Nos. 18-1222 and 18-6992

In the Supreme Court of the United States

CHRISTOPHER ANDRE VIALVA, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

BRANDON BERNARD, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASES

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioners' challenge to the denial of their motions under Federal Rule of Civil Procedure 60(b) to reopen judgments denying relief on collateral attacks under 28 U.S.C. 2255, which the district court dismissed as uncertified successive Section 2255 motions under 28 U.S.C. 2255(h), did not warrant a certificate of appealability.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. *Vialva et al.*, No. 6:99-cr-70 (June 16, 2000) (judgments of conviction)

United States v. *Vialva et al.*, No. 6:99-cr-70 (Mar. 26, 2001) (judgment of conviction for codefendant Tony Sparks following guilty plea)

United States v. *Vialva et al.*, No. 6:99-cr-70 (Sept. 28, 2012) (judgment denying Section 2255 relief)

Bernard v. *United States*, No. 6:04-cv-164 (judgment and order filed in No. 6:99-cr-70 on Sept. 28, 2012 and Dec. 20, 2017)

Vialva v. *United States,* No. 6:04-cv-163 (judgment and order filed in No. 6:99-cr-70 on Sept. 28, 2012 and Dec. 21, 2017)

United States v. *Vialva et al.*, No. 6:99-cr-70 (Dec. 20 and 21, 2017) (orders denying Rule 60(b) motions)

United States v. *Vialva et al.*, No. 6:99-cr-70 (Mar. 19, 2018) (amended judgment of conviction of Tony Sparks following resentencing)

United States Court of Appeals (5th Cir.):

United States v. *Sparks*, No. 01-50405 (Dec. 14, 2001) (direct appeal of codefendant Tony Sparks)

United States v. *Bernard et al.*, No. 00-50523 (July 19, 2002) (direct appeal)

United States v. *Bernard et al.*, Nos. 13-70013, 13-70016 (Aug. 11, 2014) (proceedings regarding denial of Section 2255 relief)

United States v. *Vialva et al.*, Nos. 18-70007, 18-70008 (Sept. 14, 2018) (proceedings regarding denial of Rule 60(b) motions)

United States v. *Sparks*, No. 18-50225 (Oct. 24, 2019) (direct appeal of codefendant Tony Sparks following resentencing)

Supreme Court of the United States:

Vialva v. *United States*, No. 02-8448 (June 16, 2003)

Bernard v. *United States*, No. 02-8492 (June 16, 2003)

Bernard v. *United States*, No. 14-8071 (Jan. 19, 2016)

Vialva v. *United States*, No. 14-8112 (Feb. 29, 2016)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 904 F.3d 356.[1] The order of the district court (Pet. App. 15a-22a) is unreported. Prior opinions of the court of appeals are reported at 299 F.3d 467 and 762 F.3d 467.

[1] Citations to the petition appendix in this brief are to the petition appendix in No. 18-1222.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2018. A petition for rehearing was denied on November 19, 2018 (Pet. App. 23a-24a). The petition for a writ of certiorari in No. 18-6992 was filed on December 7, 2018. On February 6, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 19, 2019, and the petition in No. 18-1222 was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of carjacking resulting in death, in violation of 18 U.S.C. 2119 and 2 (Count 1); conspiracy to commit murder, in violation of 18 U.S.C. 1117 (Count 2); and the first-degree murders of Todd Bagley (Count 3) and Stacie Bagley (Count 4) in the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111(b) and 2. *United States* v. *Bernard*, 299 F.3d 467, 473 (5th Cir. 2002), cert. denied, 539 U.S. 928 (2003). After a bifurcated penalty-phase hearing, the jury unanimously recommended that petitioner Vialva be sentenced to death on all three capital counts (Counts 1, 3, and 4) and that petitioner Bernard be sentenced to death on Count 4 (for Stacie Bagley's murder). *Ibid.* The district court imposed the recommended capital sentences and terms of life imprisonment for the remaining counts. *Ibid.* The court of appeals affirmed, *id.* at 489, and this Court denied certiorari, 539 U.S. 928.

Petitioners moved to vacate their sentences under 28 U.S.C. 2255. In 2012, the district court denied those

motions and declined to issue certificates of appealability (COAs). 9/28/2012 Order (D. Ct. Doc. (Doc.) 449). The court of appeals denied applications for COAs, and this Court denied certiorari. *United States* v. *Bernard*, 762 F.3d 467, 470 (5th Cir. 2014), cert. denied, 136 S. Ct. 892, and 136 S. Ct. 1155 (2016).

In late 2017, petitioners moved under Federal Rule of Civil Procedure 60(b)(6) for relief from the district court's 2012 judgment denying their Section 2255 motions. Pet. App. 3a, 16a. The district court dismissed the Rule 60(b) motions for lack of jurisdiction as uncertified successive Section 2255 motions and declined to issue COAs. *Id.* at 15a-22a. The court of appeals denied applications for COAs. *Id.* at 1a-14a.

1. In June 1999, petitioners and other members of a street gang in Killeen, Texas, carjacked and murdered Todd and Stacie Bagley. 299 F.3d at 471-473. Petitioner Vialva and two other gang members initially developed a plan to abduct and rob a motorist at gunpoint, use the victim's bank card to make ATM withdrawals, and abandon the victim in a remote area locked inside his own car trunk. *Id.* at 471. Petitioner Bernard and a fifth gang member subsequently joined the plot. *Ibid.*

Bernard drove Vialva and the others from one store parking lot to another searching for a victim. 299 F.3d at 471. After some time, Bernard and another gang member temporarily departed. *Id.* at 472 & n.2. Vialva and the two remaining gang members then located suitable victims, Todd and Stacie Bagley, who were youth ministers visiting from Iowa and who had just attended Sunday services. *Id.* at 471-472. While Todd used a pay phone and his wife, Stacie, waited in their car, two of the group approached Todd and asked for a ride. *Id.* at 472. Todd agreed, and the three gang members entered the

backseat of the Bagleys' car. *Ibid.* After giving Todd directions, Vialva pulled Bernard's .40-caliber Glock on Todd, a compatriot pulled a smaller pistol on Stacie, and Vialva stated that "the plans have changed." *Ibid.* The trio then robbed the Bagleys, forced the Bagleys into the trunk of their car, and drove around in the car attempting to empty the Bagleys' bank accounts from multiple ATMs. *Ibid.*

While locked in the trunk, the Bagleys spoke to Vialva's coconspirators through the car's rear panel, discussing their faith and explaining that God's blessings were available to anyone. 299 F.3d at 472. One of the coconspirators then told Vialva that he no longer wanted to proceed with the crime, but Vialva "insisted on killing the Bagleys and burning their car to eliminate the witnesses" and any incriminating fingerprints. *Ibid.* Vialva drove to his home, where he retrieved a ski mask and clothing. *Ibid.* The Bagleys pleaded with Vialva's compatriots for their lives. *Ibid.*

After Bernard and the fifth gang member rejoined the group, "Vialva repeated that he had to kill the Bagleys because they had seen his face." 299 F.3d at 472. Bernard and another conspirator then set off to purchase fuel to burn the Bagleys' car. *Ibid.* At some point, the gang member who had expressed his desire to discontinue the crime departed. *Id.* at 472 n.3.

