No. 18-6943

IN THE

Supreme Court of the United States

GREGORY DEAN BANISTER,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in ensuring that habeas petitioners have a full and fair opportunity to have their first federal habeas petitions decided by the courts. Because the Fifth Circuit's rule would deprive petitioners of a critical portion of their first habeas proceeding—and, in turn, would jurisdictionally

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

bar petitioners like Mr. Banister from appealing the denial of even their first habeas petitions—NACDL urges the Court to reject the Fifth Circuit's position.

SUMMARY OF ARGUMENT

A timely Rule 59(e) motion and a notice of appeal are critical parts of federal habeas petitioners' *first* federal habeas proceedings. Nothing in AEDPA's text abrogates the Federal Rules allowing a district court to correct its own errors immediately following the entry of judgment and tolling the time to appeal while a district court considers doing so.

The Fifth Circuit's rule, however, treats Rule 59(e) motions as unauthorized second or successive habeas petitions. That unduly cuts short petitioners' *one* full and fair opportunity to seek federal habeas relief: It deprives them of the final procedural step that the Rules afford them in district court, and it means that petitioners like Mr. Banister will find their later appeals time-barred because their Rule 59 motions—which the Rules had informed them would toll the time to appeal—are later recharacterized as something else.

The practical effect of the Fifth Circuit's rule is to make habeas proceedings less efficient for the federal courts and less fair to habeas petitioners. That is so for four reasons, as the examples summarized in this brief demonstrate.

First, district courts do grant Rule 59 motions in habeas cases to reach a different result. That is often because habeas petitioners, who are unrepresented in

the vast majority of cases, only come to learn that the district court has misunderstood some critical detail of their case when they read the court's order denying relief; very rarely are there any hearings or interim orders that would give them an opportunity to clarify anything for the district court earlier on. So Rule 59 motions play a particularly important role in habeas cases. They are part of petitioners' one full opportunity to have their claims heard and decided accurately and fairly.

Second, even where district courts deny Rule 59 motions, they often expand their own orders to account for previously overlooked issues or authority that petitioners emphasized in their Rule 59 motions. That "clean-up" step helps to sharpen issues for appeal and ensure that petitioners have been heard on all their claims, even if they do not succeed.

Third, and related, Rule 59 motions help preempt unnecessary appeals. Where a district court makes a clear mistake or fails to address an important point in a habeas petition, it can easily correct the error itself on a Rule 59 motion. But if Rule 59 motions are effectively disallowed in habeas cases, then petitioners will be left to point out those obvious errors on appeal, leading to avoidable remands. The Fifth Circuit's rule thus disserves judicial economy by shifting more work to the courts of appeals.

Fourth, some petitioners, like Mr. Banister, might inadvertently forfeit their right to appeal at all. Petitioners who rely on the Federal Rules' plain text would expect that their Rule 59 motions toll the time to appeal, and then discover only once it is too late

that their appeals are untimely. Petitioners would lose out on meritorious claims in their *first* federal habeas petitions. Nothing in AEDPA commands that unfair result.

ARGUMENT

I. A Rule 59 Motion Is "Part And Parcel" Of A Habeas Petitioners "One Full Opportunity" To Litigate A First Federal Habeas Petition.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, imposes strict limits on "second or successive" habeas petitions. 28 U.S.C. § 2244(b). But AEDPA did not limit petitioners' right to see their *first* habeas petitions through to the end.

The "end" in a first habeas proceeding, as in general civil proceedings, extends through the filing of a timely Rule 59(e) motion to alter or amend the judgment, and then a request for review by a federal court of appeals. *See* Pet'r Br. 21-27. That is because Rule 59(e) codifies a district court's traditional, inherent authority "to rectify its own mistakes in the period immediately following the entry of judgment," and AEDPA's text says nothing to abrogate that power in this context. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982). Similarly, AEDPA expressly preserves habeas petitioners' ability to seek appellate review of the denial of a habeas petition. Although AEDPA modifies standard appellate review procedures by requiring petitioners to make a threshold showing to obtain a certificate of appealability, *see* 28 U.S.C. § 2253(c), it expressly adopts

Rule 4(a) of the Federal Rules of Appellate Procedure in habeas cases. *See* Rule 11(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Rule 4(a) provides that a timely Rule 59 motion tolls the time to appeal. Fed. R. App. P. 4(a)(1)(A) (notice of appeal due within 30 days from a judgment or order in a civil case); Fed. R. App. P. 4(a)(4)(A)(iv) (timely Rule 59 motion tolls the time to appeal).

