REEXAMINING RECALL OF MANDATE: LIMITATIONS ON THE INHERENT POWER TO CHANGE FINAL JUDGMENTS

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The federal courts of appeals exercise a rare power: the power to turn back the clocks and fix their past mistakes. This power—the "power to recall mandate"—allows courts to reassert jurisdiction after mandate has issued and reconsider a judgment on the merits. Much like Hermione Granger's time-turner, the power to recall mandate can be used innocuously to manage scheduling errors, or for more weighty purposes, like setting prisoners free.[1]

The power to recall mandate is one of the inherent powers of the judiciary. It existed at English common law subject to strict limitations that, in the modern era, have largely eroded. A court may recall mandate sua sponte or on a litigant's motion.[2] And there are various reasons why recall might be appropriate: because the court itself made a clerical or procedural error, because one of the parties engaged in fraud on the court, or because the court's decision erred on the merits. Yet if courts were willing to recall mandate every time one of these errors occurred, the recall power would eviscerate public interests in finality and repose.

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1. *See* J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (1999) (in which one of the protagonists, Hermione Granger, is given a magical device that allows her turn back time so she can fit more classes into her schedule, and that she later uses to facilitate the flight of an escaped prisoner).

2. *See* Calderon v. Thompson, 523 U.S. 538, 548, 566 (1998).

For this reason, the power to recall mandate was conceived as an "extraordinary remedy."[3] But ever since then-Justice Rehnquist acknowledged that the recall power "probably lies within the inherent power of the Court of Appeals,"[4] courts of appeals have received scores of recall motions. In 2020 alone, federal courts of appeals decided at least 138 recall motions.[5] The pace of recall motions has vastly outstripped scholarship into the recall power,[6] with the result that the disposition of these motions can vary from circuit to circuit—and worse, from panel to panel.[7] Wright and Miller observe

3. Haw. Hous. Auth. v. Midkiff, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers).

4. *Id.* at 1324.

5. A Lexis search reveals that there were 476 cases in 2020 mentioning recall of mandate. Of these, 138 cases decided motions to recall mandate, or decided other motions that the court construed as motions to recall mandate. Courts have also considered recall using other terminology, such as "vacation of judgment"—particularly before *Hawaii Housing Authority* was decided.

6. The most comprehensive sources on the scope and application of the recall power are *Thompson*, 523 U.S. at 549–66; Bos. & Me. Corp. v. Town of Hampton, 7 F.3d 281 (1st Cir. 1993); 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3938 (3d ed., rev. 2022); and A.B. Shepherd, Annotation, *Power of Appellate Court to Reconsider Its Decision After Mandate Has Issued*, 84 A.L.R. 579 (1933). For more recent scholarship dealing with the recall power, see Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203 (2011) (arguing that appellate courts should be more willing to recall mandate before mandate becomes final); Jim L. Phillips III, *"It Ain't Over 'Til It's Over," But Will It Ever Be?: The Elusive Procedural Finality of* Bell v. Thompson *and an Appellate Court's Mandate*, 60 ARK. L. REV. 319 (2007) (providing an overview of the federal court's mandate, with a focus on issues that arose in *Bell v. Thompson*, and citing cases on the origins and applications of the recall power); Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171 (2003) (laying out recall motions as one alternative to a successive habeas petition under the AEDPA).

7. *Compare* United States v. Crawford, 422 F.3d 1145 (9th Cir. 2005) (trial judge's statements disapproving of guidelines constitute "extraordinary circumstances"), *with* Carrington v. United States, 503 F.3d 888, 892–94 (9th Cir. 2007) (trial judge's statements disapproving of guidelines do not constitute "exceptional circumstances"); *compare* Conley v. United States, 323 F.3d 7, 14 (1st Cir. 2003) (recall motions can be used to get around the strictures of § 2255), *with* United States v. Fraser, 407 F.3d 9, 11 (1st Cir. 2005) (recall should not be used as an "avenue to escape" the strictures of § 2255).

that "no formal rules have yet emerged to define and cabin the power."[8]

This Article conducts a review of recall jurisprudence to suggest that courts are developing both formal and informal rules to define and cabin the recall power—even if those rules are inconsistently applied. Part I explores the nature and origins of the recall power. Part II lays out when courts have occasion to consider the recall power, including when the mandate includes a clerical or procedural error, when the mandate is based on fraud on the court, or when intervening binding court precedent reveals that the case in which the mandate issued was wrongly decided. It then delineates factors that weigh into the recall analysis. Part III harmonizes the recall power with statutory restrictions on habeas and post-conviction relief. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) restricted courts' power to grant recall motions as an alternative to habeas relief or, I argue, federal post-conviction relief. Even so, I demonstrate that recall motions remain a viable route to post-conviction relief for some state and federal prisoners.

I. ORIGINS AND HISTORY OF THE POWER

An appellate court's "mandate" is the order that conveys its decision, directs the lower court's entry of judgment, and, if necessary, requires the lower court to engage in further proceedings.[9] Federal Rule of Appellate Procedure 41(a) dictates that, in general, an appellate court's mandate consists of "a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs." A "mandate," however, includes only "matters actually decided."[10] An opinion's

8. WRIGHT, MILLER & COOPER, *supra* note 6, § 3938, at 862.

9. *See* 5 C.J.S. *Appeal and Error* § 1140 (2021); Phillips, *supra* note 6, at 342–48.

10. 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478.3, 720 (2d ed., rev. 2022).

"mere recital of matters assumed for purposes of decision and dicta are not part of the mandate."[11]

An appellate court will issue its mandate after the deadline to file a petition for rehearing expires, after such petition has been denied, or, if the court stays its mandate pending a petition for certiorari, after the Supreme Court issues its final disposition.[12] Mandate becomes effective as soon as it issues.[13] Once mandate issues, jurisdiction returns to the lower court,[14] which "has no power or authority to deviate from the mandate."[15] Still, an appellate court retains the power to recall its own mandate and to reassert appellate jurisdiction over a case.[16]

The power to recall mandate is one of the "inherent"[17] powers of the judiciary "necessary to the exercise of" Article III functions.[18] The recall power arises from the control that the Constitution "vest[s] in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases,"[19] as well as from appellate courts' statutory authority to "affirm,

11. *Id.* (internal footnotes omitted).

12. FED. R. APP. PRO. 41(b), (d).

13. *Id.* at 41(c).

14. 2A BARBARA J. VAN ARSDALE ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 3:1014. EFFECT OF MANDATE (perm. ed., rev. 2021).

15. Briggs v. Pa. R.R. Co., 334 U.S. 304, 306 (1948).

16. *See* Aerojet-Gen. Corp. v. Am. Arb. Ass'n, 478 F.2d 248, 253–54 (9th Cir. 1973); *In re* Sw. Airlines Voucher Litig., 898 F.3d 740, 747 (7th Cir. 2018). An appellate court's decision to recall mandate appears to remove jurisdiction from the inferior court charged with implementing the mandate. *See* Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976) (recalling mandate in order to remove jurisdiction from the court below, and instructing that, on remand, the remaining issues should be assigned to a new judge). This issue, however, remains unsettled. *See* Boston & Me. Corp. v. Town of Hampton, 7 F.3d 281, 282 (1st Cir. 1993) (questioning the jurisdictional effects for district courts when appellate courts recall and reissue mandate).

17. Calderon v. Thompson, 523 U.S. 538, 549 (1998).

18. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); *cf.* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 847 (2001) ("[B]ecause issuance of a judgment is a crucial component of judicial power, courts must have discretion to enter, correct, and modify their judgments and to decide when to issue their mandates.").

19. *Chambers*, 501 U.S. at 43 (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)).

modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review."[20] Exercised properly, the recall power can promote judicial order by preventing the ongoing effects of an unjust mandate,[21] serving as a check on parties wishing to "tamper[] with the administration of justice,"[22] and enabling circuits to remove clearly erroneous precedent without becoming bound by such precedent.[23]

A court's inherent power to recall mandate originally expired at the end of every term.[24] This meant that courts generally had no more than one year to recall mandate, and usually had less. In one case, *Peck v. Sanderson*, Sanderson petitioned the Supreme Court for rehearing after his counsel had been sick and had missed oral argument.[25] Issuing a one-page decision, the Supreme Court denied his petition, noting that the oral argument had occurred during the Court's previous term and holding that the Court had no power to grant rehearing after its mandate had already issued.[26]

The term-end rule was a "self-imposed" "rule of repose (somewhat analogous to a statute of limitations)" that courts sometimes "relaxed."[27] Courts recognized

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20. 28 U.S.C. § 2106; *see* Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971) (identifying the recall power's foundations in 28 U.S.C. § 2106 and in "the inherent power of a court"); *cf Thompson*, 523 U.S. at 549–50 (identifying the recall power as an "inherent power" without reference to 28 U.S.C. § 2106).

21. WRIGHT, MILLER & COOPER, *supra* note 6, § 3938, at 879–80.

22. *Chambers*, 501 U.S. at 44 (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 U.S. 238, 246 (1944)).

23. WRIGHT, MILLER & COOPER, *supra* note 6, § 3938.

24. *See* FED. R. CIV. P. 6(b) advisory committee's note to 1946 amendment; *see, e.g.*, *Hazel-Atlas Glass*, 322 U.S. at 255–56 (Roberts, J., dissenting); *In re* Nat'l Park Bank of N.Y., 256 U.S. 131, 133 (1921); Bronson v. Schulten, 104 U.S. 410, 417 (1881); Wash. Bridge Co. v. Stewart, 44 U.S. 413, 424 (1845); Browder v. McArthur, 20 U.S. 58, 58 (1822); Cameron v. McRoberts, 16 U.S. 591, 593 (1818).

25. Peck v. Sanderson, 59 U.S. 42, 42 (1855).

26. *Id.* The Court did note that Sanderson's absence of counsel was "a subject of regret."

27. James Wm. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 629–30 (1946).

certain ancillary remedies—such as the writs of *audita querula*, *coram nobis*, and *coram vobis*, and the bill of review—pursuant to which courts would sometimes grant relief long after the term-end.[28] In particular, when petitioners sought recall based on a clerical error in the mandate, other procedural error by the court, or fraud on the court, courts sometimes relaxed the term-end deadline, recalling mandate even years after the mandate had issued.[29] In *The Palmyra*, for instance, the Supreme Court found that the circuit court's clerical error had led the Supreme Court mistakenly to dismiss the petitioner's appeal in an earlier term.[30] Although the term-end deadline had long since elapsed, the Court was willing to recall its mandate (dismissing the appeal) and reinstate the appeal.[31] The Court reasoned, "[e]very Court must be presumed to exercise those powers belonging to it, which are necessary for the promotion of public justice; and we do not doubt that this Court possesses the power to reinstate any cause dismissed by

28. *Id.* at 627; *see also* FED. R. CIV. P. 60(b) advisory committee note to 1946 amendment (citing Moore & Rogers, *supra* note 27, for its interpretation of "the old common law writs" and their relationship to Rule 60); Sibbald v. United States, 37 U.S. 488, 492 (1838) (contrasting the general rule that courts cannot recall mandate after the end of term with bills of review and the writ of *coram nobis*, which can affect mandate after the end of term); Amir Shachmurove, *Entombed Writs' Effective Renaissance: Surveying and Sealing Federal Rule of Civil Procedure 60(b)'s Interpretive Gaps*, 70 CLEV. ST. L. REV. 761, 777–78 (describing the proliferation of "more and more exceptions traceable to the original writs of error coram nobis and audita querula" for evading the term-end rule).