Vialva, Bernard, and the two others remaining then drove the Bagleys' car (with the Bagleys still in the trunk) and Bernard's car to a remote location in a recreation area within the Fort Hood military reservation. 299 F.3d at 472-473. Bernard and another conspirator poured lighter fluid on the interior of the Bagleys' car, while the Bagleys sang and prayed in the trunk. *Id.* at 472. Stacie then stated that "Jesus loves you" and

"Jesus, take care of us." *Ibid.* Vialva cursed in reply, put on his mask, ordered the trunk opened, and shot the Bagleys with Bernard's handgun. *Id.* at 472-473. Vialva killed Todd instantly with a head shot, but his shot to the side of Stacie's face merely knocked her unconscious. *Ibid.* Bernard then set fire to the car, killing Stacie, who died of smoke inhalation. *Id.* at 473.

The gang's escape was foiled when Bernard's car slid off the road into a muddy ditch, where they were found and later arrested by law-enforcement officers responding to the fire. 299 F.3d at 473. A federal jury found petitioners guilty of carjacking, murder conspiracy, and the Bagleys' murders. *Ibid.* The district court imposed capital sentences as recommended by the jury. *Ibid.* The court of appeals affirmed, *id.* at 489, and this Court denied certiorari, 539 U.S. 928 (Nos. 02-8448 and 02-8492).

2. In 2004, each petitioner moved to vacate his sentence under 28 U.S.C. 2255. Vialva Mot. to Vacate Sentence (Vialva 2255 Mot.) (Doc. 372); Bernard Mot. to Vacate Sentence (Bernard 2255 Mot.) (Doc. 377). Petitioners' lengthy 175- and 155-page motions raised multiple claims, see *ibid.*, for which petitioners submitted over 1400 pages of exhibits. See 1 & 2 Vialva 2255 Mot. App. (394 and 510 pages) (Docs. 373, 374); Bernard 2255 Mot., Exs. 1-29 (548 pages).

a. In 2012, the district court denied petitioners' Section 2255 motions. 9/28/2012 Order (Doc. 449). The court's 63-page written order addressed and rejected each of the Section 2255 claims. *Id.* at 13-63.

The district court first determined that several Section 2255 claims were procedurally barred, 9/28/2012 Order 13-15, and, in any event, lacked merit, *id.* at 14-15; see *id.* at 15-26, 32-40. Those claims included petitioners' contention that the court had violated 18 U.S.C.

3005 by failing to consult the Federal Public Defender before appointing counsel. 9/28/2012 Order 14; see *id.* at 15-16. They also included Vialva's ineffective-assistance-of-counsel (IAC) claim based on his counsel's prior application for a position at the U.S. Attorney's Office (which was rejected) and ongoing interest in such a job (which he eventually received after the trial had concluded and his representation of Vialva had ended), matters which were fully disclosed and addressed in a pretrial hearing in which Vialva expressly waived any conflict. *Id.* at 14; see *id.* at 32-35. The court also rejected petitioners' other Section 2255 claims and explained why each lacked merit. *Id.* at 28-32, 40-62 (IAC claims); *id.* at 62 (cumulative error).

Section 2253 requires that a federal prisoner obtain a COA in order to appeal a "final order in a proceeding under [S]ection 2255." 28 U.S.C. 2253(c)(1)(B). A COA may issue "only if" the prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits," the prisoner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). If the court has denied Section 2255 relief on "procedural grounds," the prisoner must show "both" that (1) "'jurists of reason would find it debatable whether the district court was correct in its procedural ruling'" and (2) "'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.'" *Gonzalez* v. *Thaler*, 565 U.S. 134, 140-141 (2012) (quoting *Slack*, 529 U.S. at 484). The district court declined to issue COAs. 9/28/2012 Order 63.

b. In 2014, the court of appeals likewise denied petitioners' requests for COAs. 762 F.3d 467.

The court of appeals first addressed the COA standard. 762 F.3d at 471. The court recognized that Section 2253's requirement of a "'substantial showing of the denial of a constitutional right'" is met by "'demonstrating that jurists of reason could disagree with the district court's resolution of [the prisoner's] constitutional claims.'" *Ibid.* (citations omitted). The court also recognized that a "'claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the prisoner] will not prevail.'" *Ibid.* (citation omitted). The court thus emphasized that its "examination is limited to a 'threshold inquiry'" under which the court could not properly deny a COA "merely because it believes that the [prisoner] ultimately will not prevail on the merits." *Ibid.* (citation omitted).

Applying those principles, the court of appeals determined that petitioners had failed to make any substantial showing of a violation of any constitutional right. 762 F.3d at 471-483. The court's discussion of petitioners' separate Section 2255 contentions emphasized in precise terminology its determination that "[r]easonable jurists could not debate" each relevant "disposition," "holding," or "conclusion," *id.* at 472, 474, 476 (twice), 477, 478 (twice), 479 (twice), 480, 481, 482 (thrice), or employed an equivalent linguistic variant expressing the same determination. See *id.* at 473, 483 ("[r]easonable jurists could not disagree"); *id.* at 473 ("insufficient * * * to suggest that reasonable jurists could disagree"); *id.* at 475 ("not debatable among reasonable jurists").

The court of appeals also found that a COA was unwarranted with respect to the district court's discretionary "procedural decisions" denying an evidentiary "hearing and further discovery." 762 F.3d at 483. Given the "voluminous record presented" and the court of appeals' earlier assessment of the Section 2255 claims, the court determined that "reasonable jurists could not disagree" with the decision to resolve those claims without an evidentiary hearing or discovery. *Ibid.*

c. This Court again denied certiorari. 136 S. Ct. 892 and 136 S. Ct. 1155 (2016) (Nos. 14-8071 and 14-8112).

3. a. In 2017, each petitioner filed a motion under Federal Rule of Civil Procedure 60(b)(6) seeking relief from the district court's 2012 judgment denying their Section 2255 motions. Vialva Mot. for Relief from Judgment (Vialva 60(b) Mot.) (Doc. 553); Bernard Mot. for Relief from Judgment (Bernard 60(b) Mot.) (Doc. 569). Rule 60(b)(6) provides that a court "may" reopen its judgment if the movant timely shows "any * * * reason that justifies relief" other than those listed in Rule 60(b)(1)-(5). Fed. R. Civ. P. 60(b)(6) and (c)(1); see *Gonzalez* v. *Crosby*, 545 U.S. 524, 529, 535 (2005). Under that provision, the movant must "show 'extraordinary circumstances' justifying the reopening." *Gonzalez*, 545 U.S. at 535 (citation omitted).

