No. 10-___

IN THE

Supreme Court of the United States

DONNIE E. JOHNSON,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE: NO DATE OF EXECUTION SET

QUESTION PRESENTED

What legal standard governs the determination whether a movant alleging fraud under Federal Rule of Civil Procedure 60(b) is entitled to an evidentiary hearing to resolve disputed questions of material fact?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donnie E. Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 605 F.3d 333. The order of the district court denying petitioner's motion for relief from judgment (Pet. App. 27a-57a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2010. Pet. App. 1a. The Sixth Circuit denied petitioner's timely petition for rehearing on September 10, 2010. Pet. App. 26a. On November 29, 2010, Justice Kagan extended the time to file a petition for writ of certiorari to and including February 7, 2010. App. 10A533. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT RULE OF CIVIL PROCEDURE

The version of Federal Rule of Civil Procedure 60(b) in effect in 2004, when petitioner filed his motion for relief from judgment pursuant to that Rule, provided, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not personally notified as provided in Title

> 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. . . .[1]

STATEMENT OF THE CASE

Petitioner Donnie E. Johnson was convicted and sentenced to death for the murder of his wife based principally on the testimony of a single witness, Ronnie McCoy. At trial, McCoy represented that he was not receiving favorable treatment for his testimony. Johnson sought federal habeas relief on the ground that McCoy had in fact received a deal from prosecutors, but that relief was denied. When he obtained a new affidavit from McCoy's parole officer averring that McCoy had expressly admitted receiving such a deal, Johnson filed a motion to reopen the judgment pursuant to Federal Rule of Civil Procedure 60(b), alleging fraud upon the court. Without holding an evidentiary hearing to determine whether the parole officer's sworn testimony was true, the district court again denied relief. The court of appeals affirmed, holding that Johnson was not entitled to discovery or an evidentiary hearing on his fraud claim unless he could first establish his claim of fraud by "clear and convincing" evidence.

1. In 1985, Johnson was convicted in Tennessee state court of first-degree murder for the death of his wife, Connie Johnson. Johnson was one of two people

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[1] Effective December 1, 2007, Rule 60 was amended. The "savings clause" of Rule 60(b), which provided that the rule "does not limit the power of a court to entertain an independent action to . . . set aside a judgment for fraud upon the court," was recodified in near-identical form as Rule 60(d)(3), and the substance of the rule remains the same.

present around the time of Mrs. Johnson's death; the other was Ronnie McCoy, a convicted felon who was then in a daily work-release program.

McCoy initially denied that he knew anything about the circumstances surrounding Mrs. Johnson's death. However, two-and-a-half weeks after the murder, McCoy suddenly changed his story and admitted that he was involved, but he blamed the murder solely on Johnson. McCoy told law enforcement officials that he had left Johnson and his wife alone for a few minutes; when he returned, Mrs. Johnson was dead, and Johnson confessed to the crime. McCoy admitted that he helped clean the scene of the murder and dispose of the body. He was now coming forward with information about the murder, he told the police, because he did not "need any more time" – *i.e.*, he did not want to return to jail.

Based on McCoy's statement, Johnson was charged with his wife's murder. At trial, McCoy was both the prosecution's main witness and the only witness with first-hand knowledge of the crime. McCoy also testified, outside of the jury's presence but in front of the trial judge, that he did not receive any deal or offer of immunity for his testimony against Johnson. Johnson was convicted and sentenced to death.

Notwithstanding his express admission that he had participated in an attempt to conceal a murder, McCoy was never charged with any crime in relation to Mrs. Johnson's death. The prosecutor, Ken Roach, acknowledged that he could have charged McCoy with several serious crimes, but he indicated that he had declined to do so because he was concerned about

his ability to prove that McCoy was a "willing" participant. He claimed that his decision not to prosecute McCoy was "unrelated" to McCoy's testimony.