29. *See Sibbald*, 37 U.S. at 492 ("No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, *unless for clerical mistakes or to reinstate a cause dismissed by mistake* . . . ." (emphasis added) (citations omitted)); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944) ("From the beginning, there has existed along side the term rule a rule of equity to the effect that, under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry."). *But see Hazel-Atlas*, 322 U.S. at 256–57 (Roberts, J., dissenting) (arguing that the term-end rule applies in a case of fraud on the court).

30. 25 U.S. 1, 9–10 (1827).

31. *Id.* at 10.

mistake."[32] The power to recall mandate therefore existed long after the end of term, but was rarely exercised past that deadline.

District courts, like appellate courts, possessed a power to correct or vacate their judgments, and this power was originally subject to the term-end rule.[33] But for district courts, the Federal Rules of Civil Procedure supplanted the term-end rule.[34] The Advisory Committee noted that the term-end rule operated inequitably, granting more time to vacate judgments that were entered at the beginning of term than judgments entered at the end of term.[35] The Rules consequently replaced the term-end rule with express time limits. Now, regardless of the expiration of term, movants can file within 28 days from the entry of judgment to alter or amend judgment under 59(e),[36] and can file within one year for relief from judgment under 60(b) for reasons of "mistake, inadvertence, surprise, or excusable neglect," "newly discovered evidence," or "fraud."[37] Movants furthermore may file within any "reasonable time" for relief from judgment under 60(b) on the basis of voidness, inequity, or "any other reason that justifies relief."[38] District courts can correct clerical errors in the mandate "whenever one is found."[39] These rules regulate, but do not restrict, a district court's power to entertain independent actions to grant relief from judgment, and to set aside judgments for fraud on the court.[40]

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32. *Id.*

33. *See* Moore & Rogers, *supra* note 27, at 627; FED. R. CIV. P. 6(b) advisory committee's note to 1946 amendment; *see also* Carr v. D.C., 543 F.2d 917, 926 (D.C. Cir. 1976) ("[Rule 60(b)] preserves the historical authority of the courts of equity to reform judgments in special circumstances.").

34. *See* Moore & Rogers, *supra* note 27, at 628; FED. R. CIV. P. 6(b)–(c) and advisory committee's note to 1946 amendment.

35. FED. R. CIV. P. 6(b) advisory committee's note to 1946 amendment.

36. FED. R. CIV. P. 59(e).

37. FED. R. CIV. P. 60(b)–(c).

38. *Id.*

39. FED. R. CIV. P. 60(a).

40. FED. R. CIV. P. 60(d).

Appellate courts, meanwhile, ceased following the term-end rule after Congress passed 28 U.S.C. § 452.[41] Like other inherent powers of the judiciary, the power of courts to recall mandate operates as a "default rule"[42] which Congress may and does regulate.[43] Section 452 specifies that "[t]he continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding." Although Justice Harlan's spirited dissent in *United States v. Ohio Power Co.* argued that the purpose of § 452 was actually "to *prevent* reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment,"[44] the Court's per curiam opinion implicitly rejected Justice Harlan's argument and vacated its prior-term decision.[45] Since *United States v. Ohio Power Co.*, the Court has not treated the expiration of term as a barrier to the power of appellate courts recall of mandate.[46]

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41. Pub. L. No. 80-773, ch. 646, 62 Stat. 907, 907 (1948).

42. *Cf.* Daniel Bress, Note, *Administrative Reconsideration*, 91 VA. L. REV. 1737, 1748 (2005) (arguing that in administrative agency proceedings, the "default rule" is that agencies have an inherent power to reconsider their decisions).

43. U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1. But the power of Congress to regulate the "inherent powers" of inferior courts might have some limits. *See* Pushaw, *supra* note 18, 847–48, 847 n.580 (2001) (characterizing the power to recall mandate as an "implied indispensable power" of the judiciary, meaning that Congress may "reasonably regulate[] minor details" of the power but may not "destroy or impair" it).

44. 353 U.S. 98, 103 (1957) (per curiam) (emphasis added) (quoting ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES, H.R. DOC. No. 473, 80th Cong., 1st Sess., at 50 (1946)).

45. *Id.* at 99 ("We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.").

46. In *Wilkins v. United States*, for instance, petitioner Wilkins asked his court-appointed lawyer to appeal the Third Circuit's June 1977 judgment. 441 U.S. 468, 468 (1979) (per curiam). The lawyer assured Wilkins that he had filed a petition for writ of certiorari, but no such petition had been filed. In December 1978, Wilkins wrote to the Court asking what remedies were available to him, and the Court clarified that, if Wilkins had instead petitioned the Third Circuit, the Third Circuit would have possessed the power to recall its mandate. *Id.* at 469. The Court paid no attention to the fact that Wilkins's petition followed the end of the Third Circuit's term.

The existence of express federal rules limiting the authority of district courts to amend or vacate judgment, but not limiting the authority of appellate courts to recall mandate, might suggest that an appellate court has unfettered discretion to recall mandate.[47] But that view is wrong. The inherent power to recall mandate exists to promote the "orderly and expeditious disposition of cases,"[48] whereas an unbounded recall power would allow parties to endlessly challenge final judgments and thereby create disorder and delay.[49] An expansive body of case law—in which courts overwhelmingly have denied recall motions—suggests that courts of appeals face implicit limits on their recall power.[50] These restrictions form the foundation of the historical exercise of the recall power, and disregarding these restrictions can constitute an abuse of discretion.[51] Some appellate courts have even "codifie[d] the prevailing jurisprudence"[52] by promulgating formal rules which restrict and govern recall procedures.[53] In addition,

47. *Cf.* Boston & Me. Corp. v. Town of Hampton, 7 F.3d 281, 282 (1st Cir. 1993) (expressing concern that the express time limits on the court's power of self-correction, found in FED R. CIV. P. 60(b), but not found in the Federal Rules of Appellate Procedure, may create "an area of essentially original, rather than appellate, jurisdiction in courts of appeals over closed cases").

48. *See supra* note 19 and accompanying text.

49. *See* Calderon v. Thompson, 523 U.S. 538, 569 (1998) (Souter, J., dissenting) (agreeing with the majority that the recall power "must be reserved for 'exceptional circumstances' in the interests of stable adjudication and judicial administrative efficiency" (citations omitted)).

50. *See* Greater Boston Television Corp. v. FCC, 463 F.2d 268, 278 (D.C. Cir. 1971) (exercise of the recall power has "generated certain rules").

51. In *Thompson*, the Supreme Court implied that even if recall in that case implicated "no more than ordinary concerns of finality," it could be an abuse of discretion for a court to recognize its error, wait 53 days, and then recall mandate—even though such action would violate no express rule or statute. 523 U.S. at 552–53. The fact that the court of appeals can abuse its discretion by granting recall indicates that the recall power must necessarily be constrained.

52. Nelson v. James, 722 F.2d 207, 208 (5th Cir. 1984) (citing *Greater Boston* and *Dilley v. Alexander* as cases which are codified under 5TH CIR. R. 41.2).

53. *See* 5TH CIR. R. 41.2 (prohibiting recall of mandate "except to prevent injustice"); 10TH CIR. R. 41.2 (requiring a recall motion filed over one year after the mandate issued to show "good cause for the delay"); 11TH CIR. R. 41-1 (prohibiting recall of mandate "except to prevent injustice," and requiring that recall motions filed over one year after the mandate issued to show "good cause for the delay"); FED. CIR. R. 40(d) (imposing time limits on motions to reconsider,

Congress has occasionally regulated in a way that limits the scope of the recall power, especially by imposing statutory limits on postconviction review. Part II will consider the strength and scope of these customary and statutory limitations.

II. LIMITATIONS ON RECALL POWER

Courts of appeals may only recall mandate "sparing[ly]," "in extraordinary circumstances," and "as a last resort . . . against grave, unforeseen contingencies."[54] An improper decision to recall mandate can be overturned as an abuse of discretion.[55] In practice, however, courts of appeals rarely face scrutiny for their disposition of motions to recall mandate.[56] Since the abolition of the term-end rule, the Supreme Court has only once held that a circuit court abused its discretion by recalling mandate.[57]

Even without strict enforcement by the Supreme Court, courts of appeals generally restrict their recall power to a few specific circumstances, including when the mandate is ambiguous or contains a clerical error, when the mandate is based on a procedural error, when one of the litigants committed fraud on the court, and when the mandate relies on some error of law. Courts of appeals considering recall motions should furthermore

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vacate, or modify dispositive orders). The Fifth Circuit views its formal rule as "codifying the prevailing jurisprudence" limiting the recall power. For other incidental rules and internal operating powers implicating the recall power, see 6TH CIR. I.O.P. 41(b) (directing the clerk of the court to refer a recall motion to the judge who wrote the opinion); 7TH CIR. R. 22(f)(1) (permitting recall of mandate in death penalty cases pending a vote for en banc rehearing); 7TH CIR. I.O.P. 1(c) (treating a motion for recall of mandate as a nonroutine motion that may require immediate action); 9TH CIR. GEN. ORDS. 4.6(D), 5.10 (requiring that recall motions must be forwarded to the three-judge panel or en banc panel that decided the underlying action).

54. *Thompson*, 523 U.S. at 550.

55. *Id.* at 549, 567.

56. *See id.* at 567–68 (Souter, J., dissenting) (arguing that under the abuse of discretion standards, the decisions of courts of appeals to recall mandate should be afforded "a high degree of deference").

57. *See id.* at 558, 566.

weigh the public interest in finality against the public and private interests in recall by applying a common body of factors. This Part will begin by examining the instances in which courts most often consider recall of mandate, and will analyze how courts should and do weigh the relevant factors.

A. Cases in Which Courts Might Recall Mandate

Thompson indicates there are at least four instances[58] where a court might recall its mandate: where there are "clerical errors in the judgment itself";[59] where "procedural misunderstandings" have impacted the issuance of the mandate;[60] where there is "fraud on the court";[61] and where there are substantive errors on the merits of the court's decision.[62] Each of these scenarios could give a court reason to recall mandate, if circumstances are sufficiently "extraordinary and compelling."

1. Clerical Errors and Clarification

First, courts are at their most likely to recall mandate when there is a need to clarify the meaning of an ambiguous mandate, or otherwise correct some clerical error in the mandate.[63] *Dilley v. Alexander*, for example, was an employment law case where the D.C. Circuit's mandate required the Army to reinstate some of its soldiers, but neglected to specify whether the

58. These four instances provide a starting point for conceptualizing the recall power but may not be comprehensive. The scope of Rule 60(b) suggests that the power of courts to correct their own judgments also encompasses instances where the judgment is void, has been satisfied, released, or discharged, instances where parties discover new evidence, and more.

