlier proceed-

⁷⁶ Compare *id.* with *United States v. Duffus*, 174 F.3d 333, 337 (3d Cir. 1999).

⁷⁷ *Gonzalez I*, 366 F.3d at 1285–86.

⁷⁸ *Id.* at 1288 (Tjoflat, J., concurring in part, dissenting in part) (emphasis added).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1297; see also *id.* at 1286 (Edmonson, C.J., concurring in part, dissenting in part) (“[T]he view of Tjoflat, J.] seems more correct to me because *it leaves Rule 60 more intact as well as crediting AEDPA.*” (emphasis added)).

⁸¹ “The drafters of modern Rule 60(b) were unconcerned with ‘the substantive law as to the grounds for vacating judgments.’ Rather, they sought to create a comprehensive procedural scheme, one that would ‘remove the uncertainties and historical limitations of ancient remedies while preserving all of the various kinds of relief that they afforded.” *Gonzalez I*, 366 F.3d at 1290 (citations omitted).

⁸² *Id.* at 1288.

ing—here, a habeas corpus proceeding—that raises questions about that proceeding’s integrity.”⁸³

In his dissent, Judge Tjoflat also relied on *Rodwell v. Pepe*,⁸⁴ in which the First Circuit refused to “subscribe to a ‘one size fits all’ taxonomy,” and instead ruled that a Rule 60(b) motion should be permitted where the factual predicate addresses “some irregularity or procedural defect in the procurement of the judgment denying habeas relief.”⁸⁵ Where the factual predicate of a motion attacks the constitutionality of the conviction, the First Circuit determined, the motion “threatens to encroach upon the precincts patrolled by the AEDPA,” and must be dismissed as an SSHP.⁸⁶ Using similar reasoning, Judge Tjoflat argued that applicants seeking review of a final judgment on a Rule 60(b) motion did not need to obtain a certificate of appealability because “final orders denying a Rule 60(b) motion do not adjudicate a constitutional challenge to the movant’s conviction or sentence,” and therefore do not encroach on “precincts patrolled by the AEDPA.”⁸⁷

D. *Gonzalez v. Crosby*

After the Eleventh Circuit decision in *Gonzalez I*, Aurelio Gonzalez sought and was granted certiorari. As a threshold matter, although the lower court decision was intended to apply equally to prisoners seeking habeas relief pursuant to 28 U.S.C. §§ 2254 and 2255, the Supreme Court’s 7-2 opinion explicitly limited its holding to those Rule 60(b) motions filed by state prisoners denied relief under § 2254.⁸⁸ The Court first focused on the word “applications” as used in 28 U.S.C. § 2244, concluding “it is clear that for purposes of § 2244(b) an ‘application’ for habeas relief is a filing that contains one or more ‘claims.’”⁸⁹ Analogizing the use of the term “applica-

83 *Id.* at 1292 (quoting *Mobley v. Head*, 306 F.3d 1096, 1101 (11th Cir. 2002) (Tjoflat, J., dissenting)); *see also id.* at 1297 (“[W]e should recognize that Rule 60(b) survives in AEDPA’s wake and fashion a holding that accounts for the essential differences between Rule 60(b) motions and [successive habeas petitions].”).

84 324 F.3d 66 (1st Cir. 2003).

85 *Id.* at 70.

86 *Id.* at 71.

87 *Gonzalez I*, 366 F.3d at 1299; *Rodwell*, 324 F.3d at 71.

88 *Compare Gonzalez I*, 366 F.3d at 1262 (11th Cir. 2004) (“[T]here is no material difference in the relevant statutory language [between § 2254 and § 2255].”) with *Gonzalez v. Crosby*, 545 U.S. 524, 529, n.3 (2005) (“Although [the portion of § 2255 governing SSHP] . . . is similar to, and refers to, the statutory subsection applicable to second or successive § 2254 petitions, it is not identical.”).

89 *Gonzalez*, 545 U.S. at 530.

tion” in other provisions of the United States Code, as well as the Court’s own use of the term in an earlier case involving § 2254(d), the majority determined that “[t]hese statutes, and our own decisions, make clear that a ‘claim’ as used in § 2244(b) is *an asserted federal basis for relief* from a state court’s judgment of conviction.”⁹⁰ To conclude otherwise, the Court held, “circumvents AEDPA’s requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts.”⁹¹ The Court observed that various appellate courts, when faced with nominal Rule 60(b) motions, consistently treated them as SSHP where they asserted such federal bases for relief.⁹² “[L]ike all habeas corpus petitions,” these federal bases of relief were “meant to remedy constitutional violations (albeit ones which arise out of facts discovered or law evolved after an initial habeas corpus proceeding).”⁹³ While the majority never mentioned Judge Tjoflat in their opinion, the definition of “claim” adopted by the Supreme Court in *Gonzalez* is consistent with the definition developed by Judge Tjoflat in identifying masked Rule 60(b) motions, which are ultimately intended to address “constitutional claims by prisoners.”⁹⁴

