Nos. 05-99009, 07-15536

Decision of June 17, 2015 (Judges Kozinski, Gould, and N.R. Smith)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE WASHINGTON,

Petitioner-Appellant,

v.

CHARLES L. RYAN,

Respondent-Appellee.

Appeals from the United States District Court for the District of Arizona, Case No. CV-95-02460-JAT, Judge James A. Teilborg

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BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER-APPELLANT'S PETITION FOR REHEARING EN BANC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *Amicus Curiae* the National Association of Criminal Defense Lawyers ("NACDL") states that it is a nonprofit corporation organized under the laws of the District of Columbia. NACDL does not have a parent corporation, and no publicly-held corporation owns 10 percent or more of its stock.

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STATEMENT OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, the NACDL has approximately 10,000 direct members in twenty-eight countries—and ninety affiliate organizations totaling up to 40,000 attorneys—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes the NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

The NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. The NACDL is particularly dedicated to advancing the

[1] Pursuant to FRAP 29(c)(5), counsel for Amicus states that no counsel for a party authored this Brief in whole or in part or made a monetary contribution to the preparation and submission of this Brief, and no person other than Amicus, its members, or its counsel made such a contribution. All parties consented to the filing of this Brief.

proper, efficient, and just administration of justice, including issues involving the proper construction of the habeas corpus statutes and common law. In furtherance of this and its other objectives, the NACDL files numerous amicus curiae briefs each year in the U.S. Supreme Court and the U.S. Courts of Appeals, addressing a wide variety of criminal justice issues.

The NACDL supports the petition for rehearing, and respectfully submits this brief to highlight additional reasons why this case is extraordinary and warrants plenary review by this Court en banc.

INTRODUCTION

This case merits rehearing en banc because the Panel's holding conflicts with decisions of the First, Second, Fifth, and Sixth Circuits, and with this Court's decision in *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012). The Panel decision also overlooks district court errors that foreclosed Washington's ability to use FRAP 4(a)(5), and purports to follow a "majority rule" barring FRCP 60(b) relief when, prior to the panel's decision, the circuits were evenly split.

This case is exceptionally important because inadvertent procedural mistakes by counsel and courts are inevitable, and this Court should confirm the judicial power and discretion to correct them. This also is a capital case, and the consequences of the Court not hearing Washington's appeal on the merits may well be life or death. Washington and his co-defendant Fred Robinson sought habeas relief on similar grounds and Robinson was vindicated on the merits of his petition in his appeal to this Court, *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010), including on common grounds identified by Washington (*see* Dkt. 50 (Pet. Br.) at 57-60, 67-71). Robinson's death sentence thereafter was vacated, and he was then resentenced to 25 years to life.

See Ex. A, Judgment and Sentence, Case No. S1400CR87-14064 (Yuma Cty., Ariz., Oct. 25, 2011).[2] Unless the Panel's decision is vacated, no appellate panel will ever address the merits of Washington's comparable legal claims.

The Panel held that Washington's notice of appeal (accompanied by a motion for certificate of appealability ("COA")) was filed one day late. Even assuming the notice was tardily filed (and it was not), that was not the only procedural error. The district court itself failed promptly to forward Washington's notice of appeal as FRAP 3(d)(1) requires. That is why this Court did not discover counsel's one-day miscalculation until long after the period for relief under FRAP 4(a)(5) expired.

Moreover, in the First and Fifth Circuits, Washington's notice would be deemed premature when filed, and would have been timely when forwarded by the district court. In the Second Circuit, the district court's violation of FRAP 3(d)(1) would lead to reinstatement of the

[2] This Court has discretion to take judicial notice of Robinson's resentencing. *See* FRE 201(b)(2),(d); *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011). The Arizona Supreme Court long ago reversed the third co-defendant's conviction due to insufficient evidence. *State v. Mathers*, 796 P.2d 866 (Ariz. 1990).

appeal. And in the Sixth Circuit, as well as under *Mackey*, Rule 60(b) would be available for addressing these mistakes. The Panel opinion conflicts with all of these decisions. And under its ruling, petitioner will be denied what appears, from *Robinson*, to be a meritorious appeal of his death sentence. These extraordinary circumstances fully warrant this Court's plenary review en banc.