On direct appeal, the Tennessee Supreme Court affirmed the conviction. *State v. Johnson*, 743 S.W.2d 154, 155 (Tenn. 1987. The Court denied certiorari. *Johnson v. State*, 485 U.S. 994 (1988). Petitioner's efforts to obtain state post-conviction relief were similarly unsuccessful. *See Johnson v. State*, No. 61, 1991 WL 111130 (Tenn. Crim. App. June 26, 1991); *Johnson v. State*, No. 02-S-01-9207-CR-00041, 1993 WL 61728 (Tenn. Mar. 8, 1993); *Johnson v. State*, No. 02C01-9111-CR-00237, 1997 WL 141887 (Tenn. Crim. App. Mar. 27, 1997).

2. In 1988, McCoy pleaded guilty to unrelated charges of aggravated assault. In his presentencing report, McCoy's parole officer included a statement by McCoy indicating that he had been "granted immunity for turning state's evidence" in Johnson's case.

After his efforts to obtain state post-conviction relief failed, Johnson filed a timely petition for habeas corpus in federal district court. Among other things, he alleged that the prosecutor had withheld evidence of a deal with McCoy in violation of his obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). In reply, the State submitted affidavits from McCoy and Roach indicating that no such deal existed. In support of his *Brady* claim, Johnson presented McCoy's presentencing report that included his statement that he had received "immunity for turning state's evidence." In opposition, the State filed an affidavit from McCoy in

which he reaffirmed his denial of any deal, saying that he "d[id] not know why" the report contained such a statement.

The district court denied habeas relief. With respect to the substance of Johnson's claim, the court stated that Johnson "failed to present any credible evidence that the State had entered into a 'deal' for Mr. McCoy's testimony." Pet. App. 62a. The court credited the "unambiguous sworn denials" of McCoy and Roach over what it described as the "various ambiguous bits of evidence put forward by petitioner." Pet. App. 66a. The court therefore concluded that "there was no 'deal.'" *Id*. The district court granted a certificate of appealability on another of Johnson's claims; a divided panel of the Sixth Circuit affirmed on that issue. *Johnson v. Bell*, 344 F.3d 567, 569 (6th Cir. 2003), *cert. denied*, 541 U.S. 1010 (2004).

3. After further diligent investigation, Johnson secured an affidavit from the parole officer who had recorded McCoy's statement in his 1988 presentencing report. The affidavit indicates that the information in presentence reports is generally "obtained from records and individuals with pertinent knowledge, including the defendant." Mot. for Equitable Relief, App. 2, *Johnson v. Bell*, No. 97-3052-BBD (W.D. Tenn. Oct. 13, 2004). The parole officer then specifically affirmed, under penalty of perjury and in direct contradiction to the McCoy and Roach affidavits, that the statement in the presentencing report regarding McCoy having been "granted immunity for turning state's evidence . . . came from Ronnie Joe McCoy." *Id.*

a. With the parole officer's affidavit in hand, Johnson filed a motion in the district court for relief from its prior judgment pursuant to Federal Rule of Civil Procedure 60(b), which provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . or (6) any other reason that justifies relief." When Johnson filed his motion, Rule 60(b) further provided that the rule "does not limit the power of a court to . . . set aside a judgment for fraud upon the court." *See supra* note 1. Johnson contended that the State's submission of the Roach and McCoy affidavits, which are expressly contradicted by the parole officer's affidavit, constituted a fraud upon the court and tainted the original judgment denying habeas relief. Mot. for Equitable Relief 25-27, *Johnson v. Bell*, No. 97-3052-BBD (W.D. Tenn. Oct. 13, 2004)

Although the two sets of affidavits were fundamentally irreconcilable, the district court denied the Rule 60(b) motion without any inquiry into the conflict in the sworn evidence before it. Pet. App. 53a. Instead, the court deemed the claim procedurally defaulted on the ground that it had not been raised in state court. Pet. App. 44a. The court further held that the Rule 60(b) motion constituted a prohibited second or successive habeas petition. Pet. App. 45a n.6. Moreover, it held, Johnson had failed to state a claim for fraud on the court because he had not alleged that the State knew that the statements in McCoy's and Roach's affidavits were false and

because the alleged fraud was not "directed at the judicial machinery." Pet. App. 51a.