Accordingly, in habeas cases and traditional civil cases alike, "a timely Rule 59(e) motion *suspends* the finality of the judgment by tolling the time for appeal." *Blystone v. Horn*, 664 F.3d 397, 414 (3d Cir. 2011). And, "unlike a Rule 60(b) motion, it is neither a collateral attack on the initial habeas judgment, nor a new collateral attack on the underlying criminal judgment—rather it is part and parcel of the petitioner's 'one full opportunity to seek collateral review.'" *Id.* (quoting *Urinyi v. United States*, 607 F.3d 318, 320 (2d Cir. 2010), and distinguishing *Gonzalez v. Crosby*, 545 U.S. 524 (2005)); *accord Howard v. United States*, 533 F.3d 472, 474-75 (6th Cir. 2008); Pet'r Br. 30-33. A timely appeal filed following denial of a Rule 59(e) motion is similarly "part and parcel" of a petitioner's one full opportunity to bring a first habeas petition. *See* Pet'r Br. 16.

II. The Fifth Circuit's Rule Leads To Inefficient Judicial Administration Of Habeas Petitions And Unfair Results For Habeas Petitioners.

The Fifth Circuit's rule thus denies habeas petitioners the "full" opportunity that the Rules afford them to bring their first habeas petition. The practical

consequence of that rule is to make habeas proceedings less efficient. The Fifth Circuit's approach deprives district courts of the opportunity to correct their own obvious errors, teeing up avoidable appeals instead. And it unfairly bars *first* federal habeas appeals by unwary petitioners, like Mr. Banister, who rely on Federal Rule of Appellate Procedure 4's plain text rather than an atextual judicial interpretation of AEDPA.

A. Rule 59 motions allow district courts to correct their own errors before judgment becomes final, thus avoiding unnecessary reversals and unfair results.

First, as the examples below show, district courts regularly rely on Rule 59 motions to change the result of an initial ruling on a habeas petition before proceedings in district court are through. The Fifth Circuit's rule would eliminate this important final step at the end of a habeas petitioner's one full and fair opportunity to present his claims in district court.

1. *Peterkin v. Horn*

Otis Peterkin's habeas petition illustrates the importance of Rule 59 motions in petitioners' one full and fair opportunity to present their claims. *Peterkin v. Horn*, 179 F. Supp. 2d 518 (E.D. Pa. 2002).

Peterkin was convicted of two counts of capital murder, as well as robbery and possession of an instrument of crime, and then sentenced to death. *Id.* at 519. He filed a habeas petition in district court. The

court granted the petition in part, agreeing with several of Peterkin's claims of constitutional error. The court denied Peterkin's Eighth and Fourteenth Amendment claims, however, which arose from the trial court's failure to properly instruct jurors on aggravating and mitigating circumstances. The district court reasoned that Peterkin failed to meet his burden of rebutting the presumption that the trial court's instructions were correct. *Id.* at 521.

Peterkin moved for reconsideration under Rule 59(e). The district court granted the motion for reconsideration, determining that its initial ruling erred in applying the law and neglecting to examine the jury instructions as a whole, and in failing to consider a Third Circuit decision issued less than one week earlier, which determined a "nearly identical" jury instruction was unconstitutional. *Id.* at 521. Thus, the Rule 59 motion led to a single, final order by the district court granting Peterkin habeas relief on all claims. *Id.* at 523.

Now consider what would have happened under the Fifth Circuit's rule. Peterkin's meritorious Rule 59(e) motion would have been deemed to "attack[] the federal court's previous resolution of the claim on the merits" and thus been "construed as a successive habeas petition since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." J.A. 305 (internal citation and quotation marks omitted). Meanwhile, recharacterizing the motion as a filing that no longer tolls time under Federal Rule of Appellate Procedure 4 would mean

that the time to appeal to the Third Circuit would have expired, as it did in this case. So, assuming Peterkin relied on Rule 4's plain text and the ordinary operation of civil litigation, he would not have even had the opportunity for the Third Circuit to apply its recent, on-point precedent to his case.