ARGUMENT

I. The Panel's Ruling Conflicts With Decisions Of The First, Second, And Fifth Circuits.

On June 8, 2005, the district court ruled on Washington's motion to amend the judgment denying his petition for habeas corpus, but neither issued nor denied a COA. ER102-08. Washington then filed both a notice of appeal and motion for COA. As measured from the June 8, 2005 order, the notice of appeal, filed on Monday, July 11, came one business day after the 30-day deadline of FRAP 4(a). Nonetheless, FRAP 3(d)(1) required the district court clerk to "promptly send" Washington's notice of appeal to this Court, yet the clerk did not do so.

Months passed. On September 28, 2005, the district court (also not having noticed any timing issue) granted-in-part a COA. ER109-111. That order was docketed on September 30, 2005, and only then did

the district court transmit Washington's July 11 notice of appeal to this Court. (*See* Dkt. 123 in 2:95-cv-02460). This Court promptly docketed the appeal, and one week later, on October 7, 2005, issued an order to show cause as to why the appeal should not be dismissed as untimely. (Dkt. 2.)

A. The Notice of Appeal Became Timely On September 30, 2005, When It Was Transmitted To This Court.

Washington's July 11 notice of appeal to this Court was premature. When a notice of appeal is filed while a COA issue remains before the district court, other circuits have either "held the appeal in abeyance pending the issuance of a certificate of appealability," *Awon v. United States*, 308 F.3d 133, 139 (1st Cir. 2002), or dismissed the appeal without prejudice and "remanded to allow the district court to rule upon appellant's motion for a certificate of probable cause and re-enter its final order," *Clements v. Wainwright*, 648 F.2d 979, 981 (5th Cir. 1981). As the Fifth Circuit has explained, "the absence of a ruling on the COA in the district court … deprives us of appellate jurisdiction." *Cardenas v. Thaler*, 651 F.3d 442, 444-45 (5th Cir. 2011).

These decisions are consistent with FRAP 22(b), which makes the COA an issue that *must be resolved* in a habeas proceeding. *See*

Advisory Committee Note to FRAP 22(b) (1967) (FRAP 22(b) "requires the district judge to issue the certificate [of appealability] or state reasons for its denial"). *See also Clay v. United States*, 537 U.S. 522, 527 (2003) ("[A] federal judgment becomes final for appellate review … when the district court disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment.").[3]

Without a COA ruling, the district court's June 8 order was not an appealable judgment. Washington's notice of appeal was thus premature when filed, and should have been treated as timely on September 30, 2005, when the district court issued a COA, and the clerk transmitted the notice of appeal. *See* FRAP 4(a)(2); *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1075 (9th Cir. 1994) (counseling a "pragmatic approach to finality in situations where events subsequent to a nonfinal order fulfill the purposes of the final judgment rule"). The

[3] The only apparent decision of this Court addressing this issue is *United States v. Suesue*, 584 Fed. App'x 705, 706 (9th Cir. 2014) (unpublished), finding an appeal untimely where the notice of appeal was filed more than 60 days late, even though the district court had not ruled on a COA. *Suesue* is not precedential, cites no supporting authority, and conflicts with *Awon* and *Cardenas*.

panel's decision that the June 8, 2005, order was an appealable judgment thus squarely conflicts with decisions of two circuits and warrants rehearing en banc. At a minimum, the Court should grant rehearing en banc to address this conflict.[4]

B. Because The District Court Violated FRAP 3(d) By Failing Promptly To Forward Washington's Notice Of Appeal, The Appeal Should Not Have Been Dismissed.

Even if Washington's notice of appeal was not premature, the district court's failure to transmit the notice of appeal to this Court until September 30, 2005, violated FRAP 3(d)(1): " The clerk must promptly send a copy of the notice of appeal … to the clerk of the court of appeals named in the notice." *See Yadav v. Charles Schwab & Co.*, 935 F.2d 540, 542 (2d Cir. 1991) (Newman, J.) (reinstating dismissed appeal where SDNY clerk had failed to forward notice of appeal).