Bernard asserted "two sets of extraordinary circumstances." Bernard 60(b) Mot. 4, 12-13. First, Bernard argued that Judge Smith was "unfit when he presided over [petitioners'] habeas case" and, as a result, "improperly denied him collateral review" in 2012. *Id.* at 1-2; see *id.* at 3, 12-13. Bernard observed that Judge Smith had been reprimanded for sexually harassing a court clerk in 1998 and had later failed to follow proper procedures by recusing himself or disclosing a conflict of

interest in cases involving the attorney who was personally representing him. *Id.* at 5-6. Bernard also noted "allegations" that Judge Smith "appeared to have been drinking alcohol during the court day" "on the day of [the 1998] assault" and had a "reputation for drinking and for having a temper." *Id.* at 6. Bernard then alleged that the judge's "indifference and hostility" to proper procedure were "reflected in [his] dismissive treatment of Bernard's case," *id.* at 7, and attempted to substantiate those allegation by rearguing at length many of the Section 2255 claims previously denied in 2012, *id.* at 7-10, 15-17, 19-30. Second, Bernard argued that the Fifth Circuit had "misappl[ied] the COA standard" in declining to grant him a COA to appeal his Section 2255 judgment and thereby "denied [him] a fair opportunity to seek appellate review." *Id.* at 11, 13; see *id.* at 10-13, 30.

Vialva's Rule 60(b) motion similarly sought relief from the Section 2255 judgment on the theory that he had been denied due process, asserting that (1) the district court denied his Section 2255 motion without "plenary examination," Vialva 60(b) Mot. 2-3; and (2) the Fifth Circuit denied "appropriate review" by using an "erroneous construction of the [COA] standard," *id.* at 3; see *id.* at 6-10, 12 (COA arguments). Vialva argued that it was "evident" that Judge Smith "suffer[ed] from impaired judgment" and that his "impairments * * * persisted until his [2016] retirement," such that the judge had been "in no position to evaluate his own actions" in conducting Section 2255 review. *Id.* at 18-19. Like Bernard, Vialva reargued his various Section 2255 claims to support his assertion of the judge's impairment. *Id.* at 13-18; see *id.* at 11 n.39, 17 n.56 (citing 125 pages of prior legal arguments filed as appendices, see p. 10 n.2, *infra*).

b. Petitioners collectively attached over 700 pages of materials to their Rule 60(b) motions, the vast majority of which had been previously filed with their original Section 2255 motions and which were now resubmitted to support assertions that Judge Smith had erred in deciding the merits of the rejected Section 2255 claims.[2] Petitioners submitted only 24 pages of nonduplicative materials—one partial transcript, two articles, and four judicial decisions or orders—about their new allegation about Judge Smith's purported impairment in 2012. See Vialva 60(b) Mot. App. 45 (Doc. 553-46); Bernard 60(b) Mot., Exs. B-D (Docs. 569-2 to 569-4).

In particular, petitioners filed six pages from the transcript of the March 2014 deposition of the deputy clerk whom Judge Smith had sexually harassed in 1998. Bernard 60(b) Mot., Ex. D.[3] That deposition was taken during a Texas bar disciplinary proceeding against attorney Ty Clevenger, *id.* at 1, that had been triggered by Judge Smith's $25,000 monetary sanction against Clevenger for filing a frivolous case, Bernard 60(b) Mot., Ex. C, at 2. Clevenger later filed a September 2014 misconduct complaint against the judge based on the 1998 incident of workplace harassment, which initiated judicial misconduct proceedings. Vialva 60(b) Mot.

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[2] For instance, Vialva attached 125 pages of legal arguments from his Section 2255 motion addressing multiple Section 2255 claims, Vialva 60(b) Mot. Apps. 1-5, 43, and over 500 pages of exhibits he previously filed to support those claims, *id.* Apps. 6-40, 42. Cf. Vialva 2255 Mot. 3-41, 60-144 (original arguments); 1 & 2 Vialva 2255 Mot. App. (original exhibits).

[3] The full 35-page transcript is available, with redactions, on the Fifth Circuit's website. Compl. of Judicial Misconduct, Attach. 1 (5th Cir. Sept. 11, 2014), http://www.ca5.uscourts.gov/docs/default-source/default-document-library/redacted-version-of-complaint-of-judicial-misconduct-against-u-s-district-judge-walter-s-smith-jr.pdf.

App. 45, at 1, 8. In 2016, Clevenger entered an appearance as cocounsel for petitioners' codefendant, 3/14/2016 Notice of Appearance (Doc. 498), which promptly led Judge Smith to recuse himself from this case. 3/24/2016 Order (Doc. 501).

In the transcript, the clerk states that she had been a deputy clerk from 1994 to 1998 and had first met Judge Smith "[a]round 1998" in the courthouse hallway. Bernard 60(b) Mot., Ex. D, at 2-3. She testified that the judge had a "pretty strong smell" of "mouthwash or liquor" on his breath and said to her, "'Come see me sometime.'" *Id.* at 3. The clerk told her supervisor after the incident that she had "smell[ed] liquor on his breath" and had thought the judge "might have been intoxicated." *Id.* at 4.

One article filed by petitioners, which appears to quote from the same transcript, states that later on the same day "in 1998," Judge Smith called the deputy clerk to his chambers, where, the clerk stated, he "put his arms around [her]," "kissed her," and told her, "'Let me make love to you.'" Bernard 60(b) Mot., Ex. C, at 2. The clerk's excerpted deposition adds that the judge took her hand, stating, "'Just come stay with me in here for a while.'" *Id.* Ex. D, at 5. The clerk declined. *Ibid.* The deposition transcript reflects that Clevenger asked the clerk whether the judge had "a reputation for having a temper" and "for drinking," to which she responded, "Yes," without any further elaboration. *Ibid.*

The deputy clerk further testified that she had spoken to the district clerk "about the situation." Bernard 60(b) Mot., Ex. D, at 4. She also stated that, about two weeks after the 1998 incident, Judge Smith's law clerk called and told her that she needed to provide "'some kind of closure,'" or "'do something about'" the

situation, because the judge had "'been in the hospital,'" "'can't come into work,'" and "'you know, [was] falling apart.'" *Id.* at 6. The law clerk then told the deputy clerk that the judge was "'having to cancel court things'" and was "'not functioning,'" before reiterating, "'You've got to do something about this.'" *Ibid.* Petitioners submitted no further evidence about Judge Smith's purported incapacity other than that evidence about the 1998 incident.