Peterkin's alternative option would have carried its own significant problems. He could have appealed immediately after the district court's dismissal, rather than give the district court an opportunity to correct its error and consider the recent relevant authority. Perhaps the Third Circuit would have ultimately given him the same relief the district court did under Rule 59. But it would have come after much additional delay, and after shifting to the court of appeals the burden of considering an issue the district court could have easily resolved. That outcome would have added time, complexity, and additional demands on judicial resources, while doing nothing to advance Congress's aims in enacting AEDPA or to promote justice for petitioners.

2. *Knish v. Stine*

Steven Allen Knish's case similarly illustrates how Rule 59 motions promote both judicial efficiency and justice for petitioners.

The district court reconsidered its initial denial of Knish's habeas petition on jurisdictional grounds in light of recent Circuit Court authority granting habeas relief in a similar case. *Knish v. Stine*, 347 F. Supp. 2d 682 (D. Minn. 2004).

Knish pleaded guilty to tax evasion and aiding and abetting charges and was sentenced to 24 months in prison. *Id.* at 684. Prison staff informed Knish that he would be recommended for Community Corrections Center (CCC) placement for the last ten percent of his sentence, which they believed was the maximum legally permissible duration of CCC placement. Knish filed a habeas petition under 28 U.S.C. § 2241 to claim that the Bureau of Prisons (BOP) policy capping the time that could be spent in a CCC was based on an incorrect understanding of the relevant statute. *Id.*

The district court dismissed Knish's petition for lack of jurisdiction because the requested relief affected the place or conditions of confinement, rather than the duration of a sentence. *Id.* at 686. But, four days earlier, the Eighth Circuit had granted habeas relief in a nearly identical claim. *Elwood v. Jeter*, 386 F.3d 842 (8th Cir. 2004).

Knish then filed a Rule 59(e) motion to alter or amend the order dismissing his petition, arguing the court's decision was erroneous in light of the Eighth Circuit decision in *Elwood*. *Knish*, 347 F. Supp. 2d at 686. The district court agreed that *Elwood* provided a basis to reconsider the dismissal. Considering the merits, the court then held the BOP policy was indeed contrary to law, and that the petitioner was entitled not to be subjected to a BOP policy predicated on an erroneous statutory interpretation. The court granted Knish's petition for habeas relief and directed the BOP to promptly reconsider Knish for placement in a CCC according to a correct interpretation of the applicable statute.

If the Fifth Circuit's rule applied and Knish's Rule 59(e) motion had been deemed to challenge the merits, rather than present a purely procedural question, his motion might have been deemed an invalid second habeas petition under 28 U.S.C. § 2244(a), and Knish might have lost his opportunity to then file any appeal. Alternatively, if Knish had perceived the risk that his motion might be recharacterized, he would sensibly have forgone the motion in favor of an appeal to the Eighth Circuit, which would have reversed on grounds that the district court was able to reach more quickly and efficiently. The Rule 59 motion thus saved the parties and the court what would have been an entirely unnecessary appeal, and allowed the district court to issue a single, final judgment that considered the Eighth Circuit's relevant precedent.

3. *Walker v. Carroll*

The clarifying function of motions for reconsideration is particularly important for the large majority of habeas petitioners who are unrepresented by counsel. Levaughn Walker's Rule 59 motion is illustrative. *See Walker v. Carroll*, No. CIV.A. 02-325-GMS, 2003 WL 1700379, at *1 (D. Del. Mar. 24, 2003).

Walker was convicted of murder when he was 16 and began serving a 38-year sentence. He filed a habeas petition on April 30, 2002, which the court dismissed as untimely because it was filed beyond the August 10, 2001, expiration of AEDPA's statute of limitations. *Id.* at *1, *3. Walker promptly filed a motion for reconsideration, arguing his petition was timely because he had previously filed a habeas peti-

tion on March 23, 2001, and withdrawn it on September 21, 2001, pursuant to a Third Circuit procedure (the "AEDPA Election Form") that he believed gave him the opportunity to re-file it within one year of the denial of his petition. Walker's understanding was incorrect; the AEDPA Election Form provided that Walker could withdraw and re-file a petition for habeas corpus within the one-year period *defined by 28 U.S.C. § 2244(d). Id.* at *4. But, while the district court found no error in its original ruling dismissing Walker's petition, it noted the difficulty even judges and attorneys face in calculating the time period set forth in section 2244(d), and concluded the AEDPA Election Notice failed to "sufficiently warn the pro se petitioner that the one-year period does not re-commence on the date of the order." *Id.* The court therefore granted the motion for reconsideration and agreed to review the habeas petition on the merits. *Id.*