If the district court had followed FRAP 3(d)(1), this Court would have discovered the timeliness issue in July, well within the 30-day

[4] Because issues that determine whether a court has jurisdiction to hear an appeal may be raised at any stage, this Court may and should consider the issues presented here in Part I now. *See Ashcroft v. Iqbal,* 556 U.S. 662, 671 (2009) ("[J]urisdiction cannot be forfeited or waived and should be considered when fairly in doubt."); *Solano v. Beilby*, 761 F.2d 1369, 1370 (9th Cir. 1985) ("This court is obligated to raise jurisdictional issues *sua sponte*.")

window in which Washington could have sought relief under FRAP 4(a)(5). *Cf. Yadav*, 935 F.2d at 542 ("[I]f in this case the notice had been promptly forwarded to this Court, we could have promptly dismissed the appeal at a time when the appellants would still have had 30 days to file a new notice of appeal after the denial of their motion for reconsideration by the District Court.").

Although the Panel overlooked the lower court's violation of FRAP 3(d)(1), the result here conflicts with the Second Circuit's *Yadav* decision, which holds that a court's violation of FRAP 3(d)(1) may excuse an untimely appeal. While counsel's one-day miscalculation initiated Washington's problem, the district court's failure to follow FRAP 3 gravely compounded it, and on its own justifies reinstating Washington's appeal because it was the *court's* error, and not counsel's, that deprived Washington of the opportunity to seek relief under FRAP4(a)(5). *See Yadav*, 935 F.2d at 542 (declining to apply FRAP 4(a)'s timing rules "so rigidly as to exacerbate the trap in a situation where a court official has omitted an important step in the appellate process"). Independently, the combined set of counsel and court errors

collectively constitutes either "mistake" under Rule 60(b)(1) or provides another "reason that justifies relief" under 60(b)(6).[5]

II. The Panel's Bar On Use Of A Rule 60(B) Motion To Render A Notice Of Appeal Timely Conflicts With The Sixth Circuit And *Mackey*.

The Panel held "that where a party files a Rule 60(b) motion solely to render a notice of appeal timely, and the motion seeks relief on grounds identical to those offered by Rule 4(a), Rule 60(b) motions may not be used to escape the time limits for appeal." *Washington v. Ryan*, 789 F.3d 1041, 1046 (9th Cir. 2015).[6] That holding conflicts with both

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[5] Of course, if the district court had issued a COA along with its denial, the clerk presumably would have promptly sent the notice of appeal to this Court, and again this Court would have discovered the one-day-late filing while relief under FRAP 4(a)(5) was still available. The district court's delay in issuing the COA is yet another "reason that justifies relief" under 60(b)(6).

[6] It appears that this Court also may not have followed applicable circuit rules and internal operating procedures when it reassigned the case to a new panel. Circuit Rule 22-2(a) provides that in section 2254 appeals involving judgments of death, "the Clerk, upon the completion of briefing, will assign the appeal to a death penalty panel." Briefing on these appeals was completed by August 2012, and they were assigned to Judges Betty Fletcher, Pregerson, and Thomas. (*See, e.g.*, Dkts. 83, 91.) Circuit Rule 22-2(c) provides that "[o]nce a case is assigned to a death penalty panel, the panel will handle all matters pertaining to the case"; this Court has previously reassigned death penalty cases because the original panel "has jurisdiction over" them. *Wood v. Ryan*, 759 F.3d 1075, 1075-76 (9th Cir. 2014). Nonetheless, after Judge Fletcher passed away in October 2012, the clerk did not substitute "a replacement by

Sixth Circuit precedent and with this Court's own decision in *Mackey*. Further, the "majority rule" the Panel follows has in fact been adopted by only the Third and Fifth Circuits, and in the Fifth Circuit (under *Cardenas*) resort to Rule 60(b) would be unnecessary because this appeal would have been deemed timely filed as a matter of law.

A. The Panel Opinion Conflicts With This Court's Decision In *Mackey* And Supreme Court's Decision In *Hill*.

The Panel acknowledged that the appeal in *Mackey* "was untimely not for lack of notice," and that this Court had therefore "concluded that the Federal rules were not so comprehensive as to leave no room for Rule 60(b)(6)." 789 F.3d at 1047. As *Mackey* confirms, there is no rule barring a Rule 60(b) motion filed "solely to render a notice of appeal

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lot" as seemingly required by *Wood* and under Gen. Order 3.2(g) for a member of an existing panel, but instead "refer[red] these appeals to the next available merits panel for disposition." (Dkt. 104; *see* Dkt. 117.)