59. *Thompson*, 523 U.S. at 557.

60. *Id.* at 550.

61. *Id.* at 557.

62. *Id.*

63. *See id.*; *see, e.g.*, Mars, Inc. v. Coin Acceptors, Inc., 557 F.3d 1377, 1379 (Fed. Cir. 2009); Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activities, 518 F.3d 1013, 1022 (9th Cir. 2008).

soldiers were owed backpay.[64] The Army then refused to disburse backpay—even though it had conceded in litigation that if the soldiers were entitled to reinstatement, they were also entitled to backpay.[65] The soldiers petitioned the court to recall and clarify its mandate, but the Army argued that the D.C. Circuit had already lost jurisdiction over the case and that no "extraordinary circumstances" existed to justify recall of mandate.[66] The D.C. Circuit rejected this argument, finding that courts possess the power to recall mandate to correct clerical mistakes and clarify outstanding mandates, and holding that "the misconstruction of our mandate by the Army" provided the court with "ample cause to recall [its] mandate."[67]

When the mandate itself is ambiguous or contains clerical errors, courts will still weigh public interests in finality and repose against the litigant's interest in recall.[68] But that analysis is very likely to lead courts to recall mandate. *Dilley* illustrates that when the meaning of a mandate is contested—and especially when one party is engaging in dilatory or bad faith tactics to avoid implementation of the mandate—refusing to recall mandate can prevent the parties from enjoying finality or repose.[69] As the Supreme Court pointed out in *Thompson*, "[t]he State can have little interest, based on reliance or other grounds, in preserving a mandate not

64. 627 F.2d 407, 409 (1980).

65. *Id.* at 408.

66. *Id.* at 410–11.

67. *Id.* at 410–12.

68. *See id.*; *see, e.g.*, Nat'l Sur. Corp. v. Charles Carter & Co., 621 F.2d 739 (5th Cir. 1980) (refusing to recall and correct an ambiguous mandate where the parties did not act diligently, and where recall was not necessary to "prevent injustice").

69. *See Dilley*, 627 F.2d at 412 ("When delay and misconstruction of our mandate seriously threaten its implementation, we will entertain a motion for clarification."). As noted in Part I, even before the abolition of the term-end rule, courts would nonetheless sometimes recall mandate to correct clerical errors in judgments. *See supra* note 29 and accompanying text. *But see In re* Nat'l Park Bank of N.Y., 256 U.S. 131 (1921) (holding that the term-end rule, the interest in finality, and the lack of diligence by the parties together blocked the Fifth Circuit from recalling and modifying its mandate to dispose of a particular tract of land which had been omitted from the mandate).

in accordance with the actual decision rendered by the court."[70]

2. Procedural Errors

Second, courts may recall mandates that involve a procedural error by the court—or, in rare instances, by one of the parties. When a mandate imposes harm on a litigant based on nothing more than the court's own procedural errors, the need for the court's recall power becomes plain. *Davis v. United States* presents one such case.[71] There, defendant Davis sent the Second Circuit a timely request for an extension of time to file a pro se motion for rehearing on his direct appeal.[72] The motion was postmarked weeks before the mandate issued, but it inexplicably was not stamped "received" by the court until weeks *after* the mandate issued.[73] Since the "circumstances [were] outside Davis's control"—and the court itself had ostensibly engaged in some procedural error—the Second Circuit recalled its mandate, allowing the court to consider Davis's motion for rehearing.[74]

Thompson itself is an example of a case where the court recalled a mandate that issued after the court purportedly engaged in a procedural error.[75] In that case, a panel of the Ninth Circuit denied habeas relief and "procedural misunderstandings within the court"

70. 523 U.S. 538, 557 (1998). This statement by the Court likely indicates that the special procedural hurdles associated with postconviction relief do not apply when a petitioner simply seeks recall of mandate for clarification purposes or to correct a clerical error.

71. 643 F. App'x 19 (2d Cir. 2016); *see also supra* notes 30–32 and accompanying text; N. Cal. Power Agency v. Nuclear Regul. Comm'n, 393 F.3d 223 (D.C. Cir. 2004) (recalling mandate where the clerk's office issued the mandate instead of the court, and where the mandate dismissed the case based on consent but the parties had not consented, and where the mandate failed to decide whether the agency action below should be vacated).

72. *Davis*, 643 F. App'x at 20–21.

73. *Id.* at 21.

74. *Id.* at 22. The court then denied that motion. *Id.*; *see also* Rose v. Baker, No. 17-15009, 2020 U.S. App. LEXIS 14322 (9th Cir. May 5, 2020) (recalling mandate when mandate issued inadvertently).

75. 523 U.S. at 550.

prevented the court from calling for en banc review of the denial.[76] Namely, two off-panel judges missed their opportunity to make a timely en banc call under Ninth Circuit rules—in part because email notices to one judge's chambers about the disposition of the case "fell between the cracks" during a law clerk transition.[77] Citing these procedural errors, as well as substantive errors in the mandate,[78] the en banc court later decided sua sponte to recall the mandate. But the Supreme Court held that the en banc court had abused its discretion by recalling mandate.[79]

As a threshold matter, the Supreme Court was skeptical that procedural errors had affected the Ninth Circuit's mandate.[80] And any errors that did occur were insufficiently serious to justify recall of mandate.[81] Although two judges had failed to "contribute their views" to the en banc call, other judges were able to contribute to the en banc call, and the case had received full consideration by a three-judge panel.[82] The Court further considered the fact that the Ninth Circuit stalled four months before addressing errors in the en banc call as evidence that the errors were, ultimately, of little concern.[83] Even if the case had not implicated special concerns as a state prisoner's petition for habeas relief,

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76. *Id.* at 548.

77. Thompson v. Calderon, 120 F.3d 1045, 1067–69 (Kozinski, J., dissenting) (detailing the chain of events that led to the Ninth Circuit's recall of mandate and arguing that there was "nothing at all unusual" about what occurred during the en banc call). *Contra* Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 327–40 (1999) (arguing that "nothing was usual" about the en banc call).

78. *See infra* notes 117–19 and accompanying text.

79. *Thompson*, 523 U.S. at 566.

80. *See id.* at 552 (citing 120 F.3d at 1067 (Kozinski, J., dissenting)).

81. *Id.* at 551.

82. *Id.*

83. *Id.* at 552. Although the Court, in dicta, characterized the four-month delay as "compound[ing]" the Ninth Circuit's error, *id.*, it is hard to see why a court's worsening of its own procedural mistake should affect a litigant's ability to seek and receive recall. The better explanation is that in the face of competing claims by Ninth Circuit judges regarding whether errors occurred in the en banc call, the Ninth Circuit's sluggishness is evidence that any procedural error was minor.

the Court expressed "grave doubts" that the Ninth Circuit would be able to base a decision to recall mandate on such "slight[]" procedural errors.[84] *Thompson* suggests that courts are at least somewhat limited in their power to recall mandate based on their own procedural errors. When the court's procedural error is slight, a court might abuse its discretion by recalling mandate.

In rare circumstances, courts will recall mandates that involve procedural errors by court-appointed counsel. When defendants' court-appointed counsel engage in clear "procedural errors" amounting to bad faith—like failing to seek certiorari in the face of the defendant's express wishes—a court might recall mandate as a way of extending a missed deadline.[85]

But otherwise, a procedural error by a litigant (or by counsel) will seldom justify recall of mandate. And for good reason. In the extreme, recalling mandate based on a litigant's own error could incentivize litigants to commit procedural errors as a means of avoiding potentially adverse precedent or of delaying proceedings.[86] Parties can usually avoid procedural errors by exercising diligence, and recalling mandate in cases involving litigants' procedural errors would gravely disrupt finality and encourage bad faith, so the equities almost never favor recalling mandate based on a litigant's own procedural error.[87]

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84. *Id.* at 551–53. The Court subsequently examined substantive errors in the mandate and special concerns arising from the case's posture as a habeas petition. *See infra* Part II-A(4), Part III-A.

85. In dicta, the Supreme Court has recognized that courts of appeals have the power to recall mandate in this limited circumstance. *See* Wilkins v. United States, 441 U.S. 468, 469 (1979) (per curiam).

86. *See* Brit. Int'l Ins. Co. v. Seguros La Republica, S.A., 354 F.3d 120, 124 (2d Cir. 2003) (refusing to recall mandate when the parties failed to properly notify the court, before mandate issued, that they had reached a tentative settlement); Mfrs. Hanover Tr. Co. v. Yanakas, 11 F.3d 381, 384 (2d Cir. 1993) (similar). *But cf.* IAL Aircraft Holding, Inc. v. FAA, 216 F.3d 1304 (11th Cir. 2000) (recalling mandate upon finding that the issue had become moot, and the court had thus lost jurisdiction, before the mandate issued).

87. *E.g.*, United States v. Reyes-Sanchez, 509 F.3d 837 (7th Cir. 2007) (denying prosecutor's motion to recall mandate when the need for recall arose

3. Fraud on the Court

Third, courts have the power to recall a mandate that is based on an underlying fraud on the court.[88] The most famous case examining the recall power in instances of fraud on the court is *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*[89] There, Hartford applied to the U.S. Patent Office for a patent on its "gob feeding" glass-manufacturing machine.[90] Hartford's lawyer wrote an article praising the machine as a "remarkable advance in the art of fashioning glass," and then persuaded a prominent glass expert, William Clarke, to sign the article as his own.[91] Hartford submitted the article to the Patent Office, which granted the patent.[92] When Hartford later sued Hazel for patent infringement, the district court found that no infringement had occurred.[93]

On appeal, appellant-Hartford repeatedly drew the Third Circuit's attention to the Clarke article and never disclosed the article's true authorship.[94] The Third Circuit, quoting copiously from the Clarke article, reversed the district court's decision and held that Hazel had infringed Hartford's valid patent.[95] Hazel later investigated the provenance of the article, to no avail.[96] After Clarke refused to cooperate with Hazel's investigators and signed an affidavit for Hartford reasserting his connection to the article, Hartford paid Clarke a sum of $8,000.[97]

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from the prosecutor's own "negligence"); Nelson v. James, 722 F.2d 207, 208 (5th Cir. 1984) (refusing "to remedy counsel's inadvertence"). *See infra* Part II-B (listing factors that courts will weigh in considering a petition to recall mandate).

88. *E.g.*, Fierro v. Johnson, 197 F.3d 147 (5th Cir. 1999); Workman v. Bell, 227 F.3d 331 (6th Cir. 2000); M2 Software, Inc. v. M2 Commc'ns, LLC, 463 F.3d 868, 869–70 (9th Cir. 2006) (Beezer, J., specially concurring).

89. 322 U.S. 238 (1944).

90. *Id.* at 240.

91. *Id.*

92. *Id.* at 240–41.

93. *Id.* at 241.