The second article filed by petitioners addressed two additional matters relating to the judicial misconduct proceedings initiated by Clevenger's September 2014 complaint against Judge Smith. First, the article recounts that attorney Greg White, who represented Judge Smith in the misconduct proceedings, understood that the judge's permanent law clerk was supposed to disclose the attorney-client relationship between them by calling counsel in White's cases before Judge Smith. Vialva 60(b) Mot. App. 45, at 10. That informal procedure apparently broke down in at least one instance. White stated that an opposing counsel, who was unhappy with Judge Smith's rulings in a case, asked about White's relationship with the judge. *Ibid.* After White told him that he was representing the judge, opposing counsel "immediately filed a [recusal] motion," which Judge Smith granted. *Ibid.*

Second, the article recounts that White, in representing Judge Smith in the misconduct proceedings, had been under the (mis)impression that Judge Smith believed the deputy clerk whom he harassed "might have acted in a way to suggest her willingness to participate in a personal relationship—that she was the aggressor"—and that White then had during the proceedings conveyed that impression "as Judge Smith's 'memory.'"

Vialva 60(b) Mot. App. 45, at 10. The "memory," however, originated from one of the judge's friends during the judge's divorce, when apparent "'threats'" had been made to "'make [the deputy clerk's] complaint a public matter.'" *Ibid.* That friend suggested that they might respond to "the threatened publicity" by identifying the possibility that "the woman [had] approached the judge romantically" to gain "favorable treatment for her husband, who was part of a group considering litigation in Smith's court." *Ibid.* That suggestion, White explains, "stuck with [the judge]," who then "suggested it" to White. *Ibid.* But "a more careful examination" later revealed that the woman would not have approached Judge Smith for that purpose because the suit involving her husband was not filed until long after the incident in the judge's chambers. *Id.* at 11. White later acknowledged to an investigator in the misconduct inquiry that he had misstated the matter in a filing and wished to correct it. *Ibid.*

As petitioners' Rule 60(b) submissions noted, in December 2015, the Fifth Circuit Judicial Council issued an order of reprimand to Judge Smith, based on its finding that "in 1998 Judge Smith made inappropriate and unwanted physical and non-physical sexual advances toward a court employee" and failed to "understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts." Vialva 60(b) Mot. App. 45, at 1-2 (order). The Council also reprimanded Judge Smith for allowing "false factual assertions to be made in response to the [misconduct] complaint" and being "late[]" in his admissions. *Id.* at 2. For those actions, the Council suspended the assignment of new cases to Judge Smith for one year and directed him to complete sensitivity training, but it determined that

Judge Smith's actions did "not warrant a recommendation for impeachment." *Ibid.*; cf. Bernard 60(b) Mot., Ex. B (order assigning new cases).

The Judicial Council also separately determined that Judge Smith did "not follow appropriate procedures regarding recusal from cases" in which White "was representing parties in his court" and that "the informal procedure used by Judge Smith resulted in at least one party in a case before him not being informed that opposing counsel was also representing Judge Smith." Vialva 60(b) Mot. App. 45, at 3 & n.1. The Council directed Judge Smith to recuse himself from any case in which White had entered an appearance (and any future case involving an attorney who represents the judge); and to follow formal procedures, "rather than attempting by informal means," to obtain waivers of other potential conflicts of interest. *Id.* at 3.

Petitioners' Rule 60(b) submissions also noted that in July 2016, on Clevenger's petition for review, a United States Judicial Conference committee determined that it was unable to complete its review because it lacked findings on all relevant matters. Vialva 60(b) Mot. App. 45, at 4-5 (committee decision). The committee noted that Clevenger believed the 1998 incident was not an isolated one, and that Clevenger had submitted "'the names of witnesses to other alleged incidents wherein Judge Smith sexually harassed women in the courthouse,'" "rais[ing] the question whether there was a pattern and practice of such behavior." *Id.* at 6-7. Because the Fifth Circuit Judicial Council had not made findings on those "additional allegations," the committee remanded the matter for additional investigation and findings. *Id.* at 7. But when Judge Smith retired in September 2016, the Fifth Circuit determined that his

retirement rendered unnecessary further action on the misconduct complaint. *Id.* at 13.

c. The district court (Yeakel, J.) dismissed petitioners' Rule 60(b) motions for lack of jurisdiction as uncertified "successive Section 2255 motions." Pet. App. 21a-22a; see *id.* at 15a-22a. Under Section 2255(h), "[a] second or successive [Section 2255] motion must be certified as provided in [S]ection 2244 by a panel of the appropriate court of appeals." 28 U.S.C. 2255(h); see 28 U.S.C. 2244(b)(3)(C).

The district court explained that although petitioners framed their motions as "an attack on a *procedural* defect in prior habeas proceedings"—*i.e.*, "the denial of 'meaningful review of potentially meritorious claims' by both the district court and Fifth Circuit"—petitioners' arguments were "substantive rather than procedural," as reflected by their reargument of the "merits" of "numerous constitutional claims" from their Section 2255 motions. Pet. App. 20a-21a & n.3. The district court accordingly determined that petitioners' motions reflected "disagree[ment] with the result of the previous proceedings" and ultimately constituted "successive Section 2255 motions." *Id.* at 21a. The court declined to issue a COA, because "reasonable jurists could not debate the denial or dismissal of [petitioners'] motions on substantive or procedural grounds." *Id.* at 22a.

4. The court of appeal likewise denied COAs. Pet. App. 1a-14a. The court determined that "jurists of reason could not debate that the district court was correct to construe the petitioners' [Rule 60(b) motions] as successive motions under Section 2255." *Id.* at 13a; see *id.* at 5a-6a.

The court of appeals explained that it applies this Court's decision in *Gonzalez* v. *Crosby*, *supra*, about the

permissibility of Rule 60(b) motions in the context of state habeas applications to the analogous context of "successive Section 2255 motions" under 28 U.S.C. 2255(h). Pet. App. 6a-7a & n.3. And the court recognized that, under *Gonzalez*, "a Rule 60(b) motion is appropriate" if it "challenges 'not the substance of the federal court's [prior] resolution of a claim on the merits but some defect in the integrity of the federal habeas proceedings.'" *Id.* at 7a (quoting *Gonzalez*, 545 U.S. at 532). The court noted, however, that if a Rule 60(b) motion "'attacks the federal court's previous resolution of a claim on the merits,'" it is properly construed "as a successive habeas petition." *Ibid.* (quoting *Gonzalez*, 545 U.S. at 532).