Amicus raises this issue not to question whether the new panel gave this case due consideration, but to note that this may constitute yet a further procedural (or even jurisdictional) error by a court in the handling of this case. It undermines the appearance of justice in a capital case if no consequences attach to the failure of the district court, and possibly even this Court, to follow applicable procedural rules, but counsel's inadvertent procedural mistake is nevertheless deemed grounds for denying an otherwise meritorious appeal.

timely" unless that motion seeks "to utilize Rule 60(b)(6) to cure a Rule 77(d) 'lack of notice' problem." *Mackey*, 682 F.3d at 1252. The Panel provides no principled reason why Rule 60(b)(6) can be used to revive a lost right to appeal (as *Mackey* holds), but other, non-overlapping provisions of the same rule—in particular, 60(b)(1)—cannot.

The Supreme Court stated decades ago that district courts may vacate and re-enter judgments pursuant to Rule 60 for the purpose of permitting a timely appeal, for reasons including those listed in Rule 60(b)(1). *Hill v. Hawes*, 320 U.S. 520, 523-24 (1944) ("The Federal Rules of Civil Procedure permit the amendment or vacation of a judgment for … errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect.")

In *Hill*, the issue concerned a party's lack of notice of entry of judgment; FRCP 77(d) was later amended to eliminate the possibility of Rule 60(b) relief in such circumstances. *See* Advisory Committee Note to FRCP 77 (1946 Amendment). The Rules were amended once again in 1991 to add FRAP 4(a)(6), permitting the reopening of time to file an

appeal for parties who lacked notice. *See* Advisory Committee Note to FRAP 4 (1991 Amendment).

Hill thus confirmed the availability of Rule 60(b) to vacate and reenter a judgment to allow a timely appeal; the 1946 Amendment to FRCP 77 abrogated *Hill* for lack-of-notice cases; and the 1991 Amendment to FRAP 4(a) restored the ability to obtain relief in such cases. But no amendment to the Rules (or intervening Supreme Court decision) overturned the broader principle of *Hill*: there *are* circumstances—including those identified in Rule 60(b)(1)—in which Rule 60(b) can be used to vacate and reenter a judgment to allow a timely appeal.

B. The Panel Opinion Conflicts With Sixth Circuit Precedent.

The Panel's holding that 60(b) relief is unavailable conflicts with the Sixth Circuit decisions in *Tanner v. Yukins*, 776 F.3d 434 (6th Cir. 2015) and *Lewis v. Alexander*, 987 F.2d 392 (6th Cir. 1993). In *Lewis*, the Sixth Circuit held that Rule 60(b)(1) could be used to vacate and reenter an order Rule 60(b)(1) "to revive a lost right of appeal." 987 F.3d at 395-96. And in *Tanner*, the Sixth Circuit held that "the district court improperly determined that it lacked jurisdiction to rule on

Tanner's Rule 60(b)(6) motion and erred in failing to recognize that *Lewis* remains binding precedent post-*Bowles*," citing this Court's decision in *Mackey*. 776 F.3d at 442-44 (reversing and remanding with instructions to grant relief under 60(b)(6)).

C. The Panel Did Not Follow A "Majority Rule."

The Panel followed what it called "the majority rule in our sister circuits" that "bringing a Rule 60(b) motion 'for no purpose but to induce the district court to vacate and re-enter the underlying judgment and thereby re-start the time to appeal' is 'clearly forbidden.'" 789 F.3d at 1046 n.4, citing 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3950.3 at nn. 37-47 (4th ed. 2014). But the cases Wright and Miller cite do not establish any majority rule. As explained above, two circuits—this Court, in *Mackey*, and the Sixth Circuit, in both *Tanner* and *Lewis*—have rejected it.