The Rule 59 motion was necessary because Walker had "failed to mention" his earlier, timely (and then withdrawn) habeas petition at first. *Id.* at *3. The court cited Third Circuit precedent requiring courts "to avoid th[e]s unfairness of a *pro se* petitioner losing the right to have a single habeas petition adjudicated," so it deemed Rule 59 relief "consistent with the ... practices of assisting pro se petitioners." *Id.* at *4 (internal brackets omitted).

Walker's situation is hardly uncommon. The vast majority of habeas petitioners lack counsel. *See* Nancy J. King, et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* (2007) at 8, https://tinyurl.com/y3fgj33a (in 93% of noncapital cases, the petitioner had no counsel, approximately

the same proportion as prior to AEDPA). For those who are unrepresented, a single Rule 59 motion is simply part of the iterative process district courts depend upon to ensure that pro se prisoners are given one full and fair opportunity to have their claims heard, akin to liberally granting pro se litigants leave to amend. *Cf. Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) ("*pro se* litigants are held to a lesser pleading standard than other parties"); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("The handwritten pro se document is to be liberally construed.").

Walker's Rule 59(e) motion may have been permissible even under the Fifth Circuit's rule because it addressed only the timeliness of his petition. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (challenging a previous ruling denying relief for reasons such as "failure to exhaust, procedural default, or statute-of-limitations" would not be on the merits). However, petitioners—particularly proceeding *pro se*—who seek clarification of decisions dismissing their petitions on procedural or merits grounds would have everything to lose by risking such a motion, and much less to gain by proceeding under Rule 59 in the hope that they correctly state what the court of appeals would consider a permissible, purely procedural question.

B. Rule 59 motions also allow district courts to clarify their own orders even where they continue to deny relief, thus avoiding unnecessary remands.

Even when a Rule 59(e) motion does not result in a different outcome, the motion serves a valuable pur-

pose in allowing district courts to clarify their reasoning in response to a petitioner's claims of error, or to respond more fully to the petitioner's arguments. Several cases demonstrate that motions for reconsideration can sharpen issues for appeal and avoid the need for appeals on issues that could have been easily resolved by the district court. The Fifth Circuit's rule would require petitioners to skip this clean-up step and proceed straight to appeal in order to file a timely appeal.

1. *Simpson v. Norris*

Sedrice Simpson's case illustrates the value of Rule 59(e) motions in habeas proceedings, even if those motions are unsuccessful. 490 F.3d 1029, 1035 (8th Cir. 2007).

Simpson was convicted of two counts of capital murder and sentenced to death in May of 1998. After exhausting his post-conviction remedies in Arkansas state courts, Simpson brought a habeas petition in district court in 2006. Simpson advanced eight claims, including a claim that he was intellectually disabled and so his capital sentence violated *Atkins v. Virginia*, 536 U.S. 304 (2002). The district court denied his petition and determined he was not entitled to an evidentiary hearing regarding his intellectual disability. *Simpson v. Norris*, No. 5:04CV00429 JLH, 2006 WL 1520628 (E.D. Ark. May 30, 2006). Simpson moved for reconsideration under Rule 59(e), arguing the court erred in failing to properly address the retroactive application of *Atkins v. Virginia*, among other errors. The district court denied the Rule 59(e) motion but

elaborated on its justification for dismissing Simpson's *Atkins* claim without an evidentiary hearing. *Simpson v. Norris*, No. 5:04CV00429 JLH (E.D. Ark. June 22, 2006), Doc. 23.