Finally, the district court reaffirmed its earlier rejection of Johnson's claim on the merits, relying on its prior conclusions about the reliability of the McCoy and Roach affidavits. Pet. App. 44a-47a. To the extent that the district court considered the parole officer's affidavit, it focused primarily on what it regarded as Johnson's delay in submitting the affidavit. Pet. App. 46a. But the court reasoned that, "even were the court to credit the parole officer's affidavit as truthful," it "merely" presented his conflicting recollection of the interview that he conducted in McCoy's presentencing proceedings. Pet. App. 46a-47a. And although the court recognized that the affidavit was "perhaps probative" of Johnson's claim that McCoy had an undisclosed deal with prosecutors, it did not regard the affidavit as "compelling," "conclusive," or sufficient to justify further proceedings. Pet. App. 47a.

b. On appeal, Johnson argued that he was, at a minimum, entitled to an evidentiary hearing on his fraud claim. A divided panel of the Sixth Circuit affirmed.[2]

As an initial matter, the court of appeals agreed with Johnson that his Rule 60(b) motion was not a prohibited second or successive habeas petition. Pet. App. 12a (citing *Carter v. Anderson*, 585 F.3d 1007,

[2] The court characterized Johnson's notice of appeal as a request for a certification of appealability, which it then granted, finding that "petitioner has produced a modicum of evidence in support of this claim." Pet. App. 11a.

1011 (6th Cir. 2009)). It also recognized that "there is some evidence that McCoy received favorable treatment based upon his testimony," but in its view the evidence did not "*definitively* establish[] that a deal with the prosecution did, in fact, occur." Pet. App. 12a. Because Johnson had failed to produce "clear and convincing" evidence that prosecutors had presented false material to the district court, the panel majority held, he was not entitled to an evidentiary hearing. *Id.*

Judge Clay dissented, concluding that Johnson's claim "undoubtedly raised sufficient questions which should entitle him to an evidentiary hearing." Pet. App. 18a (Clay, J., dissenting). In Judge Clay's view, it would be "incredible to contend that a witness" such as McCoy, who was a convicted felon on work release, "would give such incriminating testimony" – implicating himself in an attempt to conceal a murder – "with no assurance of immunity from prosecution." Pet. App. 19a. Thus, in light of the substantial allegations of fraud upon the court, "the proper course would have been to hold an evidentiary hearing" at which witnesses could be called and subjected to cross-examination. Pet. App. 22a. Without such a hearing, Judge Clay continued, prosecutors could "merely file unchallenged affidavits where the very nature of the evidence allegedly withheld prevents Petitioner . . . from discovering irrefutable proof that a deal existed." Pet. App. 24a.

The court of appeals denied rehearing and rehearing en banc. Pet. App. 26a. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court's intervention is warranted to resolve a conflict over the standard that a movant under Rule 60(b) must meet to obtain an evidentiary hearing on his claim of fraud on the court. The Sixth Circuit's holding – that to be entitled to an evidentiary hearing at which to prove his claim of fraud, Johnson was first required to prove his claim by "clear and convincing evidence" – directly implicates a square conflict among the circuits. The Sixth Circuit's position defies logic – with devastating consequences in this capital case – by providing evidentiary hearings only to movants who do not need them, because they already have enough evidence of fraud to win their claims without a hearing. This case is an ideal vehicle in which to resolve the question presented because three other circuits – the First, Second, and Seventh – would conclude that Johnson is entitled to an evidentiary hearing based on the conflicting sworn affidavits regarding the truth of McCoy's testimony.

I. The Court Should Resolve The Intractable Circuit Conflict Over The Legal Standard For Allowing An Evidentiary Hearing When A Movant Alleges Fraud Under Rule 60(b).

In addition to making no sense, the Sixth Circuit's holding that petitioner was not entitled to an evidentiary hearing because he did "not come forward with clear and convincing evidence" conflicts with the holdings of three other circuits. Because the question frequently arises and is of critical importance to the proper administration of justice,

particularly in the capital context, the Court should grant review.