The sole decision cited that actually supports this "rule" is *Dunn v. Cockrell*, 302 F.3d 491, 493-94 (5th Cir. 2002) (refusing "to allow a litigant to circumvent [FRAP 4(a)(5)] by invoking Rule 60(b) solely for

the purpose of extending the time for appeal").[7] That mechanical rule fails here, where the court's violation of FRAP 3(d)(1) (and Washington's need to move for a COA) left any timeliness problem undiscovered until FRAP 4(a)(5)'s 30 days had passed.

The few cases Wright and Miller cite addressing Rule 60(b) outside of the lack-of-notice context do not support the supposed "majority rule." *FHC Equities, L.L.C. v. MBL Life Assur. Corp.*, 188 F.3d 678, 684 (6th Cir. 1999) concerns the denial of 60(b) relief on the merits, but does not preclude the use of Rule 60(b), as *Tanner* explains. *See* 776 F.3d at 441-42. *Lawrence v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.*, 320 F.3d 590, 594 (6th Cir. 2003) rejects a "unique circumstances" doctrine motion based on an alleged misleading assurance from a clerk.[8] Two other cases support broader availability of Rule 60(b) relief,[9] while another rejects use of

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[7] Only the Third Circuit (in *West v. Keve*, 721 F.2d 91 (3d Cir. 1983), uncited by Wright and Miller) appears to have taken the same position.

[8] *Bowles v. Russell*, 551 U.S. 205, 214 (2007) subsequently rejected the "unique circumstances" doctrine, but does not address Rule 60(b).

[9] In *Glascoe v. United States,* 358 F.3d 967, 969 (D.C. Cir. 2004), the court exercised jurisdiction over the denial of a 60(b) motion "address[ing] the merits" of a previously-denied habeas petition. Rule 60(b) arises only in a concurrence to *Browder v. Director, Dep't of Corr.*

Rule 60(b) where a party elected to file a second lawsuit rather than appeal from an adverse decision in the first. *See Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 158, 161 n.3 (3d Cir. 2004).

The remaining Wright and Miller cases do not support the purported "majority rule" either. Six involve lack of notice, but do not otherwise limit Rule 60(b).[10] Six others address the timing of interlocutory appeals,[11] FRAP 4(a)(6),[12] or vacating-and-reentering

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of Illinois, 434 U.S. 257, 272-74 (1978) (Blackmun, J. and Rehnquist, J., concurring), which noted that relief for an untimely appeal might have been available, but the party had "disavowed any reliance on Rule 60(b)."

[10] *In re Stein*, 197 F.3d 421, 425 (9th Cir. 1999) (60(b) relief "based solely on notice problems[ ] would relax the 'outer time limit' that Rule 4(a)(6) was intended to set"); *In re Sealed Case (Bowles)*, 624 F.3d 482, 483 (D.C. Cir. 2010) (denying relief where "neither party obtained notice" until after Rule 4(a)(6)'s 180-day deadline); *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000) (same); *Vencor Hospitals, Inc. v. Standard Life and Acc. Ins. Co.*, 279 F.3d 1306, 1311 (11th Cir. 2002) ("Rule 4(a)(6) provides the exclusive method for extending a party's time to appeal for failure to receive actual notice"); *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 360-61 (8th Cir. 1994) (same); *Latham v. Wells Fargo Bank, N.A.*, 978 F.2d 1199, 1204 (2d Cir. 1993) (same).

[11] *Lora v. O'Heaney*, 602 F.3d 106, 112 (2d Cir. 2010) (interlocutory appeal untimely); *Saudi Basic Indus. Corp. v. Exxon Corp.*, 364 F.3d 106 (3d Cir. 2004) (interlocutory appeal timely)

[12] *Firmansjah v. Ashcroft*, 347 F.3d 625, 627 (7th Cir. 2003) (per curiam) (refusing to apply FRAP 4(a)(6) to BIA order); *Marcangelo v. Boardwalk*

without any Rule 60 motion.[13] In sum, the Panel could not have followed a majority rule concerning the availability of Rule 60(b) to vacate-and-reenter, because no majority rule exists. Instead, the Panel effectively switched this circuit's side on an issue only a minority of circuits have directly addressed, and created conflicts both with the Sixth Circuit and this Court's decision in *Mackey*.