Having adopted a workable definition of “claim,” the Court then turned to the question of whether a Rule 60(b) motion advances a claim, requiring the motion to be read as a successive habeas petition (and therefore held to § 2244 (b)’s restrictions). In most cases, the Court observed, the determination will not present a challenge.⁹⁵ In closer cases, the Court suggested that a motion attacking a court’s decision on a claim should itself be treated as a claim, where the targeted decision was reached *on the merits*: “[A]lleging that the court erred in denying habeas relief on the merits,” the Court reasoned, “is effectively indistinguishable from alleging that the movant is . . . entitled to habeas relief.”⁹⁶ On the other hand, “[i]f neither the motion itself nor the federal judgment from which it seeks relief sub-

90 *Id.* (emphasis added) (citing *Woodford v. Garceau*, 538 U.S. 202, 207 (2003)).

91 *Id.* at 531.

92 *See id.* (citing *Harris v. United States*, 367 F.3d 74, 80–81 (2d Cir. 2004) (Rule 60(b)(1) claim arising from counsel’s failure to raise a Sixth Amendment claim in the initial petition); *Rodwell v. Pepe*, 324 F.3d at 66 (Rule 60(b)(2) claim arising from newly discovered evidence); *Dunlap v. Litscher*, 301 F.3d 873 (7th Cir. 2002) (Rule 60(b)(6) claim arising from an intervening change in substantive law)).

93 *Mobley v. Head*, 306 F.3d 1096, 1101 (11th Cir. 2002) (Tjoflat, J., dissenting).

94 *Id.*

95 “A motion that seeks to add a new ground for relief . . . will of course qualify [as an SSHP].” *Gonzalez*, 545 U.S. at 532 (citing *Harris*, 367 F.3d 74 (2d Cir. 2004)).

96 *Id.* at 532.

stantially addresses federal grounds for setting aside the movant's state conviction," the Court saw no conflict between the goals of AEDPA and those of Rule 60(b).⁹⁷ In linking the word "claim" to the assertions made in nominal Rule 60(b) motions, the Court almost explicitly restated the distinction drawn by Judge Tjoflat in both *Mobley* and *Gonzalez I*, without referring to him or to his earlier opinions.⁹⁸

Finally, the majority turned to *Calderon v. Thompson*,⁹⁹ on which the Eleventh Circuit relied in order to support the notion that Rule 60(b) was "inconsistent and irreconcilable with AEDPA's purpose."¹⁰⁰ The Eleventh Circuit panel had analogized *Calderon's* discussion of a court's authority to recall a mandate to the use of Rule 60(b) before them, concluding that "[t]he unfettered application of either procedure" in habeas cases would "undermine . . . important principles and values" protected by AEDPA.¹⁰¹ The Supreme Court rejected this analogy: while *Calderon* did state that "a prisoner's motion to recall the mandate *on the basis of the merits* of the underlying decision can be regarded as a second or successive application," the Court found that this statement did not conflict with its understanding that a Rule 60(b) motion challenging a federal court denial *on the merits* should be treated as a successive habeas petition.¹⁰² Because *Gonzalez's* motion "challenges only the District Court's previous ruling on the AEDPA statute of limitations," the Court ruled "it is not the equivalent of a successive habeas petition."¹⁰³ The Court affirmed the "unquestionably valid role" that Rule 60(b) may play in habeas cases, and noted "several characteristics of Rule 60(b) motion[s]" that eased the conflict between the Rule and § 2244 and that would insulate the

97 *Id.* at 533.

98 Compare *Gonzalez*, 545 U.S. at 532 (distinguishing situations in which "a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on its merits, but some defect in the integrity of the federal habeas proceedings." (emphasis added)) with *Gonzalez I*, 366 F.3d 1253, 1253 (11th Cir. 2004) (Tjoflat, J., dissenting) ("[A] Rule 60(b) motion is designed to cure procedural violations in an earlier proceeding . . . that raises questions about that proceeding's integrity." (quoting *Mobley*, 306 F.3d at 1101 (Tjoflat, J., dissenting)) and *Mobley*, 306 F.3d at 1101 (Tjoflat, J., dissenting) (identifying a true Rule 60(b) motion as "impugning the integrity of the district court's judgment rejecting . . . [movant's] petition").

99 523 U.S. 538 (1998).

100 *Gonzalez I*, 366 F.3d at 1271.

101 *Id.* at 1275.

102 *Calderon*, 523 U.S. at 553, quoted in *Gonzalez*, 545 U.S. at 534.