Simpson appealed, focusing on errors in the district court's basis for rejecting his *Atkins* claim. The Eighth Circuit agreed with Simpson and vacated the district court's dismissal with instructions to allow Simpson an opportunity to establish whether he met the conditions for relief under *Atkins*. 490 F.3d at 1035-36. On remand, Simpson did so: the evidence showed he had an IQ of 59, and the State of Arkansas conceded it was unable to rebut the presumption that Simpson was intellectually disabled and could not face execution. After more than a decade on death row, the district court granted habeas relief and converted Simpson's sentence to two terms of life imprisonment without the possibility of parole. *Simpson v. Norris*, No. 5:04CV00429 JLH, 2009 WL 2985837, at *1 (E.D. Ark. Sept. 16, 2009).

Simpson's motion was not a repetitive or abusive effort to re-litigate claims. Rather, it was a reasonable and well-founded effort, as in all civil cases, to encourage the court to revisit an erroneous decision depriving him of the opportunity to establish a constitutional claim through an evidentiary hearing. And, even though the district court denied reconsideration, the Rule 59 step in the process ensured that the ultimately meritorious *Atkins* claim was fully teed up for the court of appeals.

Simpson's petition also further illuminates the severe consequences to habeas petitioners of the Fifth

Circuit's approach. Simpson, like Mr. Banister, relied on the plain language of Federal Rule of Appellate Procedure 4 and did not file his notice of appeal within 30 days of the denial of his habeas petition. Had the court of appeals considered his Rule 59 motion to be a second and successive petition, Simpson would have lost his right to appeal an erroneous decision—an appeal that was successful and saved him from an unconstitutional execution under *Atkins*.

2. *Vermillion v. Levenhagen*

Jay Vermillion was a *pro se* prisoner who claimed that he received constitutionally inadequate notice of charges for prison infractions, for which the prison punished him. 519 F. App'x 944 (7th Cir. 2013). Vermillion was charged in prison for trafficking tobacco and a cell phone. The prison informed Vermillion of the "incident date," which was the date the prison *learned* of the alleged trafficking but was not the date the alleged trafficking occurred. Vermillion then constructed his response—and alibi defense—based on the incident date, and was found guilty by a prison tribunal. *Id.* at 946.

Vermillion sought habeas relief, but the district court summarily dismissed the petition without ordering a response. *Id.* at 944. Vermillion then moved for reconsideration pursuant to Rule 59(e). The court denied the motion. *Vermillion*, No. 3:12-cv-00150-PS (N.D. Ind. May 22, 2012), Doc. 6. In its order denying reconsideration, however, the district court offered further explanation for its dismissal: namely, that Vermillion received adequate notice of the charge

against him because the prison identified the date it learned of the alleged trafficking. *Id.*

Although the Rule 59(e) motion was unsuccessful, the court's explanation helped clarify for the *pro se* petitioner the centrality of the notice issue: The Seventh Circuit observed that "[t]he principal contention between the parties is whether the district court erred in concluding that the conduct report provided constitutionally adequate notice of the trafficking charge." 519 F. App'x 944, 945-46. Finding an insufficient record existed on the notice question, the court of appeals reversed the dismissal of Vermillion's petition and remanded for further development of the factual record. *Id.* at 946-47. After remand, the Department of Corrections vacated Vermillion's misconduct conviction and dismissed the case against him. *Vermillion*, 3:12-cv-00150-PPS (N.D. Ind. May 2, 2014), Doc. 37.

The Seventh Circuit's determination illustrates that Vermillion's Rule 59 Motion was not an ill-considered or wasteful effort at a second bite at the apple. Rather, it served an important clarifying purpose. And had the district court granted reconsideration of its *sua sponte* dismissal and instead allowed some development of the record, the parties and court might have avoided the time and expense of an appeal altogether.

Vermillion, like *Simpson*, is instructive for a separate reason: the petitioner filed his notice of appeal 15 days after the court denied his Rule 59(e) motion

but 49 days after the district court summarily dismissed his habeas petition.[2] Had the Seventh Circuit applied the Fifth Circuit's rule, Vermillion's appeal would have been dismissed as untimely. The decision to seek reconsideration of the district court's premature dismissal would have cost Vermillion the opportunity to appeal and prevented him from pursuing a meritorious claim for habeas relief. The result would have been to deprive the *pro se* petitioner of his one full and fair opportunity to litigate his first habeas petition.