D. The Panel's "Identical Grounds" Rule Is Unsound And Would Not Apply To Washington.

The Panel's other basis for holding Rule 60(b) unavailable is that Washington's "motion seeks relief on grounds identical to those offered by Rule 4(a)." 789 F.3d at 1047. But the grounds for Rules 60(b) and 4(a)(5) are not coextensive: FRAP 4(a)(5) concerns "excusable neglect or good cause," while Rule 60(b)(1) concerns "mistake, inadvertence, surprise, or excusable neglect." If counsel's miscalculation (coupled

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Regency, 47 F.3d 88, 90 (3d Cir. 1995) (affirming denial of FRAP 4(a)(6) motion).

[13] *United States v. Fuller*, 332 F.3d 60, 65-66 (2d Cir. 2003) (remanding "with instructions to vacate the judgment and enter a new judgment from which a timely appeal may be taken" where the failure to file a timely notice of appeal was due to ineffective assistance of counsel); *Eaton v. Jamrog*, 984 F.2d 760 (6th Cir. 1993) (reversing district court's *sua sponte* vacatur and re-entry of judgment where no Rule 60 motion was made).

with the district court's errors) is viewed as mistake, inadvertence, or "any other reason that justifies relief," then Washington's motion simply did not seek relief on identical grounds.[14]

If the Panel's "identical grounds" rule seeks to foreclose duplicative opportunities to seek relief due to excusable neglect, that concern does not apply here. Washington had no opportunity to seek relief under FRAP 4(a)(5), because the district court's violation of FRAP 3(d) meant that the timing problem went undiscovered well past FRAP 4(a)(5)'s 30 day period. Construing Rule 60(b) to bar relief because "identical grounds" are offered by FRAP 4(a)(5) is unsupportable where Washington never knew he had a FRAP 4(a)(5) motion to make.

E. The Panel's Refusal To Permit 60(b) Relief Conflicts With The Language And Purpose Of The Federal Rules.

Rule 60(b)'s "whole purpose is to make an exception to finality," *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005), by giving courts the ability to accommodate inadvertent errors, mistakes, or unusual circumstances that have arisen in a case that proceeded to judgment.

[14] The "identical grounds" rule cannot be reconciled with *Mackey*: There seems little doubt that if the *Mackey* petitioner had discovered his attorney's neglect within 30 days (instead of 8 months later), this Court would have found relief under FRAP 4(a)(5) available and appropriate.

Holding Rule 60(b) unavailable here frustrates that clear purpose. In determining whether Rule 60(b) relief is available, the "issue is whether the text of Rule 60(b) itself, or of some other provision of law, limits its application in a manner relevant to the case before [the Court]."[15] *Id.* *See also* FRCP 1 (rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

Washington's counsel's error, as compounded by the district court's mishandling of the notice of appeal (and failure to initially rule on a COA), was mistake, inadvertence, excusable neglect, or a combination of those also justifying relief, and falls within the text of Rule 60(b). The provisions of law the Panel opinion invoked to limit the application of the rule (principally, the 30-day deadline of FRAP 4(a)(5)) simply do not contemplate the expiration of that period, unobserved by the district court, the parties, or this Court, due not only to an error of

[15] The Panel observed that missing deadlines can have harsh consequences in death penalty cases. *See* 789 F.3d at 104 (citing *Lawrence v. Florida*, 549 U.S. 327 (2007)). But that does not counsel an interpretation of Rule 60(b) to deprive Washington of review. *See Gonzalez*, 545 U.S. at 529 ("AEDPA did not expressly circumscribe the operation of Rule 60(b). (By contrast, AEDPA directly amended other provisions of the Federal Rules…).")

counsel, but also to the district court's violation of other Appellate Rules.

CONCLUSION

For the forgoing reasons and those stated in the Petition, the Court should grant rehearing en banc.

DATED: Los Angeles, CA
August 14, 2015.