103 *Gonzalez*, 545 U.S. at 535–36. Although the Court rejected the Eleventh Circuit's reasoning in *Gonzalez I*, the majority opinion still affirmed the Eleventh Circuit's judgment in the case, since the Court found that the intervening Supreme Court decision which had inspired *Gonzalez's* Rule 60(b) motion did not meet the "extraordinary circumstances" standard required for relief pursuant to Rule 60(b)(6). *Id.* at 538.

courts from “an avalanche of frivolous postjudgment motions”: (1) Rule 60(b)’s own time limitations; (2) the high evidentiary threshold of “extraordinary circumstances” required from a movant seeking relief under the “catchall” provision of Rule 60(b)(6); and (3) the limited and deferential appellate review available for Rule 60(b) proceedings.¹⁰⁴

Concurring with the majority opinion, Justice Breyer approvingly cited Judge Tjoflat’s dissenting opinion in *Gonzalez I*, observing that it was consistent with the majority’s understanding of the proper limits of a true Rule 60(b) motion.¹⁰⁵ He wrote separately, however, to underscore the distinction between Rule 60(b) motions designed to attack the merits of a lower court decision, and those intended to address issues with the integrity of the process, fearing that the Court’s decision to deconstruct the word “claim” would only serve to cloud the issue.¹⁰⁶ While dissenting on other grounds, Justice Stevens embraced the majority’s refusal to narrowly restrict the use of Rule 60(b) motions only to those alleging Rule 60(b)(3) fraud, misrepresentation, or misconduct.¹⁰⁷

IV. *PHELPS V. ALAMEIDA*¹⁰⁸ AND THE BROADER IMPACT OF *GONZALEZ*

In response to the Supreme Court’s ruling in *Gonzalez*, federal courts have worked to determine whether a Rule 60(b) motion seeking relief from a final judgment in habeas proceedings actually advances a claim on the merits, or whether it seeks to attack “some defect in the integrity of the federal habeas proceedings.”¹⁰⁹ A Ninth

¹⁰⁴ *Gonzalez*, 545 U.S. at 534–35 (citing scenarios implicating Rules 60(b)(1) and (4)).

¹⁰⁵ *Id.* at 538 (Breyer, J., concurring).

¹⁰⁶ *See id.* at 538–39 (“I fear that other language in the majority’s opinion, especially its discussion of the significance of the word ‘claim,’ could be taken to imply a different standard, with which I would disagree.”).

¹⁰⁷ *Id.* at 539 (Stevens, J., dissenting). Ultimately, Justice Stevens argued that the Court had overstepped in addressing the merits of *Gonzalez*’s Rule 60(b) motion. *Id.*

¹⁰⁸ *Phelps v. Alameida*, 569 F.3d 1120, 1124 (9th Cir. 2009), cert. denied, 130 S. Ct. 1072 (2010).

¹⁰⁹ *See Gonzalez*, 545 U.S. at 532; *see e.g.*, *Spitznas v. Boone*, 464 F.3d 1213, 1225 (10th Cir. 2006) (treating petitioner’s appeal of a district court’s ruling as a “true” Rule 60(b) motion, because the motion did not attack the substance of the district court’s ruling, but rather the lower court’s “failure to make any ruling on a claim that was properly presented”); *see also Ward v. Norris*, 577 F.3d 925, 932 (8th Cir. 2009) (“Although an assertion of ineffective assistance of habeas counsel may be characterized as a defect in the integrity of the habeas proceeding, it ultimately seeks to assert or reassert substantive claims with the assistance of new counsel.”). *But see Post v. Bradshaw*, 422 F.3d 419, 424–25 (6th Cir. 2005) (“It makes no difference that the [Rule 60(b)] motion itself . . . purports to raise a defect in the integrity of the habeas proceedings, . . . all that matters is that . . . [Petitioner] is . . . advanc[ing] a claim by taking steps that lead inexor-

Circuit decision whose procedural history straddles both sides of the *Gonzalez* divide illustrates this effort. In 1994, Kevin Phelps was convicted of murder in a California state court after two previous trials had concluded in hung juries.¹¹⁰ After exhausting his remedies in the state courts, including a state habeas process, Phelps sought federal habeas relief in 1998: one year and fifteen days after the California State Supreme Court filed its decision not to review Phelps's denied state habeas petition.¹¹¹ The district court ruled that Phelps's petition was untimely under AEDPA's one-year statute of limitations, finding that the California State Supreme Court's denial of review had become final on that court's filing date.¹¹² The Ninth Circuit affirmed the district court's opinion in an unpublished memorandum on January 26, 1999.¹¹³ In 2001, fifteen months after Phelps's appeal became final, the Ninth Circuit resolved conclusively that a California court's decision not to review a denied state habeas petition did not become final until thirty days after the court's filing date; therefore, Phelps's federal habeas petition was not untimely.¹¹⁴

