No. 18-1222

IN THE

Supreme Court of the United States

CHRISTOPHER ANDRÉ VIALVA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This petition raises basic questions about the fairness of death-penalty administration in the federal courts. Petitioner Christopher André Vialva became aware of evidence that the judge who presided over his federal capital trial, capital sentencing, and habeas proceedings was compromised by substance abuse, conflicts of interest, and courthouse misconduct. Petitioner filed a Rule 60(b) motion based, in part, on the Fifth Circuit Judicial Council's imposition of "severe sanctions" against the judge who presided over his habeas proceedings for the judge's "inappropriate behavior and the serious effect that it has on the operation of courts." ROA 3496, 3499. But the district court recharacterized Petitioner's Rule 60(b) motion as an unauthorized successive habeas petition and refused to consider Petitioner's arguments.

The Fifth Circuit then twice erred in denying Petitioner's application for a certificate of appealability ("COA"). Despite this Court's holding in *Buck v. Davis*, 137 S. Ct. 759 (2017), the Fifth Circuit decided the merits of Petitioner's Rule 60(b) arguments before concluding that the arguments were not even debatable and therefore not worthy of a COA. The Fifth Circuit's decision is in conflict not only with this Court's precedent but with the practices of at least the Fourth, Tenth, and Eleventh Circuits, too. Nothing in the opposition brief contends with this conflict; instead, the Government adopts the same flawed methodology as the Fifth Circuit, urging this Court to accept the premise that the petition does not even raise "debatable" issues.

Petitioner's Rule 60(b) motion implicates serious constitutional rights and, at a minimum, deserves full

consideration in the Fifth Circuit. This Court has a particular responsibility to ensure procedural fairness in federal capital proceedings and, accordingly, certiorari should be granted.

ARGUMENT

I. The Court of Appeals Twice Erred in Denying Petitioner a Certificate of Appealability

The Fifth Circuit committed two significant errors in denying Petitioner a COA. *First*, it improperly decided the merits of Petitioner's Rule 60(b) motion instead of determining whether reasonable jurists could debate the district court's order on that motion. *Second*, it compounded the first error by contravening this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and applying a results-oriented standard to decide whether Petitioner's motion should be construed as a successive habeas application. The Government's brief in opposition only underscores the Fifth Circuit's errors here and confirms that the decision below warrants this Court's review.

A. The Court of Appeals Applied the Wrong Standard in Denying a Certificate of Appealability

The Fifth Circuit erroneously applied a heightened standard in evaluating Petitioner's request for a COA. To obtain a COA, an applicant need show only 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." *Buck*, 137 S. Ct. at 773; *accord Slack v.*

McDaniel, 529 U.S. 473, 484 (2000) (holding that the standard for issuing a COA is whether "reasonable jurists could debate whether … the petition should have been resolved in a different manner"). If the application of *Gonzalez* were debatable, Petitioner would have received the opportunity for full consideration of his appeal. Then—and only then—could the court of appeals have properly evaluated the merits of Petitioner's Rule 60(b) motion through the lens of *Gonzalez*.

Although the Fifth Circuit articulated the proper COA standard here, it did not faithfully apply that standard. Despite conceding the correct inquiry is "limited" and "'not coextensive with a merits analysis,'" App. 5a (quoting *Buck*, 137 S. Ct. at 773-74), the opinion below is littered with discussion and evaluation of the merits of Petitioner's motion. Indeed, the court of appeals announced that "the question before us" is "whether Bernard and Vialva have actually alleged procedural defects cognizable under Rule 60(b)," App. 10a. In answering that question, the court determined that "evidence from Judge Smith's misconduct investigation does not credibly implicate the procedural integrity of [Petitioners'] prosecutions or subsequent habeas proceedings." *Id*. The court also found that the Rule 60(b) "allegations offer no evidence—beyond gross speculation—that Judge Smith was ... 'impaired' or 'unfit.'" App. 10a-11a. This wholesale evaluation of the merits of Petitioner's Rule 60(b) motion was well beyond the narrow scope of the COA inquiry and flies in the face of this Court's holdings in *Buck*.