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CERTIFICATE OF COMPLIANCE
WITH CIRCUIT RULE 29-2

Pursuant to Cir. R. 32-1 and 29-2, the foregoing brief of amicus curiae NACDL is proportionally spaced, has a typeface of 14 points or more, and contains 4,176 words, and is thereby in compliance with the alternative length limit of Cir. R. 29-2(c)(2).

s/ Mark E. Haddad
Counsel for Amicus Curiae NACDL
August 14, 2015

CERTIFICATE OF SERVICE

I, Nathaniel C. Love, a member of the Bar of this Court, hereby certify that on August 14, 2015, I electronically filed the foregoing "Brief of Amicus Curiae The National Association Of Criminal Defense Lawyers In Support Of Petitioner-Appellant's Petition For Rehearing En Banc" with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Nathaniel C. Love
Counsel for Plaintiff-Appellee

EXHIBIT A

S1400CR8714064

FILED
2011 OCT 25 PM 4:40
CLERK OF SUPERIOR COURT
YUMA ARIZONA

SUPERIOR COURT OF ARIZONA

YUMA COUNTY
YUMA, AZ

Four	**October 25, 2011**	**Andrew W. Gould**	**Lee-Anne Johnson**
Div	Date	Judge	Deputy Clerk(s)

No. **S1400CR87-14064**

STATE OF ARIZONA

vs.

FRED ROBINSON

DATE OF BIRTH: 05-03-1941

County Attorney
By: Roger Nelson

Attorney for Defendant
By: Michael Breeze/German Salazar

SENTENCE OF IMPRISONMENT

11:53 a.m. The State is represented by the above named Deputy County Attorney; the defendant is present with counsel named above.

The Court Reporter is present.

Pursuant to A.R.S. §13-607, the court finds as follows:

JURY VERDICT The determination of guilt was based upon a verdict of guilty after a jury trial.

IT IS THE JUDGMENT OF THE COURT that the Defendant is guilty of the following crime(s), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Department of Corrections is appropriate.

NO. S1400CR1987-14064, STATE VS. FRED ROBINSON

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

OFFENSE: Count One: First Degree Murder

FELONY CLASS: 1 felony

IN VIOLATION OF A.R.S. SECTIONS: 13-1105, 13-1101, 13-703, 13-801 (1987)

DATE OF OFFENSE: June 8, 1987

SENTENCE: 25 years to life

XX DANGEROUS PURSUANT TO A.R.S. 13-604 (1987)

XX NONREPETITIVE

This sentence is to date from October 25, 2011. The Defendant is to be given credit for 8904 days served prior to sentencing.

As to Counts Two through Six: THE COURT FINDS the following aggravating circumstance(s) exist(s):

1. The presence of an accomplice pursuant to A.R.S. §13-702(D)(4). (1987)
2. The cruel manner in which the offense was committed pursuant to A.R.S. §13-702(D)(5). (1987)
3. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value pursuant to A.R.S. §13-702(D)(7). (1987)

THE COURT FINDS the aggravating circumstances are sufficiently substantial to warrant an aggravated sentence and outweigh any mitigating circumstances.

NO. S1400CR1987-14064, STATE VS. FRED ROBINSON

OFFENSE: Count Two: Attempted First Degree Murder

FELONY CLASS: 2 felony

IN VIOLATION OF A.R.S. SECTIONS: 13-1105, 13-1101, 13-1001, 13-702, 13-701, and 13-801 (1987)

DATE OF OFFENSE: June 8, 1987

SENTENCE: 21 years

XX AGGRAVATED

XX DANGEROUS PURSUANT TO A.R.S. 13-604 (1987)

XX NONREPETITIVE

The sentence imposed as to Count Two shall be served consecutively to the sentence imposed in Count One and shall date from the completion of that sentence. The Defendant is to be given credit for 0 days served prior to sentencing.

OFFENSE: Count Three: Aggravated Assault Causing Serious Physical Injury

FELONY CLASS: 3 felony

IN VIOLATION OF A.R.S. SECTIONS: 13-1204(A)(1), 13-1203, 13-801, 13-702 and 13-701 (1987)

DATE OF OFFENSE: June 8, 1987

SENTENCE: 15 years

XX AGGRAVATED

XX DANGEROUS PURSUANT TO A.R.S. 13-604 (1987)

XX NONREPETITIVE

NO. S1400CR1987-14064, STATE VS. FRED ROBINSON

The sentence imposed as to Count Three shall be served concurrently with the sentence imposed in Count Two but consecutively to the sentence imposed in Count One and shall date from the completion of that sentence. The defendant is given credit for 0 days served prior to sentencing.