Because the Ninth Circuit's ruling meant that Phelps's original petition had been improperly dismissed, Phelps filed a Rule 60(b) motion asking that the district court review their earlier dismissal "in light of the intervening change in the law."¹¹⁵ The district court interpreted Phelps's Rule 60(b) motion as an SSHP and, because Phelps had not obtained permission from the court of appeals before filing, dismissed the motion for lack of subject-matter jurisdiction.¹¹⁶

After the Supreme Court's 2005 decision in *Gonzalez*, Phelps again asked the district court to review its original decision to dismiss his habeas petition as untimely, "a dismissal that by this point was predicated on two indisputably erroneous legal rulings."¹¹⁷ The district

ably to a merits-based attack on the prior dismissal of his habeas petition." (alteration in original)).

110 *Phelps*, 569 F.3d at 1124.

111 *Id.* at 1125.

112 *Id.* Under California law, "decisions" of the California Supreme Court become final thirty days after they are filed, while "orders" become final on the day that they are filed. The district court acknowledged that, in this context, the state courts had not "clearly articulated" a distinction between decisions and orders. *Id.* at 1126. Nevertheless, the district court accepted the State's argument that the denial of review was, in fact, an order. *Id.*

113 *Phelps*, 569 F.3d at 1126.

114 *Id.* at 1127 (citing *Bunney v. Mitchell*, 262 F.3d 973 (9th Cir. 2001) (per curiam)).

115 *Id.*

116 *Id.* (citing 28 U.S.C. § 2244(b)(3)). Improperly relying on an analysis of the merits by the district court, a panel of the Ninth Circuit dismissed Phelps's certificate of appealability regarding this decision as improvidently granted. *Id.* at 1127–28.

117 *Phelps*, 569 F.3d at 1128.

court denied Phelps's request for reconsideration, and denied him a certificate of appealability to seek review of this denied request for reconsideration.¹¹⁸ Phelps sought a certificate of appealability from the Ninth Circuit, which was initially denied.¹¹⁹ Eventually, however, the Ninth Circuit granted Phelps reconsideration of this most recent decision, and ultimately granted him a certificate of appealability as to whether his circumstances were sufficiently "extraordinary" to support a grant of relief under FED. R. CIV. P. 60(b)(6).¹²⁰

The Ninth Circuit panel reversed the district court's denial of Phelps's motion for reconsideration as to whether his federal habeas petition was untimely. The panel expressed alarm that "a concern for procedure has far too often obscured or eclipsed the equally important if not greater role to be played by our dedication to justice," and declared that "Phelps' case represents the epitome of our obsession with form over substance."¹²¹ The Ninth Circuit concluded that Phelps's motion for reconsideration before the district court did describe "extraordinary circumstances," and remanded the case with instructions that "the decision to grant Rule 60(b)(6) relief must be measured by the incessant command of the court's conscience that justice be done in light of all the facts."¹²² The Ninth Circuit decision in *Phelps* recognizes the considerations of equity contemplated by the Supreme Court's decision in *Gonzalez*, and seems more in line with the considerations that informed pre-AEDPA cases.¹²³

V. CONCLUSION

In both wording and legislative context, the AEDPA demonstrates a clear intent to restrict the ability of state prisoners to repeatedly seek the reversal of their state court convictions in the federal court system. If too broadly read, however, the provisions of § 2244 would overreach that Congressional purpose: such a reading would block not only potentially abusive attacks on an underlying conviction, but would also bar state prisoners from raising legitimate concerns arising from the habeas process itself. In trying to balance these apparently conflicting interests, the Eleventh Circuit in *Gonzalez I* drew the

118 *Id.*

119 *Id.* at 1129.

120 *Id.*

121 *Id.* at 1141.

122 *Id.* at 1137–1141 (quoting *Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007)) (internal quotation marks omitted).

123 *See, e.g., Sanders v. United States*, 373 U.S. 1, 22 (1962) ("An applicant for . . . [collateral relief] ought not to be held to the niceties of lawyers' pleadings.").

line too narrowly, defining legitimacy within too strict a statutory framework. By contrast, the Supreme Court decision in *Gonzalez v. Crosby* provides for a slightly more permissive examination of the exact relief sought in a nominal Rule 60(b) motion. As a result, *Gonzalez* provides a slightly broader framework for relief, addressing concerns of equity particularly in those cases where “life or liberty is at stake.”¹²⁴ At the same time, *Gonzalez*’s “claim” definition prevents Rule 60(b) from providing grounds for relief that would serve to address the underlying conviction, thereby undermining the express purpose of 28 U.S.C. § 2244.

124 *Id.* at 8.