94. *Id.*

95. *Id.*

96. *Id.* at 242.

97. *Id.* at 243.

A decade later, Hazel asked the Third Circuit to recall its mandate on the validity of the patent.[98] The Third Circuit refused, finding that Hazel had not been diligent in pursuing its claim[99] and that the "spurious publication . . . was not the primary basis" of the Third Circuit's mandate.[100]

The case proceeded to the Supreme Court, which overturned the Third Circuit's decision and held that the existence of underlying fraud on the court *required* the Third Circuit to recall its mandate.[101] "Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments," the Supreme Court held, finding "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals."[102] Hazel may not have been diligent in pursuing its claims, but Hartford's conduct damaged the public welfare by defrauding the Patent Office and by tampering with the "integrity of the judicial process."[103] Whether or not the article was actually the "primary basis" for the Court's ruling, Hartford's lawyers clearly saw it as "material" to the validity of the patent, and the Third Circuit's refusal to recall mandate in effect

98. *Id.* at 239, 243. More precisely, Hazel filed with the Third Circuit a petition for leave to file a bill of review in the district court. *Id.* at 249. The Third Circuit construed the petition like a motion to recall mandate "since the alleged fraud had been practiced on it rather than the District Court." *Id.* at 240. At the time, parties had to obtain "appellate leave before the District Court could reopen a case which had been reviewed on appeal." Standard Oil Co. of Cal. v. United States, 429 U.S. 17, 18 (1976) (per curiam). The appellate leave requirement derived from law-of-the-case principles; without leave from the appellate court, a district court could not disturb a judgment that was entered in accordance with the appellate court's mandate. *Id.* In 1976, in the interest of judicial economy, the Supreme Court eliminated the appellate leave requirement. *Id.* at 19.

99. *Hazel-Atlas*, 322 U.S. at 243; *see infra* Part II-B(2) (arguing that courts must weigh the diligence of the parties).

100. 322 U.S. at 244. The Third Circuit also found that recall was barred by the term-end rule. *Id.* The Supreme Court overruled this decision, finding that the term end rule did not apply in cases of fraud on the court. *Id.*

101. 322 U.S. at 249.

102. *Id.* at 245.

103. *Id.* at 246.

rewarded Hartford's bad faith conduct.[104] As a result, the Supreme Court reversed the Third Circuit's decision, recalled the Third Circuit's earlier mandate, and instructed the District Court to reinstate its initial mandate denying relief to Hartford on the underlying patent infringement claim.[105]

Justice Owen J. Roberts, in dissent, argued that Hazel's unreasonable delay and lack of diligence in bringing the claims (and possible participation in the fraud[106]) should prevent Hazel from obtaining relief.[107] In Justice Roberts's view, "a party may not elect to forego inquiry and let the cause go to judgment in the hope of a favorable result and then change his position and attempt, by means of a bill of review, to get the benefit of evidence he neglected to produce."[108] Without prompt investigation of Hartford's misdeeds, Hazel could not show "clean hands" and could not claim equitable relief based on an underlying fraud on the court.[109]

Although *Hazel-Atlas* suggests that courts of appeals *must* recall mandate in cases of fraud on the court, lower courts have narrowly cabined that decision. The Fifth Circuit, for example, interprets *Hazel-Atlas* to "allow[] a judgment to be attacked on the basis of intrinsic fraud that results from corrupt conduct by officers of the court."[110] The Sixth Circuit, meanwhile,

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104. *Id.* at 246–47.

105. *Id.* at 251.

106. As Justice Roberts noted, after the 1932 suit and Hazel's investigation into the Clarke article, Hartford granted Hazel a license for use of the patented machine. *Id.* at 266. A third party then in 1933 found evidence of Hartford's fraud and sent it to Hazel. *Id.* Hazel took no action, "evidently reluctant to disturb the existing status [quo]." *Id.* Hazel did not bring the recall action or otherwise make any further attempts to attack the validity of the patent until Hazel and Hartford were named as codefendants in a 1941 antitrust suit. *Id.* at 267.

107. *Id.* at 251–71 (Roberts, J., dissenting).

108. *Id.* at 260 (Roberts, J., dissenting).

109. *Id.* at 261 (Roberts, J., dissenting).

110. Fierro v. Johnson, 197 F.3d 147 (5th Cir. 1999) (holding that a police officer who offered false testimony was not acting as an "officer[] of the court," so his testimony constituted "intrinsic fraud" that could not be the basis of a recall motion). The Fifth Circuit bases this intrinsic-extrinsic distinction on the Supreme Court's decision in *United States v. Throckmorton*, 98 U.S. 61, 67–68

narrowly defines fraud on the court to include only "a positive averment or concealment of the truth" "that deceives the court" by "an officer of the court" "under a duty to disclose" that is "directed to the judicial machinery itself" and is "intentionally false, willfully blind to the truth, or in reckless disregard for the truth."[111] And when state or federal prisoners petition for recall of mandate on the basis of an underlying fraud on the court, *Thompson* might further restrict the circuit courts' power to recall mandate.[112]

4. Substantive Errors

Fourth, courts will occasionally recall mandate in order to correct substantive errors in the merits of the underlying decision. Recall motions will allege that the court of appeals, in issuing a mandate, committed a substantive error by misapplying its own precedent,[113] state high court precedent,[114] or Supreme Court precedent.[115] When such errors of law are clear and

(1878) (holding that a district court's judgment can be set aside on the basis of fraud "extrinsic or collateral[] to the matter tried," but not on the basis of an intrinsic fraud which was "in issue in the first case and was a matter of actual contest"). For district courts, Federal Rule of Civil Procedure 60(b)(3) (granting relief from judgment based on "fraud (whether previously called intrinsic or extrinsic)") obviates the distinction between intrinsic and extrinsic frauds, but no similar provision exists within the Federal Rules of Appellate Procedure. For discussions of the continued viability of *Throckmorton*, see generally Note, *Post-Term Vacation of Judgments Obtained by Perjury*, 54 COLUM. L. REV. 403 (1954) (discussing the conceptual difficulty of distinguishing between intrinsic and extrinsic fraud in relation to perjured testimony); Dustin B. Benham, Twombly *and* Iqbal *Should (Finally!) Put the Distinction Between Intrinsic and Extrinsic Fraud out of Its Misery*, 64 SMU L. REV. 649 (2011) (advocating for the elimination of the distinction between intrinsic and extrinsic fraud).

111. Workman v. Bell, 227 F.3d 331, 336 (6th Cir. 2000) (holding in a recall of mandate case that a movant is entitled to a full evidentiary hearing to determine whether mandate was based on fraud on the court).

112. *See infra* notes 226–37 and accompanying text.

113. *E.g.*, United States v. Davila, 890 F.3d 583 (5th Cir.), *reh'g granted and opinion vacated*, 738 F. App'x 257 (5th Cir. 2018); United States v. Tapia, 816 F. App'x 619 (2d Cir. 2020).

114. *E.g.*, Sargent v. Columbia Forest Prods., Inc., 75 F.3d 86 (2d Cir. 1996); Boston & Me. Corp. v. Town of Hampton, 7 F.3d 281 (1st Cir. 1993).

115. *E.g.*, Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19 (1st Cir. 2010); United States v. Fraser, 407 F.3d 9 (1st Cir. 2005); United States v. Redd, 735

material, the court of appeals might choose to recall mandate.[116] But the power to recall mandate to correct substantive errors poses a grave danger to the interest of finality, and should only be exercised in the most dire of circumstances.

In *Thompson*, the alleged substantive error was atypical of most recall petitions. There, the Ninth Circuit panel that issued the mandate had found that the new evidence presented in Thompson's habeas petition was insufficient to reach the "miscarriage of justice" standard required under AEDPA.[117] The en banc panel then reconsidered the same evidence, found the evidence did demonstrate that a "miscarriage of justice" had occurred, and held that this substantive error of law justified recall.[118] The Supreme Court later found that the en banc panel misapplied the "miscarriage of justice" standard.[119]

More commonly, changes in federal sentencing law lead many criminal defendants to petition the courts for recall. By way of example, in *United States v. Booker*, the Supreme Court held that every fact supporting a sentence enhancement under the Federal Sentencing Guidelines must be either admitted by the defendant or decided in a jury verdict; such facts could not be found by a judge under a simple "preponderance of the evidence"

F.3d 88 (2d. Cir. 2013); Bottone v. United States, 350 F.3d 59 (2d Cir. 2003); United States v. Winkelman, 746 F.3d 134 (3d Cir. 2014); Goodwin v. Johnson, 224 F.3d 450 (5th Cir. 2000); United States v. Tolliver, 116 F.3d 120 (5th Cir. 1997); United States v. Saikaly, 424 F.3d 514 (6th Cir. 2005); Carrington v. United States, 503 F.3d 888 (9th Cir. 2007); United States v. Crawford, 422 F.3d 1145 (9th Cir. 2005); Zipfel v. Halliburton Co., 861 F.2d 565 (9th Cir. 1988).

116. *Cf.* United States v. Emeary, 773 F.3d 619, 623 (5th Cir. 2014) (denying defendant's motion for recall of mandate on his sentence where defendant could not show that the sentence was the result of "plain error"); Boston & Me. Corp. v. Town of Hampton, 7 F.3d 281, 283 (1st Cir. 1993) (refusing to recall mandate where parts of the court's reasoning, but not its judgment, were "demonstrably wrong"); Ruiz v. Norris, 104 F.3d 163, 165 (8th Cir. 1997) (refusing to recall mandate where there was no error of law).

117. 523 U.S. 538, 548 (1998).

118. *Id.* The Ninth Circuit also believed that the mandate was based on procedural errors. *See id.*; *supra* Part II-A(2).

119. 523 U.S. at 566.

standard.[120] *Booker* furthermore severed mandatory sentencing provisions from the Federal Sentencing Act, allowing judges to exercise more discretion in sentencing.[121] Yet these changes applied only to cases that were not yet final when *Booker* was issued.[122] Recall thus presented a possible avenue for extending the benefits of *Booker* to cases in which mandate had already issued.

But when such petitioners requested recall of mandate on the theory that their sentences were invalid under *Booker*, courts of appeals predominately rejected the invitation to recall mandate.[123] While it is unfair to subject some criminal defendants to longer sentences than others based on the sheer timing of when mandate issued, such unfairness is present "in any Supreme Court decision which announces a new rule applicable to criminal defendants with pending prosecutions or appeals, but which is not made retroactive to defendants whose cases are final."[124]

Only the Ninth Circuit has taken a different approach. First, while some courts have expressed willingness to recall mandates that had not yet issued at the time when *Booker* was decided,[125] the Ninth Circuit has gone so far as to recall a mandate that issued *before Booker* was decided.[126] Second, the Ninth Circuit has

120. United States v. Booker, 543 U.S. 220, 243–44 (2005).

121. *Id.* at 265.

122. *Id.* at 268.

123. *See* United States v. Saikaly, 424 F.3d 514, 518 (6th Cir. 2005); United States v. Fraser, 407 F.3d 9, 11 (1st Cir. 2005).