The Government's attempt to distinguish these facts from those this Court found objectionable in *Buck* is unpersuasive. Although the Government correctly

observes that, in *Buck*, the court of appeals "reached [its] conclusion only after essentially deciding the case on the merits." Opp'n 25 (quoting *Buck*, 137 S. Ct. at 773), it ignores that the Fifth Circuit committed the very same error here. In fact, the Fifth Circuit affirmed the district court's recharacterization of Petitioner's Rule 60(b) motion only after deciding "Judge Smith's unrelated misconduct ***does not constitute a defect in the integrity of [Petitioners'] habeas proceedings***." App. 11a (emphasis added). Those conclusions go well beyond the limited inquiry prescribed by *Buck* and cannot be viewed as anything but a determination of the ultimate merits of Petitioner's Rule 60(b) motion. That determination was improper at the COA stage and warrants intervention by this Court.[1]

B. The Fifth Circuit Erroneously Applied An Outcome-Based Approach in Conflict with *Gonzalez*

Even assuming the court of appeals addressed the district court's order under the proper COA standard, review is still warranted here to correct the Fifth Circuit's erroneous application of *Gonzalez*. In *Gonzalez*, this Court clarified that a post-judgment motion should be recharacterized as a successive habeas petition only if it "attacks the federal court's previous resolution of a claim ***on the merits***." 545 U.S. at 532 (emphasis in original). The dispositive

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[1] To be sure, in denying Petitioner a COA, the Fifth Circuit not only evaluated the merits of his Rule 60(b) arguments, but also cautioned that accepting those arguments would "implicate every one of Judge Smith's decisions for an undetermined period of time." App. 11a. These considerations also go well beyond the narrow inquiry prescribed in *Buck*.

question in the *Gonzalez* analysis is whether the post-judgment motion advances a "claim" that would entitle the movant to substantive habeas relief. *Id.* If a favorable resolution of a movant's claim—ineffective assistance of trial counsel, for instance—would result in relief from the underlying criminal judgment, a post-judgment motion should be recharacterized as successive. But if the post-judgment motion truly attacks a procedural defect in the habeas process, such as "[f]raud on the federal habeas court," then the motion should not be recharacterized. *Id.* at 532 n.5.

Here, Petitioner's Rule 60(b) arguments were squarely procedural. Similar to the fraud argument this Court referenced in *Gonzalez*, Petitioner argued that Judge Smith's misconduct caused defects in the underlying habeas proceeding. That misconduct prompted the Fifth Circuit Judicial Council to conclude that "Judge Smith does not understand the gravity of [his] inappropriate behavior and the serious effect it has on the operations of the courts." ROA 3496. The relief Petitioner requested was not vacatur of his conviction, but merely the opportunity for fair consideration of his habeas arguments by a judge in good standing and free from impairment.

The Fifth Circuit nevertheless ignored this distinction and concluded that Petitioner's Rule 60(b) motion "rests substantially on a merits-based challenge." App. 10a; *see also id.* at 11a ("These are clearly merits-based attacks."). In arriving at this determination, the Fifth Circuit applied an outcome-based standard, holding that Petitioner's motion was "the very definition of a successive motion" and therefore barred by statute because its ultimate objective was securing relief from the adverse judgment denying habeas relief. App. 20a. That is not

the standard this Court set forth in *Gonzalez*. If it were, no Rule 60(b) motion could avoid recharacterization as a successive habeas petition because every Rule 60(b) motion in this context seeks, at some level of generality, "to resurrect the … claims adjudicated on the merits in the original Section 2255 proceedings." *Id*.

The Government now embraces the Fifth Circuit's outcome-based standard and tries to buttress it with a stilted and formalistic view of Petitioner's Rule 60(b) motion—counting the number of pages spent on particular arguments that are purportedly substantive, the numbers of related exhibits, appendices, and attachments included with the motion, and so forth. *See, e.g.*, Opp'n 9-10 & n.2, 24; *see also* App 20a. Under the Government's approach, Petitioner's Rule 60(b) motion was not procedural because it included supporting material that speaks to the substance of Petitioner's underlying habeas claims. But that approach finds no support in *Gonzalez*, which asks a more fundamental question: whether the petitioner's Rule 60(b) arguments are, by nature, procedural challenges to the habeas process or substantive challenges to the underlying criminal judgment. Whether Petitioners included documents supporting their substantive challenges as exhibits to the Rule 60(b) motion does not resolve that dispositive question here.