A. The Circuits Are Irreconcilably Divided.

1. The First, Second, and Seventh Circuits all hold that a Rule 60(b) movant is entitled to an evidentiary hearing if she makes a "colorable claim" of fraud, while two other circuits – the Sixth and the Tenth – have held that a district court does not abuse its discretion in failing to hold an evidentiary hearing unless the Rule 60(b) movant produces "clear and convincing" evidence of fraud.

Johnson would have received an evidentiary hearing in the First Circuit. In *Pearson v. First New Hampshire Mortgage Co.*, the court of appeals expressly rejected a lower court's conclusion that an evidentiary hearing was not warranted unless the movant alleging fraud on the court could produce a "smoking gun" demonstrating the fraud. 200 F.3d 30, 34-35 (1st Cir. 1999). In that case, a Chapter 7 debtor filed a motion pursuant to Federal Rule of Bankruptcy Procedure 9024 – which explicitly adopts Rule 60(b) – arguing that a settlement had been procured through fraud on the court because the trustee had colluded with the debtor's attorney and the bank to reach a settlement that was adverse to the debtor's interests. *Id.* at 34. The district court affirmed the bankruptcy court's order denying the motion to reopen without a hearing, but the First Circuit reversed, reasoning that such a standard could result in "claimants who have been denied both preliminary discovery and an opportunity to present witnesses" being "left with no meaningful access to

direct evidence of fraudulent intent, notwithstanding an abundance of telltale circumstantial evidence." *Id.* at 35. In its view, because "the record plainly includes considerable evidence of serious conflicts of interest which could tend to divide [Pearson's attorney's] loyalties," *id.* at 37, Pearson had raised a "colorable claim" of fraud, *id.* at 34-42, and it remanded the case to the lower court. *See also Roger Edwards, LLC v. Fiddes & Son Ltd.*, 427 F.3d 129, 137 (1st Cir. 2005) (holding that a Rule 60(b) fraud evidentiary hearing was not necessary only because the movant "points to nothing in this case that could be unearthed by discovery or proved in an evidentiary hearing that would alter our analysis").

The Seventh Circuit has adopted the same "colorable claim" standard. In *Ty Inc. v. Softbelly's, Inc.*, that court held that the district court had abused its discretion when it failed to hold an evidentiary hearing despite conflicting evidence of fraud. 353 F.3d 528, 537 (7th Cir. 2003). The Rule 60(b) movant in *Ty* contended that the defendant had committed fraud on the court by intimidating a witness to prevent him from testifying at an upcoming trial. Although the defendant denied that that he had tried to persuade the witness not to testify, the movant presented testimony from the witness that he had "realized after speaking to [the defendant] that it was a very important matter to him . . . [and] if he felt that strongly about it, . . . maybe it would be best if I did not go [testify]." *Id*. at 534-37. The Seventh Circuit expressly acknowledged that, with the conflicting evidence regarding the defendant's possible efforts to intimidate the witness, the movant could not meet the "clear and convincing"

evidence standard. *Id*. at 537. But, it continued, the conflicting evidence "required further investigation by the judge." *Id*.

Johnson would also be entitled to an evidentiary hearing in the Second Circuit. In *Madonna v. United States*, that court agreed that to justify relief from judgment, "an action for fraud on the court under Rule 60(b) must be established by clear and convincing evidence." 878 F.2d 62, 64-65 (2d Cir. 1989). But it also made clear that, before discovery and an evidentiary hearing, a Rule 60(b) movant "need not meet this high burden of proof. . . . [I]t is enough to allege facts which, when assumed to be true, would amount to fraud on the court." *Id.* at 65; *see also Hadden v. Rumsev Products*, 196 F.2d 92, 96 (2d Cir. 1952) (remanding to the district court to take evidence to decide the merits of the 60(b) motion).