124. *Saikaly*, 424 F.3d at 518. Courts also rejected many of these motions to recall mandate from federal prisoners because they failed to comply with the statutory post-conviction relief requirements set forth in AEDPA. *See infra* Part III.

125. *See Saikaly,* 424 F.3d at 517; *Fraser*, 407 F.3d at 10 n.2; Carrington v. United States, 503 F.3d 888, 892 (9th Cir. 2007); *cf.* United States v. Murray, 2 F. App'x 398, 400 (6th Cir. 2001) (recalling issued mandate after the Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

126. United States v. Crawford, 422 F.3d 1145, 1146 (9th Cir. 2005) (holding that recall of mandate was proper because mandate was not yet final when the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), and that decision "foreshadow[ed] its holding in *United States v. Booker*"). *But cf. Carrington*, 503 F.3d at 892 (denying recall and treating *Crawford* as fact-bound

interpreted on-the-record statements by the sentencing judge "express[ing] explicit reservations . . . about the sentence required under the previously mandatory Sentencing Guidelines" as an "extraordinary circumstance[]" justifying recall of mandate.[127]

While recall might be an appropriate remedy when a court has made an error of law, the existence of some error of law, on its own, is not the type of "extraordinary circumstance" sufficient to justify recall of mandate.[128] The power to recall mandate, as Judge Leventhal once articulated, "is not to be availed of freely as a basis for granting rehearings out of time for the purpose of changing decisions even assuming the court becomes doubtful of the wisdom of the decision that has been entered and become final."[129] Otherwise, "all losing parties in any appeal, criminal or civil, would move to recall the mandate every time the Supreme Court or [the circuit] court *en banc* changed the law."[130] This expansive view of the recall power would not only destroy the public's interest in finality, but would also conflict with the "general rule that changes in criminal law do not apply retroactively."[131]

Courts of appeals are nonetheless inconsistent about whether an error of law is alone sufficient to justify recall

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and "at most, a minimal extension of our policy allowing for limited remands on direct appeals to consider *Booker* claims.").

127. *Crawford*, 422 F.3d at 1145; *cf.* United States v. Shipsey, 166 F. App'x 963, 965 (9th Cir. 2006) (distinguishing *Crawford*). *But see Carrington*, 503 F.3d at 893 (denying recall in a case where the trial judge "express[ed] . . . his displeasure with mandatory guidelines" on the record since "it would be unfair to countless defendants and to numerous judges to base the retroactive application of a Supreme Court opinion on the degree to which a trial judge grumbled while enforcing the extant law").

128. *See, e.g.*, Sargent v. Columbia Forest Prods., 75 F.3d 86, 90 (2d Cir. 1996); Elijah v. Dunbar, 66 F.4th 454, 462 (4th Cir. 2023). As a result, a decision denying recall is not precedential on the issue of whether the earlier judgment was rightly decided. *See* DeWeerth v. Baldinger, 38 F.3d 1266, 1271 (2d Cir. 1994).

129. Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971) (Leventhal, J.).

130. United States v. Davila, 890 F.3d 583, 591 (5th Cir.) (Barksdale, J., dissenting), *reh'g granted and opinion vacated*, 738 F. App'x 257 (5th Cir. 2018).

131. *Id.*

of mandate. The Ninth Circuit, in *Zipfel v. Halliburton Co.*, treated a change in Supreme Court precedent as a sufficient ground to recall mandate.[132] Later, in *Carrington*, the Ninth Circuit suggested that a change in the law, by itself, does not constitute an "extraordinary circumstance."[133] To obtain recall of mandate, petitioners must show "that there are [] equities that distinguish them from other defendants sentenced" under the old law.[134] Conflicting opinions in a non-precedential decision, *United States v. Davila*, reveal tensions on the Fifth Circuit about whether a change in law, without more, constitutes an "extraordinary circumstance" justifying recall of mandate.[135] Elsewhere, the Fifth Circuit has expressed that it may recall its mandate in cases of injustice, such as "when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong."[136]

Even though a change in the law should not, on its own, be treated as sufficient grounds to recall mandate, courts may find that the presence of additional factors—such as incongruity of results with codefendants, the

132. 861 F.2d 565, 567 (9th Cir. 1988).

133. Carrington v. United States, 503 F.3d 888, 893 (9th Cir. 2007) (Callahan, J.); *cf. id.* at 898 (Pregerson, J., dissenting in part) (suggesting that a change in the law plus one other factor—a unique question of timing *or* statements by a judge evincing dissatisfaction with the old law—constitutes an "extraordinary circumstance" justifying mandate recall).

134. *Id.* at 893.

135. *Compare* 890 F.3d 583, 587 (5th Cir. 2018) (Graves, J.) ("[R]ecalling the mandate is appropriate when a subsequent decision of the Supreme Court or this court renders a previous decision demonstrably wrong." (quotation omitted)), *with id.* at 591 (Barksdale, J., dissenting) ("[A] change in the law alone is insufficient to recall the mandate."). When the Supreme Court granted a writ of certiorari in the related case, *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018), *cert. granted, judgment vacated*, 139 S. Ct. 2712 (2019), the Fifth Circuit voted to rehear *Davila* en banc, vacate its decision to recall mandate, and place the motion to recall mandate in abeyance. 738 F. App'x 257 (5th Cir. 2018). The Supreme Court's decision in *Herrold* ultimately revealed that the underlying mandate in *Davila* had been correctly decided. *See* Supplemental Letter Brief from Federal Public Defender to Fifth Circuit Court Clerk, United States v. Davila, No. 16-20081 (5th Cir. Nov. 6, 2019), ECF No. 00515188478. The Fifth Circuit therefore denied the motion to recall mandate. United States v. Davila, No. 16-20081 (5th Cir. Nov. 14, 2019) (per curiam).

136. United States v. Tolliver, 116 F.3d 120, 123 (5th Cir. 1997).

diligence of the parties and unavailability of other remedies, and a diminished public interest in finality—counsel in favor of recalling mandate.[137] Part II-B will explore the applicability and weight of those factors.

B. Factors That Courts Consider

Once a court has grounds to consider recall of mandate, it weighs various factors to determine whether recall would be proper. The public interests in finality and repose create a strong presumption against recalling mandate. If a movant can show, however, that she has pursued her claim diligently and without a bad faith purpose, and that the existent mandate works an injustice, she may be able to overcome this presumption. The Supreme Court has further recognized a few public interests that may be implicated in recall proceedings: federalism, comity, and the integrity of the judicial system and other public institutions. Where those interests are present, the Supreme Court has allowed them to dwarf the other factors, drastically limiting the circuit courts' discretion in exercising the recall power.

1. Finality Interest

The public has strong interests in finality and repose,[138] and these interests nearly always weigh against recall of mandate. There are some instances in which those interests are diminished, such as when a mandate is ambiguous or contains clerical errors,[139]

137. *See* Sargent v. Columbia Forest Prods., 75 F.3d 86 (2d Cir. 1996) (granting recall based on an error of law where petitioner pursued claim diligently, little time had passed, and the equities otherwise favored petitioner); *cf.* Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19 (1st Cir. 2010) (denying recall after change in Supreme Court precedent because parties failed to exercise diligence).

138. As the Supreme Court explained in *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931), "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."

139. *See supra* note 70 and accompanying text.

when, on remand, an administrative agency has refused to implement the mandate,[140] or when mandate is not yet final.[141] In general, however, the values of finality and repose create a strong presumption that recall of mandate would be improper.

As Judge Leventhal explained in *Greater Boston Television Corp. v. FCC*, as a result of "the strong policy of repose," recall of mandate is "the exception rather than the rule."[142] "Extraordinary circumstances" must be present to overcome this presumption.[143] If courts were to disregard the presumption against recall, parties could use the recall power to endlessly harass their opponents and to call into question settled law, destroying interests in finality and repose.[144]

Finality interests appear particularly strong when a litigant moves for recall long after the mandate has already issued.[145] Many courts are rightly reluctant to recall mandate in cases that have been considered settled for years. But the public interest in finality is

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140. *See supra* note 69 and accompanying text.

141. *See* United States v. Murray, 2 F. App'x 398, 400 (6th Cir. 2001); Sun Oil Co. v. Burford, 130 F.2d 10, 19 (5th Cir. 1942) ("No one may acquire a vested interest in a decision until the time has elapsed in which the court has jurisdiction to change it."), *rev'd*, 319 U.S. 315 (1943).

142. 463 F.2d 268, 278 (D.C. Cir. 1971).

143. *See id.*; Calderon v. Thompson, 523 U.S. 538, 550 (1998); *see also* Sargent v. Columbia Forest Prods., 75 F.3d 86, 89 (2d Cir. 1996) ("The reason for parsimony in the exercise of our power to recall a mandate is the need to preserve finality in judicial proceedings.").

144. By contrast, where a decision was plainly erroneous at the time of the decision, and litigants make no effort to call into question "settled law," recalling mandate can at least promote judicial economy by allowing the court to abrogate erroneous precedent without the need for further appeals, and without becoming bound by that precedent. *See supra* note 23 and accompanying text.

145. *E.g.*, Bottone v. United States, 350 F.3d 59, 64 (2d Cir. 2003) (declining to recall a mandate that issued six years earlier); Patterson v. Haskins, 470 F.3d 645, 664 (6th Cir. 2006) (declining to recall a mandate that issued three years earlier); Carrington v. United States, 503 F.3d 888, 893 (9th Cir. 2007) (declining to recall two mandates that issued approximately eleven and six years earlier, respectively); *cf. Sargent*, 75 F.3d at 90 (granting recall of a mandate that issued five months earlier in part because "there was not a substantial lapse of time between issuance of our mandate and the present motion"); United States v. Tapia, 816 F. App'x 619, 619–20 (2d Cir. 2020) (granting recall of a mandate that issued three months earlier). *But see* United States v. Crawford, 422 F.3d 1145 (9th Cir. 2005) (granting recall of a mandate that issued over a year earlier).

always subject to balancing. Before AEDPA imposed stricter standards on recall motions in the habeas context, Wright and Miller posited that the "public interest, parallel to a defendant's interest, in correcting an improper conviction" should "counsel a more generous recall rule in criminal cases."[146] The Supreme Court, too, has disregarded the age or staleness of a mandate where the public has a special interest in recall. In *Hazel-Atlas*, the Court held that given the particular public interests in "the integrity of the judicial process" and ensuring the validity of patents,[147] the Third Circuit had "the duty and the power" to recall the mandate that it issued eleven years previously.[148] On the other hand, in *Thompson*, the Court held that the Ninth Circuit erred in recalling its 53-day-old mandate; there, the public interest in finality and the state's interests in federalism and comity all weighed against recall of mandate.[149]

These two cases might be limited to their facts. *Hazel-Atlas* dealt only with fraud on the court in a patent suit, whereas *Thompson* was expressly limited to circumstances where "a court of appeals recalls its mandate to revisit the merits of its earlier decision denying habeas relief."[150] But outside these narrow circumstances, *Hazel-Atlas* and *Thompson* together provide lower courts with little guidance about the strength of the finality interest in any particular case. A court could either abuse its discretion by failing to disturb an eleven-year-old judgment or abuse its discretion by disturbing a 53-day-old judgment.