Even as it argues that Petitioner's challenges were not procedural, the Government concedes—as it must—the deeply troubling nature of Judge Smith's misconduct. The Government's own description of the factual record goes on for pages and acknowledges a finding by the Fifth Circuit Judicial Council that Judge Smith's inappropriate and unprofessional

behavior had a "serious effect … on the operation of the courts." *See* Opp'n 8-9, 11-15. However, instead of recognizing the impact this misconduct had on the procedural integrity of Petitioner's habeas proceedings, the Government tries to sidestep over that impact by arguing there were no obvious public displays of Judge Smith's impairment during the specific window of time when he decided Petitioner's habeas case. *Id*. at 24 ("[P]etitioners never offered any evidence that the judge was actually impaired in this case."). That is too narrow a view, especially in a capital case like this one where Petitioner had only one real opportunity to present his substantive habeas arguments. *See Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) ("Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.").

The Government's myopic approach is all the more inappropriate here because the disciplinary authorities acknowledged Judge Smith's misconduct was potentially part of a "pattern and practice" of unacceptable behavior. ROA 3500-01. Those authorities were unable to confirm the full scope of Judge Smith's misconduct only because he retired and short-circuited the disciplinary process. *See* Letter from J. Duff to Sens. Grassley and Feinstein, (Feb. 16, 2018), https://www.judiciary.senate.gov/imo/media/doc/2018-02-16%20AOUSC%20to%20Grassley,%20Feinstein.pdf, at 10 ("Before the Committee could conduct hearings, Judge Smith retired from office under 28 U.S.C. § 371(a) on September 14, 2016. Following Judge Smith's retirement, the Judicial Council concluded."). In light of that incomplete fact-

finding, the existing record of Judge Smith's misconduct not only implicates the procedural integrity of Petitioner's habeas proceedings, but also casts a long shadow over the federal capital process. Those considerations warrant this Court's review of the decision below.

II. The Fifth Circuit's Decision Below Conflicts with the Decisions of Other Courts of Appeals

The Government contends that there is no conflict between the Fifth Circuit's denial of a COA here and Tenth Circuit's decision in *In re Pickard*, 681 F.3d 1201 (10th Cir. 2012), but the two decisions are irreconcilable. In *Pickard*, the court of appeals explained that a Rule 60(b) movant may obtain relief by showing that "'he did not get a fair shot in the original [§] 2255 proceeding because its integrity was marred by a flaw that must be repaired in further proceedings.'" Opp'n 27 (quoting *Pickard*, 681 F.3d at 1206). Petitioner here has alleged precisely what *Pickard* contemplates: that he "did not get a fair shot in [his] original [§] 2255 proceedings" because the habeas judge labored under a significant impairment. But the Fifth Circuit nevertheless reached a decision that is fundamentally inconsistent with *Pickard* because it applied an outcome-based standard to hold that the recharacterization of Petitioner's Rule 60(b) motion as a successive habeas petition was not even debatable. By looking only at the procedural nature of claims contained in the Rule 60(b) motion at issue there, *Pickard* correctly applied *Gonzalez*. The Fifth Circuit did not, however, because it applied an erroneous legal standard that ignored the crux of Petitioner's arguments.

The Government's attempt to align the Fifth Circuit's decision below with the decisions of the Fourth and Eleventh Circuits, Opp'n 28, is equally flawed. The Government posits an overly narrow interpretation of both *United States v. Winestock*, 340 F.3d 200 (4th Cir. 2003), *abrogated on other grounds by United States v. McRae*, 793 F.3d 392 (4th Cir. 2015), and *Zakrzewski v. McDonough*, 490 F.3d 1264 (11th Cir. 2007), arguing that both decisions stand for the narrow proposition that Rule 60(b) motions can be "legitimate" only when they "do not themselves depend on relitigating the merits of habeas/Section 2255 claims." Opp'n at 28. But that summation of the courts' decisions misses the point.

Both the Fourth and Eleventh Circuits have expressly recognized that Rule 60(b) can be used, as here, to attack procedural defects in habeas proceedings. *See, e.g.*, *Winestock*, 340 F.3d at 207; *Zakrzewski*, 490 F.3d at 1267. Neither court follows the Fifth Circuit's outcome-based approach. Instead, if a post-judgment motion in either circuit properly alleges a procedural defect in habeas proceedings, the motion is not recharacterized as a successive habeas petition. Under the Fifth Circuit's approach below, however, what matters is not the nature of the defect in the habeas proceedings but whether the ultimate relief sought could result in vacatur of the habeas judgment. This disconnect among the circuits warrants this Court's intervention.