3. *Ferguson v. McKune*

Lena Ferguson's habeas petition presents another example of the role of even unsuccessful Rule 59 motions in advancing both judicial economy and the interests of justice for petitioners. Ferguson was charged with aggravated arson and felony murder of her ex-husband. 55 F. Supp. 2d 1189, 1190 (D. Kan. 1999), *rev'd*, 229 F.3d 1163 (10th Cir. 2000). She was represented by a public defender with whom she refused to cooperate, believing him to be untrustworthy because he worked for the state. Her counsel moved to withdraw on several occasions in light of the complete breakdown of the attorney-client relationship, but the court refused. Her counsel, who argued he was incapable of preparing a defense in light of Ferguson's

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[2] The district court dismissed Vermillion's petition for habeas corpus on April 18, 2012. Vermillion filed a motion for reconsideration pursuant to Rule 59(e) on May 16, 2012. The court denied the motion on May 22, 2012. Vermillion filed his Notice of Appeal on June 15, 2012. Brief of Appellant, *Vermillion*, No. 12-2436 (7th Cir. Nov. 1, 2012), Doc. 13.

suspicion and mistrust, represented her throughout trial in state court. Ferguson was convicted and received a sentence of 15 years to life. *Id.* at 1190-92.

Ferguson sought habeas relief on the ground that the state court denied her right to counsel and due process of law in refusing her attorney's motions to withdraw. Ferguson's initial petition for habeas corpus was denied without prejudice for failure to exhaust state remedies, however. *Id.* at 1192. Ferguson had presented new affidavits and testimony at an evidentiary hearing regarding the breakdown in her relationship with counsel. The district court found that the new evidence fundamentally altered the character of her claims and thus needed to be presented to the state courts, and so dismissed Ferguson's petition without prejudice. *Id.*

Ferguson moved for reconsideration under Rule 59, arguing the district court's order was "so vague as to virtually preclude appellate review." *Id.* at 1193. The district court granted the motion for the purpose of clarifying its ruling, but the disposition remained the same. The court's revised ruling identified the specific evidence upon which the court based its decision. *Id.* at 1193-94.

Ferguson appealed. 229 F.3d 1163 (10th Cir. 2000). The Tenth Circuit found that Ferguson had already exhausted state remedies and reversed and remanded for consideration of the habeas petition. To reach its decision, the court compared the evidence presented on direct appeal with the evidence presented in federal court and found no fundamental

change to the character of the claim presented to the state courts. *Id.*

Such a comparison was only possible because the district court's final, reconsidered judgment clarified the basis for its decision. Had a Rule 59 motion for reconsideration been unavailable, Ferguson's only options would have been to appeal the district court's original decision, which failed to adequately explain the basis for the court's ruling, or to accept the vague ruling and pursue a superfluous attempt to exhaust state remedies before again seeking habeas relief.

On remand, the district court granted Ferguson's petition and ordered that Ferguson be retried or released from custody. The Tenth Circuit affirmed. *Ferguson v. Koerner*, 131 F. Supp. 2d 1208, 1215 (D. Kan. 2001), *aff'd*, 37 F. App'x 376 (10th Cir. 2002).[3]

Ferguson's Rule 59(e) motion may have been permissible under the Fifth Circuit's rule because it addressed whether she exhausted state remedies. *See supra* at 12; *Gonzalez*, 545 U.S. at 532 n.4. However, as discussed above, she would have been taking a significant risk in staking her right to appeal on her ability to accurately predict whether the court of appeals would view her motion as raising a purely procedural question.

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[3] Ferguson's petition for habeas corpus was filed before AEDPA took effect, and her petition was reviewed according to pre-AEDPA standards. *Ferguson*, 131 F. Supp. 2d at 1212.

4. *Morrow v. Harkleroad*

Jody Morrow's Rule 59(e) motion presents another instructive example. The district court denied Morrow's habeas petition on several grounds, including the untimeliness of his petition. 258 F. Supp. 2d 418 (W.D.N.C. 2003). Morrow moved for reconsideration under Rule 59(e). The district court rejected all but the timeliness ground. The state conceded that Morrow's petition was timely under prevailing circuit law. *Id.* at 420.