146. WRIGHT, MILLER & COOPER, *supra* note 6, § 3938, at 880.

147. 322 U.S. 238, 246 (1944).

148. *Id.* at 250 (holding that the Third Circuit, in its 1943 decision, *Hartford-Empire Co. v. Hazel-Atlas Glass Co.*, 137 F.2d 764 (3d Cir. 1943), was required to recall a mandate it issued eleven years earlier, in 1932).

149. 523 U.S. 538, 557–58 (1998).

150. *Id.* at 557. *But see id.* at 552–53 (indicating the Court's decision would be the same absent habeas concerns).

2. Diligence of the Parties

Courts protect the public's interests in finality and repose by requiring that parties who request recall must show diligence in pursuing their claims. A court will hold that recall of mandate is inappropriate if parties have not exhibited diligence in pursuing their claims, or if they have affirmatively shown bad faith.

Although courts do not always note or consider the diligence of the parties as a factor in the recall analysis,[151] the diligence of the parties should weigh on the decision to recall mandate. The recall power is one of last resort.[152] Accordingly, it should not be exercised when "appellants have had full opportunity to press their arguments,"[153] but have either failed to press those arguments or have pressed them unsuccessfully.[154] As the D.C. Circuit has observed, "[s]urely with the normal process of appeal available, resort to the extraordinary step of recalling the mandate is unjustifiable."[155]

In some cases, a failure to engage in diligence can serve as evidence of a party's bad faith purpose. For example, in *British International Insurance Co. v. Seguros La Republica*, plaintiff-BIIC committed a procedural error, failed to remedy it until after mandate issued, and then petitioned for recall of mandate.[156] The Second Circuit intimated that BIIC's "dither[ing]" revealed BIIC's bad faith purpose, committing a procedural error so that if the court's decision created a precedent adverse to BIIC's interests, BIIC could later simply push to have the undesirable precedent recalled.[157]

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151. *E.g.*, United States v. Crawford, 422 F.3d 1145 (9th Cir. 2005).

152. *Thompson*, 523 U.S. at 550.

153. Johnson v. Bechtel Assocs. Pro. Corp., 801 F.2d 412, 416 (D.C. Cir. 1986).

154. *See* Bronson v. Schulten, 104 U.S. 410, 417–18 (1881).

155. *Johnson*, 801 F.2d at 416; *see also* Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 23 (1st Cir. 2010); *In re* Kunkle, 398 F.3d 683, 685 n.2 (5th Cir. 2005).

156. 354 F.3d 120, 122 (2d Cir. 2003).

157. *Id.* at 124.

Likewise, the First Circuit declined to recall mandate in *Conley* in part because it feared that the defendant had tactically chosen not to make an undesirable argument when it had the opportunity to do so below, and granting recall based on that argument would give the defendant a second bite at the apple.[158] When, as in *Seguros* and *Conley*, the "opportunity for abuse" is present, courts should be especially wary of exercising the recall power.[159]

Yet these decisions from the courts of appeals—denying motions to recall mandate based on the movant's lack of diligence or actual bad faith purposes—are in some tension with the Supreme Court's decision in *Hazel-Atlas*. There, the Supreme Court found that recall was proper "even if Hazel did not exercise the highest degree of diligence."[160] The majority was unpersuaded by the dissent's argument that Hazel should not get the benefit of recall after it swept Hartford's fraud under the rug so that it could profitably license Hartford's fraudulently-obtained patent.[161] Justice Black, writing for the majority, explained that even Hazel's lack of diligence must be balanced against public interests in preventing fraud on the courts and on the patent system.[162] A litigant might forfeit her own interests in recall by failing to engage in due diligence, but she may not forfeit the public's interests. Although evidence of lack of diligence or bad faith purpose will usually lead courts to reject a motion for recall of mandate, *Hazel-Atlas* suggests that exceptionally strong public interests will still allow recall.

158. Conley v. United States, 323 F.3d 7, 13 n.4, 14 (1st Cir. 2003).

159. *Seguros*, 354 F.3d at 124.

160. 322 U.S. 238, 246 (1944).

161. *See supra* note 103 and accompanying text. Such a scheme would likely violate current U.S. antitrust laws. *See* FTC v. Actavis, Inc., 570 U.S. 136 (2013) (holding that a settlement agreement in patent infringement involving reverse payment may violate antitrust laws).

162. *Hazel-Atlas*, 322 U.S. at 247.

3. Injustice

In cases where the mandate rests on a substantive error of law, a court may find that "extraordinary circumstances" exist if refusing to recall the mandate would work an "injustice."[163] Sometimes courts measure "injustice" in terms of harm.[164] The Ninth Circuit in *Crawford*, for example, recalled mandate because the movant could show that, absent the substantive error of law, the trial judges would actually have shortened his criminal sentence.[165] Typically, however, when there has been an error of substantive law, courts will measure the resulting "injustice" in terms of "incongruous results."[166] In the criminal context, a defendant might suffer "incongruous results" from a failure to recall mandate if, as a result of the court's error, the defendant faces a significantly longer sentence than similarly-situated defendants.[167]

Courts that focus on the incongruity of results inevitably must answer a thorny question of control group selection. They must not only determine whether the defendant's sentence is "incongruent," but also specify incongruent compared *to whom*? When an error of law leads a defendant's sentence to be much greater than that of his codefendant, the "incongruity of results" is clear, and courts will generally recall mandate if the incongruity is sufficiently unjust.[168] When a defendant's

163. *See* Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C. Cir. 1971); 5TH CIR. R. 41.2 ("Once issued a mandate will not be recalled except to prevent injustice.").

164. *E.g.*, Dilley v. Alexander, 627 F.2d 407, 411 (D.C. Cir. 1980) (measuring the "injustice" from the Army's failure to implement the D.C. Circuit's ambiguous mandate in terms of "the harm inflicted upon appellants," including the loss of their careers and attendant benefits).

165. *See supra* note 127 and accompanying text.

166. *See*, *e.g.*, Bottone v. United States, 350 F.3d 59, 64–65 (2d Cir. 2003); United States v. Tolliver, 116 F.3d 120, 123 (5th Cir. 1997).

167. *See* United States v. Davila, 890 F.3d 583, 590–91 (5th Cir. 2018) (Barksdale, J., dissenting).

168. *E.g.*, *Tolliver*, 116 F.3d at 123–24. *But see Bottone*, 350 F.3d at 59–65. *Bottone* noted that there was "some inequity" where the defendant, Bottone, was sentenced prior to the new guidelines in *Apprendi v. New Jersey*, 530 U.S. 466

sentence is merely greater than that of "similarly situated defendants," rather than codefendants, the argument for recall appears more tenuous. Some courts will grant recall in such cases,[169] whereas others might require a showing that the defendant's outcome was incongruent with the results of another case arising from the same factual situation.[170]

Neither approach is fully satisfying. Taking the former, broader approach raises complex factual questions about the timing of proceedings in order to determine which defendants are truly "similarly situated."[171] On the other hand, applying the narrower approach and recalling mandate only when there is an incongruity of results among codefendants provides a windfall to those who commit crimes as part of a conspiracy, while effectively denying recall to defendants who act alone.

Although courts generally treat the presence of some "injustice" as a necessary condition for recalling mandate, the Ninth Circuit in *Crawford* indicated that it is also a *sufficient* condition.[172] This minority position is likely incorrect under *Thompson*. While sufficiently strong instances of "injustice" may convince a court to recall mandate, *Thompson* indicates that the presence of injustice must be balanced against other factors.[173] Even

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(2000), and received a 30-year sentence, while his codefendant, Colon, was sentenced after *Apprendi* and was thus subject to a 20-year maximum sentence. *Bottone*, 350 F.3d at 64–65. The Second Circuit in *Bottone* held this was "not the kind of grave, unforeseen contingency that makes recall of the mandate appropriate." *Id.* at 65 (quotation and alteration omitted).

169. *E.g.*, *Davila*, 890 F.3d at 588 (Graves, J.). *Cf.* Sargent v. Columbia Forest Prods., 75 F.3d 86, 90 (2d Cir. 1996) (examining incongruent results between similarly situated litigants in two civil cases).

170. *E.g.*, *Davila*, 890 F.3d at 592 (Barksdale, J., dissenting).

171. *E.g.*, *id.* at 591–92.

172. 422 F.3d 1145, 1145–46, 1146 n.2; *see also* Carrington v. United States, 503 F.3d 888, 898 (9th Cir. 2007) (Pregerson, J., dissenting in part) (arguing that under *Crawford*, a showing of either type of injustice—harm or incongruity of results—is sufficient to recall mandate); Verrilli v. City of Concord, 557 F.2d 664, 665 (9th Cir. 1977) (treating injustice as a sufficient factor justifying recall).

173. *See* 523 U.S. 538, 558 (1998) (balancing the courts' need "to remedy actual injustice" against the state's "sovereign power to punish offenders" to find that, in the habeas context, courts abuse their discretion in recalling mandate "unless

where the potential for injustice weighs strongly in favor of recalling mandate, courts must still take cognizance of interests in finality, federalism, comity, and the like.

4. Other Strong Public Interests

Certain public interests, when present, place a thumb on the scale in the court's recall analysis. Indeed, the two cases where the Supreme Court reversed the circuit court's recall decisions involved such public interests. First, in *Hazel-Atlas*, the Court indicated that where a recall motion implicates interests in preventing fraud on the court and fraud on the patent office, courts of appeals must recall mandate.[174] Second, in *Thompson*, the Court held that since mandate petitions in habeas cases involving state prisoners implicate state interests in finality, federalism, and comity, the power of federal courts to recall mandate in those cases is subject to special restrictions.[175] Courts may not recall mandate in habeas cases involving state prisoners unless they comply with the statutory habeas requirements protecting state interests, and unless recall is necessary to prevent a miscarriage of justice.[176]

Still, not every public interest seems to weigh equally in the recall analysis. As Judge Reinhardt pointed out, the Ninth Circuit's decision to recall mandate in *Thompson* implicated public interests in ensuring fair trials and in preventing erroneous executions.[177] But the Supreme Court's analysis overturning the Ninth Circuit's recall of mandate never once mentioned those important interests.[178]

[they] act[] to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence").

174. 322 U.S. 238, 245–46 (1944).

175. 523 U.S. 538, 553–58 (1998); *accord* Bell v. Thompson, 545 U.S. 794, 812 (2005) (identifying the interests that motivated the "presumption against recalling the mandate" in *Thompson* as "federalism concerns," "the State's reliance interest," "finality," and "comity").

176. *See infra* Part III (explaining the limits of *Thompson*).

177. Reinhardt, *supra* note 77, at 345.

178. *Id.*; Calderon v. Thompson, 523 U.S. 538 (1998).