Similarly, in *Rothenberg v. Kamen*, the Second Circuit held that when a plaintiff brings forward a "colorable claim" of fraud, the district court may not dismiss this claim without an evidentiary hearing. 735 F.2d 753, 754-55 (2d Cir. 1984). In that case, the plaintiff sought to reopen a patent royalties settlement agreement that was allegedly procured by fraud. *Id.* at 753-54. During the settlement negotiations, an attorney for the defendant stated that future sales of the patented product were "unpredictable." *Id.* at 754. Ten days later, however, he explained in a letter that the defendant had plans to replace the existing patented product with new technology. *Id*. The Second Circuit remanded the case, *id.* at 755, holding that because the plaintiff raised a "colorable claim" of fraud, he was entitled to an evidentiary hearing to determine whether the

defendant's counsel knew of the new technology plan when he claimed future sales were "unpredictable." *Id.*[3]

2. In contrast to the "colorable claim" standard employed in the First, Second, and Seventh Circuits, the Tenth Circuit – like the Sixth Circuit in this case – has adopted a far more stringent "clear and convincing evidence" standard for obtaining an evidentiary hearing on a Rule 60(b) motion. In *Thomas v. Parker*, 609 F.3d 1114, 1120 (10th Cir. 2010), as in this case, the court of appeals recognized that the movant had provided some evidence of fraud, including that the defendant had "submit[ted] incomplete evidence or ma[de] assertions that arguably [were] incorrect." However, it nonetheless agreed with the district court that the Rule 60(b) movant was not entitled to an evidentiary hearing on his fraud-on-the-court claim because the defendant

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[3] Because *Rothenberg* involved a motion to reopen a settlement agreement, which is closely analogous to a Rule 60(b) motion, both the First and Second Circuits have cited it in cases involving Rule 60(b) motions alleging fraud on the court. *See United States v. U.S. Currency in Sum of Six Hundred Sixty Thousand, Two Hundred Dollars*, 242 Fed. Appx. 750, 752 (2d Cir. 2007) (citing *Rothenberg* for the proposition that when, "as here, the movant fails to make even a 'colorable claim' for Rule 60(b) relief, the district court is not required to consider evidence offered in support of that motion"); *see Pearson*, 200 F.3d at 35 (citing *Rothenberg* as an analogous example to support the "colorable claim" standard for a 60(b) fraud motion). Rule 60(b), in turn, applies the same standards to motions to reopen habeas cases as other civil proceedings. *See*, *e.g.*, *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

"fail[ed] to offer clear and convincing evidence to support his allegations." *Id*.

At this case illustrates, the Sixth Circuit applies the same stringent standard, denying Rule 60(b) motions without an evidentiary hearing if the movant does not bring forward clear and convincing evidence of fraud. In *Jones v. Illinois Central Railroad Co.*, 617 F.3d 843, 845-46 (6th Cir. 2010), for example, the plaintiff in a negligence suit alleged that the defendant committed fraud on the court by withholding material information and bribing a witness. . The court recognized that, if those allegations were true, they "would certainly warrant a new trial." *Id.* at 853. However, the Sixth Circuit held that "the district court did not abuse its discretion in denying post-trial discovery and an evidentiary hearing," *id*. at 854, because Jones had not provided and the court could "discern in the record . . . clear evidence of such [fraud], and . . . therefore [could not] say that the district court abused its discretion." *Id.* at 853. As in this case, the Sixth Circuit thus would not grant Jones an evidentiary hearing without clear and convincing evidence of fraud. *Id*. at 853-54; *see also Carter v. Anderson*, 585 F.3d 1007, 1012 (6th Cir. 2009) (affirming district court's denial of a 60(b) motion without a hearing because the movant "failed to satisfy the [elements] of fraud on the court by clear and convincing evidence").

B. The Threshold For Granting An Evidentiary Hearing To Resolve Rule 60(b) Fraud Claims Is A Recurring And Important Issue.