The court of appeals thus agreed with petitioners that "Rule 60(b) motions can legitimately ask a court to reevaluate already-decided claims—as long as the motion credibly alleges a non-merits defect in the prior habeas proceedings." Pet. App. 10a. But the court determined that "jurists of reason could not debate" that petitioners' Rule 60(b) motions were properly deemed successive Section 2255 motions, because petitioners attempted to use "unrelated misconduct by Judge Smith" that "cast no doubt on th[e] [Section 2255] proceedings' integrity" to pave the way for "substantive 'attacks [on] the federal court's previous resolution'" of their Section 2255 claims. *Id.* at 13a (citation omitted; last set of brackets in original); see *id.* at 10a-13a.

With respect to petitioners' "invocation of defective procedure" to "attack the integrity of their prior habeas proceedings" before Judge Smith, the court of appeals reasoned that petitioners' Rule 60(b) motions "rest[] substantially on a merits-based challenge." Pet. App. 10a. Petitioners' evidence about Judge Smith, the court

stated, "does not credibly implicate the procedural integrity" of prior proceedings in their cases: "Evidence that Judge Smith engaged in unrelated misconduct in 1998" or "neglected certain recusal requirements during the 2014 misconduct investigation" raises no "inference of defects in the habeas proceedings at issue here." *Ibid.* Petitioners thus "offer no evidence—beyond gross speculation—that Judge Smith was, as [petitioners] repeatedly assert, 'impaired' or 'unfit' to oversee" their case. *Id.* at 10a-11a.

The court of appeals stated that petitioners instead "clearly [presented] merits-based attacks," because they "spent much of their Rule 60(b) motions rearguing the merits of [their Section 2255] claims" in an effort to "point to errors allegedly committed by Judge Smith" and thereby "to link Judge Smith's misconduct to their own proceedings." Pet. App. 9a, 11a. That effort "to transform these previously unsuccessful merits-based claims into a claim of procedural defect," the court reasoned, was the "sort of 'attack [on] the federal court's previous resolution of . . . claims[s] on the merits" that *Gonzalez* rejects as a successive habeas petition. *Id.* at 12a (quoting *Gonzalez*, 545 U.S. at 532) (brackets in original).

The court of appeals also found no basis for a COA on petitioners' claim that the court of appeals had "misapplied the COA standard" when in 2014 it declined to issue a COA in their Section 2255 proceedings. Pet. App. 12a-13a. The court addressed petitioners' reliance on *Buck* v. *Davis*, 137 S. Ct. 759 (2017), which reversed "a different panel of [the Fifth Circuit]" for "failing to limit its COA review" to "whether the district court's decision was 'reasonably debatable.'" Pet. App. 12a (quoting *Buck*, 137 S. Ct. at 774). The court observed that

petitioners "fail to explain how the error present in *Buck* was also present in this court's application of the COA standard in their proceedings." *Ibid.* Moreover, the court continued, petitioners' contention was "'fundamentally substantive'" because "[petitioners] merely argue that the district court's disposition of their Section 2255 motions was, in fact, debatable by jurists of reason," an argument that petitioners made in prior proceedings and presented in their 2015 certiorari petitions, "which were denied by the Supreme Court." *Id.* at 12a-13a (citation omitted).

ARGUMENT

Petitioners contend (Vialva Pet. 6-11, 15-18; Bernard Pet. 14-15, 18-28) that the court of appeals erred in denying COAs to authorize appeals from the denial of their Rule 60(b) motions, which sought to vacate the district court's 2012 judgment denying Section 2255 relief. Petitioners first argue (Vialva Pet. 6-15; Bernard Pet. 14-18) that the court applied an erroneous standard under Section 2255(h), which purportedly conflicts with that used by other courts of appeals, for distinguishing between a permissible Rule 60(b) motion and one that constitutes a successive Section 2255 motion. Petitioners further argue (Vialva Pet. 15-18; Bernard Pet. 18-28) that the decision below applied an incorrect COA standard. The court of appeals correctly denied petitioners' applications for COAs, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, certiorari would in any event be unwarranted for the additional reason that petitioners have failed to make the essential showing necessary for a COA, namely, a substantial showing that they were denied a "constitutional right" in their Section 2255 proceedings. No further review is warranted.

1. The court of appeals correctly denied petitioners' COA applications because jurists of reason would not debate that petitioners' Rule 60(b) motions constituted successive Section 2255 motions. Pet. App. 6a-13a. Section 2255(h) prohibits a federal prisoner from filing a "second or successive [Section 2255] motion," unless the motion is "certified as provided in [S]ection 2244 by a panel of the appropriate court of appeals." 28 U.S.C. 2255(h). Petitioners contend (Vialva Pet. 7-11; Bernard Pet. 14-15) that the court of appeals' application of Section 2255(h) is contrary to this Court's decision in *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005). Petitioners are incorrect. Although the government has not disputed that *Gonzalez*'s approach to Rule 60(b) motions in the context of state habeas proceedings applies to the Section 2255(h) context in this case, the court of appeals' decision is consistent with *Gonzalez*.

a. Rule 60(b) applies in proceedings under Section 2254 or Section 2255 only to the extent it is "not inconsistent with" governing statutes or rules. Rule 12, Rules Governing Section 2254 Cases; Rule 12, Rules Governing Section 2255 Proceedings; see *Gonzalez*, 545 U.S. at 529. The statutory prohibitions against uncertified successive habeas corpus applications, 28 U.S.C. 2244(b), and Section 2255 motions, 28 U.S.C. 2255(h), thus preclude a Rule 60(b) motion that constitutes—or is "similar enough" to—a habeas application or Section 2255 motion. See *Gonzalez*, 545 U.S. at 529, 531.

In *Gonzalez*, the Court addressed the circumstances in which a Rule 60(b) motion constitutes a successive "'habeas corpus application' as [28 U.S.C. 2244(b)] uses that term." *Gonzalez*, 545 U.S. at 530. The Court observed that Section 2244(b)'s text shows that a habeas corpus application is a filing that contains "one or more

'claims,'" *i.e.*, one or more "federal bas[e]s for relief" from a judgment in a criminal case. *Ibid.* The Court then reasoned that "[u]sing Rule 60(b) to present new claims for relief" would impermissibly circumvent Section 2244(b)'s prohibition against successive habeas applications, even if such "claims [are] couched in the language of a true Rule 60(b) motion." *Id.* at 531. If "a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," such as fraud on the court, the motion does not present a prohibited "'claim.'" *Id.* at 532 & n.5. But a Rule 60(b) motion, for instance, will "bring a 'claim'" and thus constitute a successive habeas application "if it attacks the federal court's previous resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* at 532.

As the lower courts correctly recognized in this case, petitioners' Rule 60(b) motions sought to revisit the merits. The motions' nominal assertion of a defect in the integrity of petitioners' Section 2255 proceedings was unsubstantiated; the motions instead relied on generalized allegations of impropriety that they tried to connect to their case solely through an argument that the district court had made reversible errors in its adjudication of that case. In other words, petitioners presented "claims couched in the language of a true Rule 60(b) motion" but, as *Gonzalez* teaches, their motions constituted successive motions for collateral relief because they sought to "revisit[]" the *merits* of the district court's denial their Section 2255 claims as the

means for establishing a nominal procedural defect. *Gonzalez*, 545 U.S. at 531, 534.