III. THE HABEAS CASE

While the power to recall mandate is part of the inherent power of the judiciary, "the judicial power is not boundless."[179] As the Supreme Court has explained, "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for these courts were created by act of Congress."[180] Congress, by passing AEDPA, restrained the power of lower courts to recall a mandate that denies habeas relief.[181] Although *Thompson* is expressly limited to habeas dispositions involving *state* prisoners, I argue that AEDPA also applies to recall motions when the underlying mandate involves issues of postconviction review for *federal* prisoners.

Even so, AEDPA does not always bar courts from granting postconviction relief. Courts may sometimes grant recall motions brought by state or federal prisoners, so long as mandate recall is consistent with the text of AEDPA and properly balances the relevant public interests.

A. AEDPA and the "Miscarriage of Justice" Standard

State and federal prisoners applying for postconviction relief from a federal court are governed by a parallel set of statutes. State prisoners may first seek a writ of habeas corpus in state court. Later, once the state remedies are exhausted,[182] state prisoners may seek a writ of habeas corpus in federal court under 28 U.S.C. § 2241 subject to the restrictions in § 2254. If that petition is denied, state prisoners may present new claims by filing successive federal habeas petitions under 28 U.S.C. § 2244.

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179. United States v. Williams, 790 F.3d 1059, 1070 (10th Cir. 2015).

180. Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) (quotation and brackets omitted).

181. *See Thompson*, 523 U.S. at 553.

182. *See* 28 U.S.C. § 2254(b)(1).

But § 2244, as amended by AEDPA, strictly limits the ability of state prisoners to obtain habeas relief in successive petitions.[183] Before filing a successive petition in the district court, the petitioner must receive a certificate of appealability by the court of appeals.[184] New claims raised in a successive petition "shall be dismissed" unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and the petition alleges facts that, if proven to be true, would show "by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense."[185]

Federal prisoners, meanwhile, can seek postconviction relief under 28 U.S.C. § 2255 by filing a motion to vacate, set aside, or correct a sentence. In the first instance, a § 2255 motion may allege that a sentence was imposed in violation of the Constitution or of federal statute, that the sentencing court lacked jurisdiction, that a sentence exceeds statutory maximums, or that the sentence "is otherwise subject to collateral attack."[186] But if the motion is denied, a federal prisoner, like a state prisoner, must receive a certificate of appealability from the court of appeals before filing a successive motion.[187] AEDPA further requires that courts of appeals may only certify successive petitions if they contain "newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense," or if they rely on "a new rule of constitutional law, made retroactive to cases on

183. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214.

184. 28 U.S.C. § 2244(b)(3)(A).

185. *Id.* § 2244(b)(2).

186. 28 U.S.C. § 2255(a).

187. 28 U.S.C. § 2255(h).

collateral review by the Supreme Court, that was previously unavailable."[188]

Thompson expressly concerned the ability of federal courts to recall mandate for state prisoners, not federal prisoners. In that case, a California state prisoner petitioned for state habeas relief three times.[189] After all three petitions were denied, he brought a federal habeas petition based on an ineffective assistance of counsel claim, which the district court granted.[190] A unanimous three-judge panel of the Ninth Circuit reversed that decision in an opinion dated June 19, 1996.[191]

Thompson filed a petition for rehearing and a suggestion for rehearing en banc, which circulated to each active judge of the court.[192] Due to some malfunctioning of the email system or a law clerk transition, however, two judges missed the notice.[193] No judge requested an en banc call, and the panel denied the petition and rejected the suggestion on March 6, 1997.[194] After Thompson sought and was denied certiorari, the Ninth Circuit's mandate finally issued on June 11, 1997.[195] On July 22, Thompson filed a motion for recall of mandate, which the panel quickly denied.[196]

Then in August, before Thompson was set to be executed, the en banc Ninth Circuit voted sua sponte to recall the June 11 mandate because the court believed it had committed procedural errors, and "on the basis of the claims and evidence presented in Thompson's first federal habeas petition."[197] The en banc majority specifically held that, since they were acting sua sponte

188. *Id.*
189. 523 U.S. 538, 545 (1998).
190. *Id.*
191. *Id.*
192. *Id.* at 546.
193. *Id.* at 546, 550–51; *see* Part II-A(2) (discussing whether the Ninth Circuit committed a procedural error in *Thompson* that could justify recall of mandate).
194. *Thompson*, 523 U.S. at 546.
195. *Id.*
196. *Id.* at 546–47.
197. *Id.* at 548.

and not ruling on any successive petition by Thompson, § 2244 did not impede the court's ability to grant relief.[198]

The Supreme Court reversed that decision. The Court made clear that if the Ninth Circuit had been ruling on Thompson's July 22 motion for recall of mandate, it would have been bound by AEDPA's statutory limitations on successive habeas petitions.[199] Even though the court of appeals technically recalled its mandate sua sponte on the basis of a state prisoner's first federal habeas petition—and thus did not "contravene the letter of AEDPA"—the court of appeals was still bound to respect the interests in finality, federalism, and comity underlying the Supreme Court's habeas corpus jurisprudence.[200] As a result, the Court held that "where a federal court of appeals sua sponte recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."[201]

In sum, *Thompson* stands for the proposition that courts of appeals must apply AEDPA's statutory limits to recall motions based on underlying habeas petitions. Even where courts recall mandate in habeas cases sua sponte, and not based on a successive petition, the public interests in finality, federalism, and comity prohibit recall of mandate unless the failure to recall mandate would constitute a "miscarriage of justice."

B. Lower Courts Err by Failing to Apply AEDPA to Recall Motions Brought Pursuant to Federal Postconviction Review

While *Thompson* squarely controls the ability of federal courts of appeals to recall mandate in habeas cases involving state prisoners, courts are split over

198. Thompson v. Calderon, 120 F.3d 1045, 1049 (9th Cir. 1997).
199. 523 U.S. at 554.
200. *Id.*
201. *Id.* at 558.

whether *Thompson* applies with equal force to motions for recall of mandate by federal prisoners. The Second, Third, Sixth, and Seventh Circuits hold that *Thompson* applies with equal force to both state and federal postconviction review,[202] but the issue remains "murky, to say the least."[203] In particular, the First Circuit found *Thompson* to be "distinguishable" because *Thompson* implicated state rather than "intra-federal" proceedings.[204] Still more courts will analyze recall petitions brought by federal prisoners separately and apart from AEDPA's statutory requirements, without ever considering whether that analysis is proper under *Thompson*.[205]

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202. Bottone v. United States, 350 F.3d 59, 64 (2d Cir. 2003); United States v. Fabian, 555 F.3d 66, 68 (2d Cir. 2009); United States v. Winkelman, 746 F.3d 134, 135 (3d Cir. 2014); United States v. Wilson, No. 07-6086, 2020 U.S. App. LEXIS 17341 (6th Cir. June 1, 2020); Gray-Bey v. United States, 209 F.3d 986, 988 (7th Cir. 2000); *see also* United States v. Saikaly, 424 F.3d 514, 518 (6th Cir. 2005) (citing favorably post-*Booker* cases that hold that motions for recall of mandate cannot be used to obtain relief that would be unavailable under § 2255).

203. United States v. Emeary, 773 F.3d 619, 622 (5th Cir. 2014).

204. Conley v. United States, 323 F.3d 7, 14 (1st Cir. 2003). *But cf.* United States v. Fraser, 407 F.3d 9, 11 (1st Cir. 2005).

205. *See, e.g.*, *In re* Hunter, No. 20-1721, 2020 U.S. App. LEXIS 35668 (6th Cir. Nov. 12, 2020) (denying leave to file a successive petition under § 2255, but analyzing petitioner's recall motion without reference to § 2255); Carrington v. United States, 503 F.3d 888 (9th Cir. 2007) (denying petitioner's writ of *audita querula* after construing it as a successive petition under § 2255, but analyzing petitioner's recall motion without reference to § 2255); United States v. Crawford, 422 F.3d 1145 (9th Cir. 2005) (granting federal prisoner's recall motion without reference to § 2255); United States v. Tapia, 816 F. App'x 619 (2d Cir. 2020) (same); *see also* Nnebe v. United States, 534 F.3d 87 (2d Cir. 2008) (construing pro se federal prisoner's appeal from a district court's denial of an earlier § 2255 motion instead as a motion to recall mandate, and granting recall without addressing the relevant § 2255 limitations); Davis v. United States, 643 F. App'x 19 (2d Cir. 2016) (same); United States v. Smith, 321 F. App'x 229 (4th Cir. 2008) (same), *cert. granted, judgment vacated,* 556 U.S. 1279 (2009); United States v. Fernandez, 397 F. App'x 433, 438–41 (10th Cir. 2010) (O'Brien, J., concurring) (applying the Second Circuit's analysis in *Nnebe*, but holding on the facts that circumstances were less "extraordinary" than in *Nnebe*, so petitioner's appeal from the denial of his § 2255 motion should not be construed as a motion to recall mandate); United States v. Capers, 182 F. App'x 207 (4th Cir. 2006) (holding that petitioner had not alleged "extraordinary circumstances," so petitioner's appeal from the denial of his § 2255 motion should not be construed as a motion to recall mandate).

The Supreme Court's decisions in *Gonzalez v. Crosby*[206] and *Banister v. Davis*,[207] however, suggest that AEDPA applies to all postconviction recall motions—whether brought by state or federal prisoners. When a district court denies a defendant's motion for postconviction relief, defendants sometimes subsequently bring motions under Federal Rule of Civil Procedure 60(b) requesting relief from the district court's judgment. In *Gonzalez*, the Court found that treating these two motions as one "petition" for AEDPA purposes would create "substantive conflict" with AEDPA's requirements and effectively "circumvent" AEDPA's successive-petition bar.[208] As a result, the Court held that such Rule 60(b) motions are "successive petitions" under AEDPA.[209]

In *Banister*, by contrast, the Court held that motions under Federal Rule of Civil Procedure 59(e) to alter or amend a district court's judgment are not substantively distinct from the underlying judgment, and thus are not subject to AEDPA's bar on successive petitions.[210] The Court distinguished Rule 59(e) motions from Rule 60(b) motions in four important ways. First, "Rule 59(e) derives from a common-law court's plenary power to revise its judgment during a single term of the court, before anyone could appeal," whereas "Rule 60(b) codifies various writs used to seek relief from a judgment at any time after the term's expiration—even after an appeal had (long since) concluded."[211] Second, "it is practically impossible to find a case dismissing a Rule 59(e) motion for raising repetitive claims," whereas "decisions abound dismissing Rule 60(b) motions for that reason."[212] Third, Rule 59(e) motions may only be brought within a "28-day window," whereas Rule 60(b) motions may be brought,

206. 545 U.S. 524 (2005).
207. 140 S. Ct. 1698 (2020).
208. *Gonzalez*, 545 U.S. at 532.
209. *Id.* at 531.
210. *Banister*, 140 S. Ct. at 1708.
211. *Id.* at 1709.
212. *Id.*

"depending on the reason given for relief, within either a year or a more open-ended 'reasonable time.'"[213] Fourth, appeal of a Rule 59(e) motion "merges into" appeal of the underlying judgment for appellate review, promoting judicial economy, whereas appeal of a Rule 60(b) motion is "independent of the appeal of the original petition" and "does not bring up the underlying judgment for review."[214] The Court therefore held that while Rule 60(b) motions can constitute "successive petitions" under AEDPA, Rule 59(e) motions do not.