Indeed, the Fifth Circuit's outlier approach to habeas review is not limited to the Rule 60(b) context. The Fifth Circuit routinely permits the recharacterization of procedural motions under other Rules as unauthorized second or successive habeas petitions. *See, e.g., Williams v. Thaler*, 602 F.3d 291,

312-13 (5th Cir. 2010) (affirming recharacterization of Rule 59(e) and Rule 60(b) motions); *United States v. Patton*, 750 F. App'x 259, 264-65 (5th Cir. 2018) (characterizing postjudgment motion under Rules 52 and 59 as unauthorized successive habeas petition). This Court is currently considering a challenge to those recharacterizations in *Banister v. Davis*, No. 18-6943, where the Fifth Circuit treated a Rule 59(e) motion for a new trial as a successive habeas petition under *Gonzalez*, in conflict with decisions from other courts of appeals. At the very least, the Court should hold this petition pending resolution of *Banister*.

III. Petitioner's Rule 60(b) Motion Implicates Serious Constitutional Rights

Petitioner made a substantial showing in his COA application that the district court's recharacterization of his Rule 60(b) motion denied him a constitutional right. The Government's contention that Petitioner "addressed only whether reasonable jurists would debate the district court's procedural ruling" in his COA application, and did not "develop[] any constitutional (presumably, due process) argument," Opp'n 32, ignores that Petitioner alleged that he was denied his "one fair shot at habeas review" by the district court's treatment of his Rule 60(b). ROA 2821 (quoting *Buck*, 137 S. Ct. at 767).

As this Court has emphasized, the "writ of habeas corpus plays a vital role in protecting constitutional rights." *Holland v. Fla.*, 560 U.S. 631, 649 (2010). This Court has also repeatedly recognized that there is a constitutional right to habeas corpus review provided in the Suspension Clause of the United States Constitution. *See, e.g.*, *Boumediene v. Bush*, 553 U.S.

723, 745 (2008) ("The [Suspension] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution."); *Felker v. Turpin*, 518 U.S. 651, 661 (1996). Petitioner's COA application alleged that the district court's findings deprived him of the fair opportunity to vindicate his constitutional right of habeas corpus. Thus, contrary to the Government's argument, Opp'n 32, Petitioner complied with the requirements of § 2253(c)(2) by establishing that he was denied a constitutional right, satisfying that prerequisite to obtaining a COA.

IV. This Case is an Appropriate Exercise of the Court's Supervisory Authority Over the Lower Federal Courts.

Absent certain enumerated circumstances, a federal prisoner generally will receive only one opportunity to challenge defects in his convictions and sentences. *See* 28 U.S.C. §§ 2255(h), 2244(b). Where, as here, a petitioner's singular opportunity at collateral review is marred by allegations of significant procedural irregularities, this Court should intervene.

Petitioner is one of fewer than a hundred current federal death-row inmates. *See* Bureau of Justice Statistics, Capital Punishment, 2017: Selected Findings, tbl. 2 (July 2019), https://www.bjs.gov/content/pub/pdf/cp17sf.pdf. Unlike in habeas proceedings brought by state court defendants, where federal courts must be careful not "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," *Fay v. Noia*, 372 U.S. 391, 419-20 (1963), this Court has plenary supervisory authority over the federal habeas process. And as *Buck* recognized, in weighing Rule 60(b) motions, courts should consider "'the risk of

injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" 137 S. Ct. at 778. It is vitally important that this Court exercise its supervisory authority in this case to ensure the procedural adequacy of federal capital cases, particularly now that the federal government has announced its intention to resume executions. *See* Department of Justice, Office of Public Affairs, "Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse," July 25, 2019, https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse.

This Court has affirmed that "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzalez*, 545 U.S. at 534. But the Fifth Circuit did not even permit Petitioner the opportunity to demonstrate why his Rule 60(b) motion was a valid avenue for vindicating his constitutional right to habeas proceedings before a neutral and unimpaired federal judge. Instead, the Fifth Circuit improperly decided that Petitioner's underlying claims were meritless. This Court should not sanction federal executions where, as here, there remain credible and unresolved allegations of serious procedural irregularities in a capital defendant's habeas proceedings.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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