The court of appeals' Section 2255(h) analysis properly focused on two feature of petitioners' contentions about Judge Smith. Pet. App. 10a-13a. First, "[a]lthough [petitioners' Rule 60(b) motions] purport[ed] to attack the integrity of their prior habeas proceedings" by asserting that the judge was unfit in 2012 when he denied their Section 2255 claims, petitioners failed to proffer "[any] evidence—beyond gross speculation—that Judge Smith was * * * 'impaired' or 'unfit'" at the time. *Id.* at 10a; see *id.* at 13a. Second, petitioners then attempted to "link" their limited evidence of prior "unrelated misconduct by Judge Smith" to their Section 2255 proceedings by presenting "merits-based attacks" on Judge Smith's 2012 decision. *Id.* at 11a, 13a. But because petitioners' evidence "cast no doubt on [the Section 2255] proceedings' integrity" and because petitioners sought to fill the gaps in that showing by renewing "substantive" attacks on the merits of the district court's Section 2255 decision, jurists of reason would not debate that their Rule 60(b) motions reflected successive Section 2255 motions. *Id.* at 13a.

b. Petitioners continue to assert that they proffered "compelling evidence" that Judge Smith was "significantly impaired and unfit" to adjudicate their case. Vialva Pet. 9; see Bernard Pet. 3 (asserting that the judge had a "severe drinking problem" rendering him "so unfit" that he canceled court obligations). But the court of appeals correctly determined that their evidence did "not credibly implicate the procedural integrity" of the proceedings "at issue here." Pet. App. 10a. Petitioners' evidentiary showing confirms that conclusion.

Petitioners' 24 pages of evidence principally concern Judge Smith's sexual harassment of a deputy clerk in 1998. See pp. 10-15, *supra*. The government does not condone that improper conduct. But petitioners' evidence of that workplace harassment does not support any inference that Judge Smith was unfit to adjudicate the criminal-law questions in this case when he denied petitioners' Section 2255 motions 14 years later in 2012.

Petitioners focus (Vialva Pet. 5-6; Bernard Pet. 3, 8) on the deposition of the deputy clerk who was harassed in which she indicates that, when she first met Judge Smith in 1998, the judge may have had alcohol on his breath and had a reputation for drinking. See pp. 11-12, *supra* (discussing testimony). But the deputy clerk testified that she left her position in the courthouse in 1998, see p. 11, *supra*, and petitioners have offered no evidence to link her unelaborated testimony on the point to Judge Smith's rejection of their Section 2255 motions 14 years later in 2012.

Petitioners emphasize (Vialva Pet. 5; Bernard Pet. 3, 8, 19) that, about two weeks after the 1998 incident of sexual harassment, Judge Smith's law clerk called the deputy clerk and told her that the judge was "'not functioning'" and "'falling apart,'" which petitioners interpret as reflecting a drinking problem so "severe" that the judge had to "cancel[] court obligations" and "could not even get himself to the courthouse." But petitioners' evidence does not support such speculation. The evidence shows that the deputy clerk had reported the judge's wrongful harassment to her supervisor. Bernard Pet. 8; see p. 11, *supra*. That report of harassment undoubtedly prompted attention internally within the court. Thus, in the same conversation in which Judge Smith's law clerk told the deputy clerk that the judge

was "falling apart," "not functioning," had been hospitalized, and could not "come to work," the law clerk implored her, specifically, to "do something about" the situation and provide "some kind of closure." Pp. 11-12, *supra*. If Judge Smith's difficulties in 1998 were the cause of some freestanding alcohol problem, it would have made no sense for his law clerk to view action by the deputy clerk—who had just met the judge two weeks earlier on the day he harassed her, see pp. 11-12, *supra*—as the solution to the difficulties that the judge was then experiencing. The deputy clerk's testimony makes sense only if the judge's problems related to her workplace-harassment complaint. And those difficulties in 1998 in the wake of the clerk's complaint do not reasonably suggest that the judge would have continued to have such problems 14 years later when he denied petitioners' Section 2255 motions in a comprehensive 63-page order. See pp. 5-6, *supra*.

The balance of petitioners' evidence likewise fails to raise any reasonable inference that Judge Smith was unfit to adjudicate their Section 2255 motions. The evidence shows that, after Judge Smith retained White to represent him in the misconduct proceedings, the judge used an informal process to disclose his attorney-client relationship with White. See pp. 12, 14, *supra*. Although that process broke down at least once and the judge presumably should have recused in such matters before being requested to do so, see p. 14, *supra*, those issues provide no basis to infer that the judge was significantly impaired and unfit to resolve petitioners' unrelated Section 2255 motions in 2012, two years before the judicial misconduct complaint had been filed. Likewise, petitioners' sweeping theory of judicial incapacity in 2012 finds no support in the judge's failure to vet and promptly

correct a theory included in a filing made on his behalf in the misconduct proceedings. See pp. 12-13, *supra*.

Tellingly, despite their assertion that Judge Smith was seriously impaired from 1998 through his 2012 denial of their Section 2255 motions, petitioners never offered any evidence that the judge was actually impaired in this case or any other of the numerous cases that he adjudicated. Cf. Pet. App. 11a (noting that petitioners' assertions "implicate every one of Judge Smith's decisions" in the relevant timeframe). Petitioners did not submit even one declaration (from their own counsel or others in a position to observe the judge) indicating that Judge Smith was inebriated or unable to discharge his judicial duties in the context of *any* case. Instead, as the court of appeals explained, petitioners offered nothing "beyond gross speculation." *Id.* at 10a.