Although the disposition remained the same—denial of Morrow's habeas petition—the final district court judgment was not based in part on the erroneous determination that the petition was untimely. And when Morrow appealed the denial of habeas relief, the Fourth Circuit did not need to consider the issue. *See Morrow v. Harkleroad*, 77 F. App'x 672 (4th Cir. 2003) (denying certificate of appealability and dismissing Morrow's appeal).

C. Eliminating Rule 59 motions would create additional burdens for the courts of appeals.

As noted in several of the examples above, the Fifth Circuit's rule would disserve judicial economy because it would leave habeas petitioners with no choice but to wait for appeal to raise obvious errors or omissions in district court orders, rather than present them in Rule 59 motions so that district courts may efficiently clean up straightforward issues in their own orders. Indeed, if the Fifth Circuit's rule were

adopted, "it would almost always be effectively impossible for a district court to correct flaws in its reasoning, even when the problems were immediately pointed out and could be easily fixed by that court. Court of appeals permission would be required, and could only be granted in the extremely limited circumstances provided by 28 U.S.C. § 2255(h)." *Howard*, 533 F.3d at 475.

Yet "[t]he purpose of Rule 59(e) is to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings." *Id.* (internal quotation marks omitted). The effect of the Fifth Circuit's rule would be to shift additional work to the courts of appeals, contrary to the design of the Federal Rules.

Already, the Fifth Circuit regularly considers appeals from vague, unclear, and erroneous district court cases that could more efficiently have been cleaned up by the district court itself, as the examples below illustrate. The Fifth Circuit's approach makes trivial appeals like these even more necessary.

1. *Rivera v. Dretke*

In *Rivera v. Dretke*, for example, the Fifth Circuit reversed and remanded the dismissal of Timotheo Rivera's habeas petition because the district court had failed to include enough information for the court of appeals to rule. 125 F. App'x 527, 528 (5th Cir. 2005).

Rivera claimed before the district court that he filed a state habeas petition in January 2004. The dis-

trict court concluded that rendered his federal application untimely even with tolling for the period his state habeas claim was pending. On appeal, Rivera explained that he had in fact filed a state court petition for habeas relief in November 2003, thus tolling AEDPA's limitations period for longer and rendering his federal habeas petition timely. The record on appeal did not clarify when Rivera filed the state habeas petition, so the court of appeals could not determine whether Rivera's federal petition was time-barred. Thus, the court vacated and remanded for further proceedings to resolve the timeliness question. This appeal and reversal could have been avoided too with a straightforward Rule 59 motion before the district court.

2. *Belasco v. Bidden*

Similarly, in *Belasco v. Bidden*, the Fifth Circuit remanded a denial of habeas relief with instructions for the district court to develop the factual record. 89 F. App'x 896, 897 (5th Cir. 2004). Rene Belasco filed a habeas petition under 28 U.S.C. § 2241 contending that the Bureau of Prisons (BOP) calculated his good-time credits in a manner contrary to statute, thus depriving him of earned good-time credits without due process of law. The district court dismissed Belasco's petition *sua sponte*, reasoning that he had no constitutionally protected right to good-time credits.

Belasco did not move for reconsideration. The district court, however, had failed to consider Fifth Circuit precedent recognizing that, although prisoners have no intrinsic right to good-time credits, a prisoner's Fourteenth Amendment rights are implicated

when the government chooses to create a right to good-time credits. *Id.* at 897. Because the dismissal also failed to develop the factual record—in particular, regarding the time Belasco had served and the good-time credit he had received, or regarding the BOP's methods of calculating good-time in general or for Belasco in particular—the Fifth Circuit was unable to "conduct a meaningful appellate review." *Id.* The court of appeals therefore vacated the dismissal and remanded with instructions to develop the factual record. A Rule 59 motion pointing out the district court's clear errors and omissions could have eliminated the need for this year-long detour through the court of appeals.