Resolution of this case would provide much-needed clarity to the federal courts. Allegations of fraud as a justification for reopening judgments under Rule 60(b) arise regularly, in all kinds of civil actions: a search reveals that, in the last three years, the courts of appeals have considered roughly 150 cases involving claims of fraud under Rule 60(b).[4] Yet, at present, this *Federal* Rule of Civil Procedure is applied in dramatically different fashion across the country. That disparity is particularly untenable in the capital context, where the Rule must balance competing interests in fairness and finality that are of the highest order for both defendants and States alike.

More generally, a clear rule regarding the standard that must be met to obtain an evidentiary hearing will discourage frivolous Rule 60(b) motions and reduce the burden on federal courts handling these motions, while simultaneously allowing meritorious claims to proceed to definitive resolution. Given the volume of civil litigation in the federal courts, and the fact that the Rules apply equally to all civil cases, courts are dealing constantly with the standards for disposing of motions under Rule 60(b). The ad hoc and often unpublished resolution of these

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[4] This is the result of surveying the results of a Westlaw search for "FRAUD" in the same sentence as "60(b)."

motions confuses litigants about the standards applied in determining whether a hearing will be allowed. Given the uncertainty, many litigants err on the side of asking for a hearing. Thus, the lack of clarity in the standards under which courts are currently operating affirmatively encourages Rule 60(b) motions and leads to an increased incidence of appeals from Rule 60(b) rulings. Without a clearer standard for when an evidentiary hearing should be granted, litigants will continue to try their luck and ask for judgments to be reopened – and with no guidance in either direction, litigants as well as courts will continue to operate under an umbrella of unnecessary confusion.

II. This Case Is An Ideal Vehicle For Resolving This Important Question.

This case is an ideal vehicle in which to resolve the circuit split.

The facts of this case squarely present the conflict. In the First, Second, and Seventh Circuits, petitioner would be entitled to an evidentiary hearing because he can make the "colorable claim" required under those circuits' precedent. Johnson's Rule 60(b) motion alleged that the denial of his habeas petition was procured by fraud because the State knowingly submitted a false affidavit from the original state prosecutor (Roach) which stated that prosecutors had not made a plea deal with McCoy for his testimony against Johnson. Johnson supported this claim with a presentencing report from McCoy's parole officer which memorialized McCoy's statement "that he was granted immunity for turning state's evidence" in Johnson's case, Pet. App. 12a, as well as an affidavit

from McCoy's parole officer confirming the accuracy of the presentencing report. Pet. App. 10a. In response, the State relied on the earlier affidavits from both McCoy and Roach indicating that McCoy had not been provided with a plea deal. Even the Sixth Circuit in its opinion conceded that "there is some evidence that McCoy received favorable treatment based upon his testimony." Pet. App. 12a.

And indeed, this is at least as strong as – if not stronger than – the kinds of "colorable claims" that courts in the First, Second, and Seventh Circuits have found to warrant an evidentiary hearing. *See Rothenberg*, 735 F.2d at 754-55 (ordering evidentiary hearing in face of competing testimony); *Pearson*, 200 F.3d at 34 (holding that movant had demonstrated "colorable claim" of fraud regarding a conflict of interest, when he provided supporting evidence that included statements by the bankruptcy court in an earlier proceeding regarding the existence of a conflict and documentary evidence that law firm had been representing "materially adverse interests"); *Ty*, 353 F.3d at 537 (holding that the district court had abused its discretion in failing to hold an evidentiary hearing despite conflicting evidence of fraud).

This case cleanly presents the question presented, without any procedural impediments that would prevent this Court from resolving it. The court of appeals agreed that Johnson's Rule 60(b) motion was not a prohibited second or successive habeas petition, and it granted a certificate of appealability on the Rule 60(b) issue. Pet. App. 11a. Moreover, in his court of appeals brief, Johnson expressly asked that court to "remand for further proceedings, including an evidentiary hearing," Petr. C.A. Br. 12 –

a request that the Sixth Circuit denied. Pet. App. 12a-13a.[5]

That the question arises in this case in the context of a habeas proceeding is also no impediment to resolving the broader circuit conflict over the standard for granting evidentiary hearings to resolve Rule 60(b) motions. Rule 60 applies equally, and in the same way, to all civil judgments, including habeas judgments. *See*, *e.g.*, Fed. R. Civ. P. 1 (providing that Federal Rules govern "all civil actions and proceedings in the United States District Courts"); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (holding because a prior "decision was based on [the] interpretation and application of Rule 8," it articulated the standard "for 'all civil actions'"). Thus, in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court rejected any claim that the basic standards of Rule 60 are somehow displaced in the habeas context, explaining that the Rule is "as legitimate in habeas cases as in run-of-the-mine civil cases." *Id.* at 534.