In an effort to "link Judge Smith's [unrelated] misconduct to their own proceedings," petitioners' motions make "merits-based attacks" on Judge Smith's 2012 decision denying their Section 2255 claims. Pet. App. 11a; see pp. 9-10 & n.2, *supra* (discussing petitioners' merits arguments with hundreds of pages of supporting exhibits). As petitioners acknowledge, their Rule 60(b) motions "argued that the *merits* [*of the district court's Section 2255*] *disposition itself*, along with [the aforementioned] facts about Judge Smith's condition and behavior, evidenced a 'procedural defect'" warranting relief from the 2012 Section 2255 judgment. Bernard Pet. 15 (emphasis altered); see Vialva Pet. 10 (admitting "point-[ing] to errors and procedural irregularities in how Judge Smith administered [petitioners'] cases" as "further evidence that Judge Smith was impaired"). In the context of this case, where petitioners identified only "unrelated misconduct" by Judge Smith that "cast no

doubt on [their own Section 2255] proceedings' integrity," Pet. App. 13a, the court of appeals correctly concluded that reasonable jurists would not debate that petitioners' attempt "to revisit the federal court's denial *on the merits* of [their Section 2255] claim[s]" using arguments nominally "couched in the language of a true Rule 60(b) motion," *Gonzalez*, 545 U.S. at 531, 534, placed their motions squarely within Section 2255(h)'s prohibition against successive Section 2255 motions.

c. The same is true of petitioners' Rule 60(b) contention that the court of appeals applied the wrong COA standard in 2014. See Pet. App. 12a-13a. As an initial matter, petitioners fail to explain how such a claim of error by the court of appeals is properly presented under Rule 60(b) to the district court, a subordinate tribunal bound by the court of appeals' earlier mandate. In any event, the court of appeals correctly determined that petitioners' appellate-error claim did not save their Rule 60(b) motions from being successive Section 2255 motions.

Petitioners relied on *Buck* v. *Davis*, 137 S. Ct. 759 (2017), which reversed a different decision by a different panel of the same court of appeals for applying an incorrect COA standard. Pet. App. 12a. But *Buck* concluded that the appellate panel in that case erred because it had expressly framed its determination in merits-based terms and thus "reached [its] conclusion only after essentially deciding the case on the merits." *Buck*, 137 S. Ct. at 773 (stating that the panel determined that Buck failed to show "'extraordinary circumstances that would permit relief under [Rule] 60(b)(6),'" and that the "balance of the [panel's] opinion reflect[ed] the same approach") (citation omitted). In this case, however, the court of appeals' 2014 decision not only articulated the

correct COA standard, it also repeatedly and consistently focused on the question whether reasonable jurists would debate the disposition of petitioners' Section 2255 claims. See pp. 7-8, *supra*. Petitioners have never "explain[ed] how the error present in Buck [i]s also present" here. Pet. App. 12a.[4]

Petitioners instead argued that the "district court's disposition of their Section 2255 motions was, in fact, debatable by jurists of reason." Pet. App. 12a. But that contention—which petitioners raised in their prior certiorari petitions that this Court denied in 2016—is a simple assertion of appellate error that is "fundamentally substantive," *id.* at 13a (citation omitted). Petitioners thus "plainly s[ought] 'a second chance'" to relitigate their Section 2255 claims rather than identify a defect in the integrity of their proceedings. *Ibid.* (citation omitted).

d. Vialva contends (Pet. 6-11) that the court of appeals incorrectly applied an "outcome-based rule" under which a Rule 60(b) motion "presenting purely procedural arguments" is deemed a successive Section 2255 motion "if its ultimate outcome might be to require a court to re-examine previously[ ]dismissed claims," Vialva Pet. 7. That is incorrect. The court of appeals itself emphasized that "Rule 60(b) motions can legitimately ask a court to reevaluate already-decided claims" if they do so by "credibly alleg[ing] a non-merits

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[4] The Fifth Circuit has repeatedly granted COAs, including in at least four capital cases in just the year immediately after its 2014 decision in this case. See *Clark* v. *Stephens*, 627 Fed. Appx. 305 (2015) (per curiam) (Rule 60(b) appeal); *Butler* v. *Stephens*, 600 Fed. Appx. 246 (2015) (per curiam) (same); see also *Roberson* v. *Stephens*, 614 Fed. Appx. 124 (5th Cir. 2015) (per curiam); *Eldridge* v. *Stephens*, 608 Fed. Appx. 289 (5th Cir. 2015) (per curiam).

defect in the prior habeas proceedings." Pet. App. 10a. But the court explained that "the question before [it]" was "whether [petitioners] have actually alleged procedural defects cognizable under Rule 60(b)." *Ibid.* The court merely determined that they did not, because petitioners' evidence did "not credibly implicate the procedural integrity" of the proceedings and, instead, their "invocation of defective procedure rest[ed] substantially on a merits-based challenge." *Ibid.* That decision does not suggest that a federal prisoner has "no remedy for allegations of serious judicial misconduct." Vialva Pet. 11. It merely determines that a prisoner cannot relitigate the merits of Section 2255 claims as a means of indirectly suggesting a procedural defect in his proceedings.

e. Petitioners contend (Vialva Pet. 12-15; Bernard Pet. 15-18) that the Section 2255(h) decision of the court of appeals conflicts with decisions in other courts of appeals. No such conflict exists.

The Tenth Circuit has observed that nothing is "improper" about a Rule 60(b) motion whose "success * * * would ultimately lead to a claim for relief under [Section] 2255." *In re Pickard*, 681 F.3d 1201, 1206 (2012). That is because a Rule 60(b) "movant is always seeking in the end to obtain [Section] 2255 relief" and may properly do so by showing that "he did not get a fair shot in the original [Section] 2255 proceeding because its integrity was marred by a flaw that must be repaired in further proceedings." *Ibid.* Although Vialva contends (Pet. 13) that *Pickard* "cannot be reconciled" with the decision of the court of appeals in this case, the court of appeals here agreed with *Pickard's* relevant observation: "Rule 60(b) motions can legitimately ask a court to reevaluate already-decided claims."

Pet. App. 10a. Beyond that, *Pickard* does not speak to this case, because petitioners' Rule 60(b) motions did not merely seek ultimate relief from a Section 2255 judgment. They instead attempted to obtain that relief by relitigating the *merits* of petitioners' Section 2255 claims, asserting substantive errors as purported evidence of a nominally procedural defect.

The other decisions petitioners cite (Vialva Pet. 14; Bernard Pet. 16-17) are equally inapposite. They simply reflect that Section 2244(b) and Section 2255(h) do not preclude legitimate Rule 60(b) motions based on defects in the integrity of prior proceedings where such motions do not themselves depend on relitigating the merits of habeas/Section 2255 claims. See *Williams* v. *Chatman*, 510 F.3d 1290, 1295 (11th Cir. 2007) (per curiam) (concluding that Rule 60(b) claim alleging a failure to "permit[] further briefing" on an issue, which was "confined to a nonmerits aspect of the proceedings," was not a successive habeas application under Section 2244(b)); *Zakrzewski* v. *McDonough*, 490 F.3d 1264, 1266-1267 (11th Cir. 2007) (per curiam) (concluding that Rule 60(b) motion alleging "fraudulent representations" by prisoner's prior counsel constituting "fraud on the court," which did "not assert or reassert allegations of error in [the prisoner's] state convictions," was not a successive Section 2254 habeas application); *United States* v. *Winestock*, 340 F.3d 200, 208 (4th Cir.) (determining that motion asserting claims "relate[d] to the validity of the underlying criminal judgment" was a successive Section 2255 motion), cert. denied, 540 U.S. 995 (2003).[5]

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[5] Bernard discusses (Pet. 16-17) unpublished dispositions from other courts of appeals involving Rule 60(b) motions alleging procedural defects. Those decisions are consistent with the disposition in

f. Finally, no reason exists to hold the petitions in this case pending the disposition of *Banister* v. *Davis*, No. 18-6943 (argued Dec. 4, 2019). *Banister* presents the question whether, and under what circumstances, a filing styled as a motion under Federal Rule of Civil Procedure 59(e) may in fact be a second or successive habeas application. The petitioner in that case does not raise claims of the sort at issue here, and this Court's disposition of *Banister* will therefore have no bearing on the resolution of this case.