Applying the *Banister* factors, a motion for recall of mandate—whether brought by a state or federal prisoner—is more similar to a Rule 60(b) motion than a Rule 59(e) motion, and thus for AEDPA purposes should be treated as a separate "application,"[215] independent of any prior applications which gave rise to the mandate. Like a Rule 60(b) motion, the power to recall mandate derives from a court's power to revise its judgment—a power that was expansive during the court's term, but also extended in a more limited fashion beyond the term's expiration.[216] As with Rule 60(b) motions, decisions abound where courts have dismissed motions to recall mandate on the basis that they raised repetitive claims.[217] Movants may bring recall motions for years after a court issues its mandate,[218] and the appeal of a decision to deny recall does not bring up the underlying

213. *Id.* at 1710 (quoting FED. R. CIV. P. 60(c)(1)).

214. *Id.* (citation omitted).

215. 28 U.S.C. § 2244(b).

216. Contrary to the characterization in *Banister*, the recall power, Rule 59(e), and Rule 60(b) are all traceable to the inherent power of the courts to correct their own judgments. *See supra* Part I. While *Banister* characterizes Rule 60(b) as codifying the old writs, 140 S. Ct. at 1709, those writs primarily suspended the operation of the term-end rule. Moore & Rogers, *supra* note 27, at 629–30. It was the inherent power to correct its judgments which allowed the court to act on the old writs. *Id.* at 627, 629.

217. *E.g.*, Legate v. Maloney, 348 F.2d 164, 165–66 (1st Cir. 1965); Fine v. Bellefonte Underwriters Ins. Co., 758 F.2d 50, 54 (2d Cir. 1985); Tippins v. Caruso, No. 17-1508, 2020 U.S. App. LEXIS 21419, at *2 (6th Cir. July 9, 2020).

218. *E.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944) (recall requested a decade after mandate issued).

judgment for review.[219] In short, a motion to recall mandate, like a Rule 60(b) motion, stands apart from the underlying judgment. *Thompson* correctly found that a motion to recall mandate is an independent application for postconviction relief to which AEDPA applies.[220]

Since none of the *Banister* factors pertains to differences between relevant state and federal interests, there is no reason to believe that AEDPA applies to recall motions by state prisoners but not by federal prisoners. *Banister* and *Gonzalez* each define the scope of what constitutes a "successive" application under § 2244, and the language in § 2244(b) governing "successive" applications for state prisoners is parallel to the language in § 2255(h) governing "successive" motions for federal prisoners.[221]

Nonetheless, even though the reasoning of *Banister* suggests that both state and federal prisoners are bound by the text of AEDPA, they are still bound by *different provisions* of AEDPA, so their recall motions will arise in different postures. When a conviction issues in state court, the defendant's case will only arise in federal court once he brings a federal collateral attack, such as a § 2241 habeas claim. Thus, a state prisoner's recall motion will always follow some previous collateral attack, and will always run up against AEDPA's strict limits on successive petitions.[222] When a conviction issues in federal court, on the other hand, a defendant's first collateral attack might be a motion to recall mandate on the circuit court's affirmance of the underlying conviction.[223] In that instance, the motion to recall mandate will be subject to the more permissive

219. *See* Calderon v. Thompson, 523 U.S. 538 (1998) (reversing the Ninth Circuit's recall of mandate without addressing the merits of the underlying conviction).

220. *See id.* at 553–54.

221. *See* Banister v. Davis, 140 S. Ct. 1698, 1705–06 (2020); Gonzalez v. Crosby, 545 U.S. 524, 531–32 (2005); 28 U.S.C. § 2255(h) ("A second or successive motion must be certified as provided in section 2244.").

222. *See* 28 U.S.C. § 2244.

223. *E.g.*, United States v. Tapia, 816 F. App'x 619, 619 (petitioner sought recall of the court's mandate affirming the underlying conviction).

§ 2255(a) standard (governing initial collateral attacks) rather than the stricter § 2255(h) standard (governing successive motions). Although AEDPA applies to motions to recall mandate pursuant to both state and federal convictions, the differences in AEDPA's statutory scheme for state and federal prisoners could have an outsized impact on a court's ability to grant recall in a particular case.[224]

C. Courts May Sometimes Recall Mandate Consistent With AEDPA

While AEDPA applies with equal rigor to recall motions by state and federal prisoners, not every recall motion faces substantive limitations under AEDPA. First, when a federal prisoner files a recall motion in place of a first motion for postconviction relief under § 2255(a), AEDPA does not impose enormous restrictions.[225] Second, *Thompson* establishes that when a court sua sponte recalls its mandate without relying on "any new evidence or claims" by the defendant,[226] the court is not acting pursuant to the defendant's "application," and AEDPA does not apply.[227] Third, there is some debate among circuit courts about whether AEDPA applies at all when a prisoner applies for postconviction relief based on a claim of fraud on the

224. Even so, as a practical matter, there is little incentive for a federal prisoner to bring a recall motion rather than a habeas petition. Both motions are subject to the same restrictions under § 2255, so a federal prisoner who files a recall motion on direct review would largely be sacrificing the possibility of winning a subsequent motion for relief under § 2255.

225. *Compare* § 2255(a), *with* § 2255(h). *See also* 7 WAYNE R. LAFAVE ET. AL, CRIM. PROC. § 28.9(b), *Limits on Relief Under § 2255* (4th ed. 2022) (characterizing § 2255 as providing "somewhat more generous review" than §§ 2244 and 2254).

226. Calderon v. Thompson, 523 U.S. 538, 548 (1998).

227. More specifically, in *Thompson*, the Ninth Circuit sua sponte recalled its mandate based on the arguments in Thompson's initial habeas application under § 2254 rather than his later motion for recall of mandate, a successive petition under § 2244. *See* 523 U.S. at 553–54. In that case, the decision to recall mandate was subject to the limits in § 2254 rather than § 2244. *See id.*

court.[228] If it does not, then AEDPA must not impose substantive restrictions on the ability of courts to recall mandate based on prisoners' claims of fraud on the court.[229]

Gonzalez v. Crosby establishes one final important carve-out to AEDPA: Postconviction motions that do not challenge the merits of the underlying conviction are not subject to AEDPA.[230] A Rule 60(b) motion challenging a court's interpretation of the applicable statute of limitations on habeas petitions, for example, does not attack the underlying conviction, so prisoners may bring such motions without meeting AEDPA's strict requirements.[231]

As a result, AEDPA should not restrict a court's power to recall mandate to correct a clerical or scheduling error—so long as the error correction does not disrupt the underlying conviction.[232] Where, for example, prisoners miss the deadline for filing a petition for writ of certiorari, AEDPA does not bar the court of appeals from extending the deadline by recalling and immediately reentering mandate.[233]

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228. *Compare* Workman v. Bell, 227 F.3d 331, 335 (6th Cir. 2000) ("[C]ases of fraud upon the court are excepted from the requirements of section 2244."), *with* United States v. Williams, 790 F.3d 1059, 1070 (10th Cir. 2015) (agreeing with the government's argument that "AEDPA limits a court's inherent authority . . . even if the petition alleges fraud on the court."). *See also* Hack, *supra* note 6, at 203 ("*Thompson* seems to establish an exception to AEDPA's successive petition rules for petitioners alleging fraud upon the court.").

229. This rule would comport with *Thompson*'s explicit statement that its holding does not encompass cases of fraud on the court. *See* 523 U.S. at 557.

230. *See* 545 U.S. 524, 533–34, 539 n.1 (2005).

231. *Id.* at 533–36.

232. Procedural errors that do affect the validity of the underlying conviction must meet the AEDPA requirements. *See* United States v. Locascio, No. 17-1126, 2017 WL 8897004 (2d Cir. Oct. 20, 2017) (finding that motion to recall mandate fails to meet § 2255(h) successive petition requirements where movant asserts that the convicting judge should have recused himself).

233. *See, e.g.*, Wilkins v. United States, 441 U.S. 468, 469 (1979) (per curiam); Nnebe v. United States, 534 F.3d 87 (2d Cir. 2008); Davis v. United States, 643 F. App'x 19 (2d Cir. 2016); United States v. Smith, 321 F. App'x 229 (4th Cir. 2008), *cert. granted*, *judgment vacated*, 556 U.S. 1279 (2009); United States v. Fernandez, 397 F. App'x 433, 438–41 (10th Cir. 2010) (O'Brien, J., concurring); United States v. Capers, 182 F. App'x 207 (4th Cir. 2006).

Ultimately, a finding that AEDPA does not apply should begin rather than end the court's analysis. Even when AEDPA does not bar courts from recalling mandate, the recall power remains "one of last resort."[234] Recall of mandate is only appropriate in a limited set of circumstances,[235] and courts still must weigh competing interests in finality, preventing injustice, and other factors.[236] While courts generally may exercise discretion in balancing these interests, *Thompson* greatly reins in that discretion when recall would implicate state interests in finality, federalism, and comity.[237] In such circumstances, courts of appeals may only recall mandate in order to prevent a "miscarriage of justice."[238]

IV. CONCLUSION

Courts of appeals possess an inherent power to recall mandate and revisit their past decisions. Although this power was once tightly restrained by the term-end rule, courts of appeals now have broad discretion to recall their mandates. Unsurprisingly, they are frequently asked to exercise this power. But overzealous attempts to amend past works can sow confusion and destabilize settled principles.[239] Courts should accordingly exercise caution in granting recall, and should approach recall motions systematically under one unified framework.

Recall is appropriate in only a few circumstances, such as when the mandate is ambiguous or contains clerical errors, when it is infected with the court's own procedural errors, when it is the product of fraud on the court, or when it announces an erroneous statement of

234. *Thompson*, 523 U.S. at 550.

235. *See supra* Part II-A.

236. *See supra* Part II-B.

237. *See supra* note 175 and accompanying text.

238. *Thompson*, 523 U.S. at 558.

239. *See generally* J.K. ROWLING, HARRY POTTER AND THE CURSED CHILD (2016) (in which the protagonists' use of a device to travel backward in time alters past events—despite the suggestion in previous *Harry Potter* books that such devices cannot change what has already happened).

the law. Even in such circumstances, courts should weigh competing factors before granting mandate, such as the interests in finality and repose, the diligence or bad faith of the parties, the risk of harm or incongruent results, and the presence of other strong public interests. And courts must remain cognizant of the requirements of AEDPA, which severely restrict the judicial power to recall mandate and grant postconviction relief to both state and federal prisoners. Use of this framework preserves the recall power, not as a substitute for ordinary judicial process, but as an extraordinary remedy for extraordinary circumstances.