OFFENSE: Count Four: Aggravated Assault Using a Deadly Weapon

FELONY CLASS: 3 felony

IN VIOLATION OF A.R.S. SECTIONS: 13-1204(A)(2), 13-1203, 13-801, 13-702 and 13-701 (1987)

DATE OF OFFENSE: June 8, 1987

SENTENCE: 15 years

XX AGGRAVATED

XX DANGEROUS PURSUANT TO A.R.S. 13-604 (1987)

XX NONREPETITIVE

The sentence imposed as to Count Four shall be served concurrently with the sentence imposed in Counts Two and Three, but consecutively to the sentence imposed in Count One and shall date from the completion of that sentence. The defendant is given credit for 0 days served prior to sentencing.

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NO. S1400CR1987-14064, STATE VS. FRED ROBINSON

OFFENSE: Count Five: Burglary in the First Degree

FELONY CLASS: 2 felony

IN VIOLATION OF A.R.S. SECTIONS: 13-1508, 13-1507, 13-1501, 13-702, 13-701 and 13-801 (1987)

DATE OF OFFENSE: June 8, 1987

SENTENCE: 15 years

XX AGGRAVATED

XX DANGEROUS PURSUANT TO A.R.S. 13-604 (1987)

XX NONREPETITIVE

The sentence imposed as to Count Five shall be served concurrently with the sentence imposed in Count Six, but consecutively to the sentence imposed in Count Two and shall date from the completion of that sentence. The defendant is given credit for 0 days served prior to sentencing.

OFFENSE: Count Six: Armed Robbery

FELONY CLASS: 2 felony

IN VIOLATION OF A.R.S. SECTIONS: 13-1904, 13-1901, 13-702, 13-701 and 13-801 (1987)

DATE OF OFFENSE: June 8, 1987

SENTENCE: 21 years

XX AGGRAVATED

XX DANGEROUS PURSUANT TO A.R.S. 13-604 (1987)

XX NONREPETITIVE

NO. S1400CR1987-14064, STATE VS. FRED ROBINSON

The sentence imposed as to Count Six shall be served concurrently with the sentence imposed in Count Five, but consecutively to the sentence imposed in Count Two and shall date from the completion of that sentence. The defendant is given credit for 0 days served prior to sentencing.

PAROLE

As to Counts Two through Six, the defendant shall serve a term of parole in compliance with the Statutes in effect in 1987.

FEES, FINES AND ASSESSMENTS

It is ORDERED the defendant shall pay the following fees, fines and assessments commencing on the first day of the second month after the defendant is released from incarceration with the Arizona Department of Corrections and are to be paid at a monthly rate established by JAU:

[x] **VICTIM COMPENSATION FUND FEE** in the amount of $100.00

It is further ORDERED all payments ordered above are to be made payable to the office of the Yuma County Clerk of the Superior Court through the Judicial Assistance Unit.

It is further ORDERED within 15 days after being released from the Arizona Department of Corrections, the defendant shall report to or contact the Judicial Assistance Unit (JAU) at 168 South 2nd Avenue, Yuma, Arizona 85364, telephone number (928) 817-4150, to execute a payment contract for monies assessed in this matter. Payments shall commence on the first day of the second month following the defendant's release from custody and are to be paid at a monthly rate established by JAU.

The defendant is advised concerning rights of appeal or post conviction and written notice of those rights is provided.

IT IS ORDERED authorizing the Sheriff of Yuma County to transport the defendant to the Arizona Department of Corrections and authorizing the Department of Corrections to carry out the

term of imprisonment set forth herein.

IT IS ORDERED that the Clerk of the Court send to the Department of Corrections a copy of this order together with all presentence reports, probation violation reports, medical and mental health reports relating to the defendant and involving this cause.

IT IS ORDERED exonerating any bond.

Let the record reflect that the defendant's fingerprint is permanently affixed to this sentencing order in open court.

12:04 a.m. Hearing Concludes

Judge of the Superior Court

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[Fingerprint]