2. Contrary to petitioners' contentions, the court of appeals correctly expressed and applied the COA standard in this case. Pet. App. 5a-6a, 13a. Petitioners do not identify any error in the articulation of the COA standard in the decision below. Vialva Pet. 17-18; Bernard Pet. 18-28. Vialva instead states (Pet. 17) that the court "inverted the statutory order of operations" by "deciding the merits of [his Rule 60(b)] motion without having first granting a COA." Bernard contends (Pet. 21-27) that because this Court has previously reversed the same court of appeals for failing to apply the proper COA standard, it should do so again here. Both contentions lack merit and warrant no further review.

First, the court of appeals correctly recognized that "the only question" at the COA stage is "whether the

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this case. But even if they were not, the unpublished dispositions are not binding in future cases, even in the same court of appeals. See *Fassbender* v. *Correct Care Solutions, LLC*, 890 F.3d 875, 889 (10th Cir. 2018); *Sun Life Assurance Co. of Can.* v. *Jackson*, 877 F.3d 698, 702 (6th Cir. 2017), cert. denied, 138 S. Ct. 2624 (2018); *Sharrieff* v. *Cathel*, 574 F.3d 225, 229 n.5 (3d Cir. 2009), cert. denied, 558 U.S. 1120 (2010); *Hogan* v. *Carter*, 85 F.3d 1113, 1118 (4th Cir.) (en banc), cert. denied, 519 U.S. 974 (1996). They therefore do not reflect a division of authority that might warrant certiorari.

applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" Pet. App. 5a (citation omitted). The court emphasized that its inquiry was "'limited' and '*not* coextensive with a merits analysis,'" such that it could "'*not* rule on the merits of [petitioners'] case.'" *Ibid.* (emphases added; citations omitted). "In other words," the court stated, it "must make only 'an initial determination whether a claim is reasonably debatable.'" *Id.* at 6a (citation omitted). The court did exactly that: It "conclude[d] that the issue [whether petitioners' Rule 60(b) motions were successive Section 2255 motions] is not reasonably debatable." *Ibid.*

Vialva suggests that the court of appeals engaged in a merits inquiry because it stated that petitioners offered "no evidence" that Judge Smith was impaired and thus did not "*credibly* implicate the procedural integrity" of the proceedings. Vialva Pet. 17 (quoting Pet. App. 10a). But the court's description of petitioners' evidence was not a merits ruling. The court merely described the nature of petitioners' evidence and the failure of that evidence to raise any inference that Judge Smith was impaired when he denied petitioners' Section 2255 motions. See Pet. App. 10a (evidence raised no "inference of defects in the habeas proceedings at issue here"). Because that evidence involved "unrelated misconduct by Judge Smith" that "cast no doubt on [their] proceedings' integrity," and because petitioners then made "substantive" attacks on the "'merits'" of the 2012 denial of their Section 2255 claims to "link" their assertions of judicial impairment to the

Section 2255 proceedings in their case, the court determined that "jurists of reason could not debate that the district court was correct to construe the petitioners' filings as successive motions under Section 2255." *Id.* at 13a (citation omitted).

Second, the fact that this Court has reversed other Fifth Circuit panels for applying an incorrect COA standard in different cases fails to suggest any error in this case. Bernard identifies (Pet. 21-27) three decisions of this Court that predate the appellate decision in this case. Not only do those decisions not suggest any error in the later decision here, but the most recent of them (*Buck* v. *Davis*) the court of appeals expressly and repeatedly considered, Pet. App. 5a, 12a. See also *id.* at 5a-6a (following *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003)).

3. Finally, even if petitioners had presented a question that might otherwise merit review, review would be unwarranted because they have not attempted to make the full showing necessary for a COA. A COA may issue "only if" the prisoner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2); see *Slack* v. *McDaniel*, 529 U.S. 473, 483-484 (2000) (explaining that the denial of a nonconstitutional "federal" right is insufficient). And because the district court denied relief on "procedural grounds," petitioners needed to show not only that "'jurists of reason would find it debatable whether the district court was correct in its procedural ruling'" that their motions were successive Section 2255 motions, but also that "'jurists of reason would find it debatable whether [their motions] state[d] a valid claim of the denial of a constitutional right.'" *Gonzalez* v. *Thaler*, 565 U.S. 134, 140-141 (2012) (quoting *Slack*, 529 U.S. at 484). Petitioners have

failed—in the court of appeals and this Court—to make any substantial showing of the denial of a constitutional right in their Section 2255 proceedings. That alone provides a sufficient reason to deny certiorari.

In the court of appeals, Bernard correctly recognized that, in addition showing that the "district court's procedural ruling" was debatable, he needed to make a "'substantial showing of the denial of a constitutional right,'" which, in this case, he identified as a purported denial of "the due process that should have attached to his [Section] 2255 proceedings." Bernard C.A. Br. 16 (citation omitted). But Bernard then focused only on the district court's purported procedural error in characterizing his Rule 60(b) motion a successive Section 2255 motion under Section 2255(h). *Id.* at 18-25. Like Bernard, Vialva addressed only whether reasonable jurists would debate the district court's procedural ruling that petitioners' Rule 60(b) motions were a successive Section 2255 motions prohibited by Section 2255(h). Vialva C.A. Br. 15; see *id.* at 8-15. Neither developed any constitutional (presumably, due process) argument to warrant a COA. And in this Court, petitioners again focus on the district court's procedural Section 2255(h) ruling. See Vialva Pet. 6-11; Bernard Pet. 14-15.

Petitioners have argued that the district court erred under Rule 60(b)(6), because "extraordinary circumstances" purportedly exist to warrant relief from the Section 2255 judgment. See pp. 8-9, *supra*. But not every error that might serve as the basis for relief under a rule of civil procedure is a violation of constitutional due process. Rule 60(b) simply embodies a district court's "inherent and discretionary power * * * to set aside a judgment whose enforcement would work inequity." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S.

211, 234 (1995). More would be required to identify a due-process violation. Petitioners' failure to develop any argument on whether reasonable jurists would debate whether they were denied constitutional due process is thus a sufficient reason to conclude that petitioners failed to justify COAs.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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