Finally, there can be no dispute that the question presented is important. The application of the wrong standard for granting an evidentiary hearing will have serious consequences for any case, as it leaves the movant subject to a civil judgment that may have been fraudulently procured without any opportunity to fully air his allegations of fraud on the court.

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[5] Although the court of appeals did not address any of the alternative arguments advanced by the State to support denying Johnson relief, those questions would all be left for the court of appeals to address on remand from this Court.

In capital cases, the stakes are obviously even higher: Johnson faces the prospect of being executed without ever having the opportunity to properly present a claim of fraud on the court that even the Sixth Circuit described as being supported by "at least some evidence." The crux of Johnson's fraud-on-the-court claim is directly conflicting affidavits, the veracity of which cannot be properly assessed without an evidentiary hearing. Critically, if the evidence supporting his allegations were proven true at an evidentiary hearing – if the court concluded that the prosecution and its principal witness lied to the court about the existence of deal for the witness's testimony – there could be no question that he would be entitled to have his habeas proceedings reopened. But, without such an opportunity, Johnson will face execution while a material disputed fact regarding fraud on the court remains unresolved.

III. The Decision Below Is Wrong On The Merits.

Certiorari also is warranted because the Sixth Circuit's ruling is wrong on the merits. If, considering all of the available evidence, a Rule 60(b) movant raises a colorable claim of fraud on the court, he should at a minimum receive an evidentiary hearing if it would allow him to prove his case. This is the correct standard for three principal reasons. First, it avoids the logical paradox that would arise if Rule 60(b) movants were entitled to hearings only when, in essence, they already have sufficient proof to win their claim on the merits. Second, the rule strikes the proper balance between furthering the court's interest in the integrity of its decisions with the need to efficiently dispose of unmeritorious

claims. Third, the "colorable claim" standard accounts for the difficulty of obtaining direct evidence, which can be particularly burdensome to obtain in cases alleging fraud.

1. In the Sixth Circuit, a Rule 60(b) movant such as Johnson is entitled to an evidentiary hearing to prove his fraud-on-the-court claim only if he can show "clear and convincing evidence" of fraud based solely on the facts he can muster himself, without discovery or the ability to compel testimony from, and cross-examine, witnesses. Pet. App. 12a. In so holding, the Sixth Circuit conflates the standard of proof necessary to *prevail* on a fraud-on-the-court claim with the standard necessary to *move forward* on a possibly meritorious claim. *Cf. Carter v. Anderson*, 585 F.3d 1007, 1011-12 (6th Cir. 2009) (demanding "clear and convincing evidence" to prevail on fraud on the court claim). Requiring an applicant to prove his case on the merits to be entitled to an evidentiary hearing – which he no longer needs – makes no sense.

The real effect of such a rule, as Judge Clay recognized in his dissent in this case, is the predictable denial of meritorious claims of fraud on the courts, to the detriment of defendants and the judicial system alike. Judge Clay explained that conflating the standard of obtaining a hearing with the standard for relief on the merits "allow[s] the prosecution to merely file unchallenged affidavits" to definitively end the inquiry into the potential fraud. Pet. App. 24a. Thus, in this case, Johnson must ultimately prove by clear and convincing evidence that prosecutors knew that the affidavits that they had submitted in his federal habeas proceedings were

false. Because those affidavits deny that prosecutors and McCoy had struck a plea deal in exchange for his testimony against Johnson, the *only* possible way to prove by clear and convincing evidence that they are fraudulent would be to undermine those statements through cross-examination or additional discovery. But the Sixth Circuit's holding would deny Johnson that very opportunity unless he can produce clear and convincing evidence of the fraud at the outset – evidence that, almost by definition, can only be obtained through adversary proceedings.