3. *Koumjian v. Quarterman*

The Fifth Circuit considered a similar issue in *Koumjian v. Quarterman*, 325 F. App'x 321, 321-22 (5th Cir. 2009). The district court concluded that Paul Koumjian had not filed a state habeas application before the expiration of the limitations period, but Koumjian explained on appeal that he had done so and thus his federal application was timely. The Fifth Circuit had no factual record to consider, and so it vacated and remanded for further proceedings. *Id.*

In short, decisions like these show that depriving habeas petitioners of the opportunity to seek reconsideration of erroneous dismissals would have the practical effect of increasing the burden on courts of appeals, increasing the frequency with which they must remand for further consideration of a habeas petition, and extending the overall duration of habeas proceedings. Far from advancing AEDPA's purpose,

this result would undermine the law's goals of preventing undue delay in habeas proceedings. *See, e.g.*, H.R. Rep. No. 104-518 (1996) (Conf. Rep.) (purpose of AEDPA includes reforms to curb abuse of the writ and prisoners' ability to delay imposition of sentences).

D. Recharacterizing Rule 59 motions as unauthorized second or successive petitions would deprive many petitioners of the opportunity to appeal in their first federal habeas proceedings.

Of course, the Fifth Circuit's rule would not lead to avoidable appeals and remands when petitioners, like Mr. Banister, rely on the Rules' plain text and proceed with filing Rule 59 motions in district court. In their cases, after their Rule 59 motions are dismissed as improper, they would discover that they are jurisdictionally barred from appealing because Federal Rule of Appellate Procedure 4(a)(4)(A)(iv)'s tolling provision would not apply.

As noted, several of the petitioners discussed above (Peterkin, Knish, Simpson, and Vermillion) had meritorious claims that they would have lost entirely, by virtue of filing a Rule 59 motion, had the Fifth Circuit's rule applied. Mr. Banister's own case demonstrates the unfairness of depriving petitioners of this final step in their one full opportunity to seek federal habeas relief. And one further example illustrates the point.

Joel Darnell Patton was a repeat offender who pleaded guilty to one count of possession of a firearm

by a convicted felon. His sentence was enhanced under the Armed Career Criminal Act (ACCA). *United States v. Patton*, 750 F. App'x 259, 261 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 2743 (2019). Four years later, this Court held that ACCA's residual clause was unconstitutionally vague, *see Johnson v. United States*, 135 S. Ct. 2551, 2562-63 (2015), a rule that applied retroactively to cases on collateral review, *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

In light of the new rule of constitutional law, the Fifth Circuit tentatively granted Patton authorization to file a successive petition for habeas corpus under 28 U.S.C. § 2255 to show that he was sentenced under the residual clause of the ACCA. *Patton*, 750 F. App'x at 261. The district court denied the successive petition, concluding that Patton failed to demonstrate his sentence was enhanced under the unconstitutional residual clause of the ACCA,[4] and alternatively, that Patton's prior robbery convictions qualified as violent felonies under ACCA's force clause. *Id.* at 263.

Patton then moved for reconsideration under Rule 52(b) and Rule 59, arguing the court should amend its findings and conclusions in light of an intervening Fifth Circuit decision. *Id.* at 261-62. The court rejected the motion for reconsideration. Patton then filed a notice of appeal of the district court's denial of his successive petition. *Id.*

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[4] Whether this showing was necessary at all is the subject of a circuit conflict, as described in the petition for certiorari in *Levert v. United States*, No. 18-1276 (U.S. Apr. 5, 2019).

The court of appeals granted a certificate of appealability to consider (1) whether Patton's motion for reconsideration was an unauthorized, successive § 2255 application; (2) if so, whether such an unauthorized application could extend the filing deadline for his appeal, and (3) if so, whether Patton's prior convictions for robbery qualified as violent felonies under the ACCA's (constitutionally permissible) force clause. *Id.* at 262. Extending *Gonzalez* to Rule 59 motions, the Fifth Circuit recharacterized the Rule 59 motion as an unauthorized successive petition. Accordingly, Patton, like Mr. Banister, effectively forfeited his right to appeal when he filed a motion for reconsideration, notwithstanding Federal Rule of Appellate Procedure 4's suggestion that the time to appeal would be tolled. *Id.* at 265.

CONCLUSION

These examples from federal habeas cases illustrate how Rule 59(e) motions serve an important clarifying function in habeas petitioners' one full and fair opportunity to present their claims. They further demonstrate that adopting the Fifth Circuit's rule would make habeas proceedings less efficient for the federal courts and less fair to habeas petitioners. Accordingly, the Court should reverse the judgment below.

Respectfully submitted,

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