Under the Sixth Circuit rule, the evidentiary hearing is denied its most important and effective role – allowing the fact finder to resolve credibility issues on the basis of live testimony and cross-examination. *See*, *e.g.*, *California v. Green*, 399 U.S. 149, 158 (1970) (observing that live cross-examination is the "greatest legal engine ever invented for the discovery of truth"); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (noting that our legal system "assumes that adversarial testing will ultimately advance the public interest in truth and fairness"). The hearing serves little function if, before granting it, the court must first resolve (or ignore) the conflicting testimony the hearing is meant to test.

2. The "colorable claim" standard, on the other hand, avoids the illogic of the Sixth Circuit's rule while preserving the proper balance between the need to ensure the fundamental integrity of a proceeding and the need to limit endless litigation over judgments that have already been entered. Under that test, the relevant inquiry is whether the record as a whole contains "telltale circumstantial

evidence" that could lead, after an evidentiary hearing, to a successful motion to reopen the prior judgment. *Pearson*, 200 F.3d at 35; *see also Ty Inc.*, 353 F.3d at 537.

This test is consistent with the standard for allowing an evidentiary hearing on the merits of a federal habeas claim – a particularly apt analogy, because habeas proceedings too are directed at reopening a prior judgment and, therefore, must balance the important interests in fairness and finality. As this Court explained in *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007), "[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Thus, "if the record *refutes* the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* (emphasis added).

Like the habeas standard, the Rule 60(b) "colorable claim" test allows courts to protect the fundamental fairness of the legal system without unreasonably burdening district courts with a slew of meritless evidentiary hearings.[6] It is well-settled

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[6] Similarly, there is no reason to believe that evidentiary hearings on Rule 60(b) motions will be lengthy and burdensome for district courts, as such hearings do "not constitute a trial," but instead may be "limited in scope and purpose." *E.g.*, *W. Reserve Oil & Gas Co. v. Key Oil, Inc.*, 626 F. Supp. 948, 951 (S.D.W. Va. 1986).

that a "court need not hold a hearing on a motion for relief from a judgment if the motion clearly is without substance and merely an attempt to burden the court with frivolous contentions," 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2865 (2010). Moreover, because Rule 60(b) relief is available only in "extraordinary circumstances," a Rule 60(b) movant will only be entitled to a hearing if his motion alleges a serious fraud that, if true, would substantially undermine the integrity of a prior proceeding.

To be sure, more claims would proceed to a hearing under the "colorable claim" rule, imposing some marginal cost to the States' interests in finality. But this Court has admonished that Rule 60 is a "provision whose whole purpose is to make an exception to finality." *Gonzalez*, 545 U.S. at 529. It cannot serve its intended function if applicants are pervasively denied access to the courts' most basic truth-seeking tools unless they can prove they do not need them.

3. Finally, the "colorable claim" standard is especially appropriate in cases of fraud because documentary evidence that would prove fraudulent intent "is almost never available." 2 Leonard B. Sand et al., *Modern Federal Jury Instructions* §§ 44-4 to -6 (2002) (reproduced as Appendix in Lawrence M. Solan, *Jurors As Statutory Interpreters*, 78 Chi.-Kent L. Rev. 1281, 1311-16 (2003)). It is in fact "a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent." *Id.* When, as here, a Rule 60(b) movant "ha[s] been denied both preliminary discovery and an opportunity to present

witnesses," holding a hearing is essential because he "may well be left with no meaningful access to direct evidence of fraudulent intent."[7] *Pearson v. First New Hampshire Mortgage Co.*, 200 F.3d 30, 35 (1st Cir. 1999).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] In this case, Johnson has been unable to question McCoy, prosecutor Roach, or the state's federal habeas counsel directly since the original trial.