

No. _____

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*

PETITION FOR WRIT OF CERTIORARI

SUSAN M. OTTO
MICHAEL LIEBERMAN
OKLAHOMA PUBLIC
DEFENDER'S OFFICE
215 DEAN A. MCGEE
SUITE 109
OKLAHOMA CITY, OK
73102
(405) 609-5930
Susan_Otto@fd.org

MICHAEL F. WILLIAMS, P.C.
Counsel of Record
SUSAN M. DAVIES, P.C.
ARIEL V. LIEBERMAN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
mwilliams@kirkland.com

Counsel for Petitioner Christopher André Vialva

March 19, 2019

CAPITAL CASE
QUESTION PRESENTED

After the United States Court of Appeals for the Fifth Circuit resolved Petitioner's motion under § 2255 seeking habeas relief from his death sentence, a public investigation revealed that the federal judge who presided over Petitioner's capital trial and habeas proceedings was suffering from a debilitating addiction to alcohol while Petitioner's cases were pending before him. The revelations about the judge's alcohol abuse and impaired decision-making cast new light upon irregular decisions the judge had made during the conduct of Petitioner's proceedings.

Petitioner sought relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, asserting that the judge's impairment was a defect in the integrity of Petitioner's capital trial and habeas proceedings. The district court dismissed Petitioner's Rule 60(b) motion as a successive habeas petition under § 2255(h). The Fifth Circuit summarily rejected Petitioner's request for a Certificate of Appealability.

The question presented is:

Whether the Fifth Circuit erred, in conflict with decisions of other federal court of appeals and the decision of this Court in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), in denying a Certificate of Appealability to review whether Petitioner's Rule 60(b)(6) motion challenging a procedural defect in the integrity of his federal habeas proceedings must be dismissed as a "merits-based," successive motion under § 2255(h)?

TABLE OF CONTENTS

	Page(s)
CAPITAL CASE.....	ii
QUESTION PRESENTED.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION.....	6
I. The Fifth Circuit Applied An Inappropriate, Outcome-Based Standard For Determining Whether A Rule 60(b) Motion Must Be Dismissed As Successive Under § 2255(h).	6
A. The Outcome-Based Standard Applied By The Fifth Circuit Is Contrary To This Court’s Precedent In <i>Gonzalez v. Crosby</i>	7
B. The Outcome-Based Standard Applied By The Fifth Circuit Is Inconsistent With Decisions Of Other Courts of Appeals.....	12

II. The Fifth Circuit Imposed An Erroneous And Unreasonably Demanding Standard In Denying A Certificate Of Appealability.	15
III. This Court Should Exercise Its Supervisory Authority To Direct The Fifth Circuit To Grant The Certificate Of Appealability.	18
CONCLUSION	21

APPENDICES

Appendix A

Order and Opinion, United States Court of Appeals for the Fifth Circuit, *United States v. Vialva*, 904 F.3d 356 (W.D. Tex.) (Sept. 14, 2018)..... App. 1a

Appendix B

Order on Motions and Relief from Judgment, *United States v. Vialva*, No. W-99-CR-070 (1)-LY (W.D. Tex.) (Dec. 20, 2017)..... App. 15a

Appendix C

Order on Petition for Rehearing, Motions and Relief from Judgment, *United States v. Vialva*, No. 18-70007 (5th Cir.) (Nov. 19, 2018) App. 15a

Appendix D

28 U.S.C.A. § 2253..... App. 25a

Appendix E

28 U.S.C.A. § 2255 App. 27a

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Balentine v. Thaler</i> , 626 F.3d 842 (5th Cir. 2010)	7
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017)	15, 17, 18, 19
<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009)	15
<i>In re Compl. of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr.</i> , No. 05-14-90120 (Sept. 28, 2016)	4
<i>Gonzalez v. Crosby</i> , 545 U.S. 524 (2005)	7, 8, 9, 11, 19
<i>Harris v. United States</i> , 367 F.3d 74 (2d Cir. 2004).....	7
<i>Klapprott v. United States</i> , 335 U.S. 601 (1949)	11
<i>Liljeberg v. Health Services Acquisition Corp.</i> , 486 U.S. 847 (1988)	11, 19
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	15, 17, 18
<i>In re Pickard</i> , 681 F.3d 1201 (10th Cir. 2012)	12, 13, 14
<i>Spitznas v. Boone</i> , 464 F.3d 1213 (10th Cir. 2006)	12

<i>Tennard v. Dretke</i> , 542 U.S. 274 (2004)	16, 18
<i>United States v. Bernard</i> , 299 F.3d 467 (5th Cir. 2002)	2
<i>United States v. Bernard</i> , 762 F.3d 467 (5th Cir. 2014)	4, 18
<i>United States v. Fields</i> , 761 F.3d 443 (5th Cir. 2014)	18
<i>United States v. Garza</i> , 165 F.3d 312 (5th Cir. 1999)	19
<i>United States v. Hall</i> , 455 F.3d 508 (5th Cir. 2006)	19
<i>United States v. Jones</i> , 287 F.3d 325 (5th Cir. 2002)	19
<i>United States v. Robinson</i> , No. 09-70020, ECF No. 00511135322 (5th Cir. June 8, 2010)	19
<i>United States v. Vialva</i> , 904 F.3d 356 (5th Cir. 2018)	1
<i>United States v. Washington</i> , 653 F.3d 1057 (9th Cir. 2011)	14, 15, 16
<i>United States v. Webster</i> , 392 F.3d 787 (5th Cir. 2004)	19
<i>United States v. Winestock</i> , 340 F.3d 200 (4th Cir. 2003)	14
<i>Zakrzewski v. McDonough</i> , 490 F.3d 1264 (11th Cir. 2007) (per curiam)	14
Statutes	
28 U.S.C. § 1254	1

28 U.S.C. § 2244..... 6, 7, 8
28 U.S.C. § 2253..... 2
28 U.S.C. § 2254..... 8
28 U.S.C. § 2255..2, 3, 4, 6, 9, 10, 11, 12, 13, 15, 16, 19

Rules

Fed. R. Civ. P. 59 2
Fed. R. Civ. P. 60 1, 6, 7, 8, 9, 10, 11, 12,
13, 14, 15, 16, 17, 18, 19

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Fifth Circuit denying Petitioner’s application for a Certificate of Appealability is reported at 904 F.3d 356 (5th Cir. 2018) and reprinted in the Appendix (“App.”) at App. 1a. The unpublished order of the district court dismissing Petitioner’s Rule 60(b) motion is reprinted at App. 21a.

JURISDICTION

The Fifth Circuit rendered its decision denying a Certificate of Appealability on September 14, 2018. App. 1a. The court of appeals denied Petitioner’s request for rehearing *en banc* on November 19, 2018. App. 23a. On February 6, 2019, Justice Alito extended the time for filing a petition for certiorari to and including March 19, 2019. Petitioner invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure provides, in relevant part:

“On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time

to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.”

The relevant provisions of the Antiterrorism and Effective Death Penalty Act of 1996 are located at 28 U.S.C. §§ 2253, 2255 and are reprinted at App. 25a.

STATEMENT OF THE CASE

On June 1, 2000, a federal jury in the United States District Court for the Western District of Texas found Petitioner Christopher André Vialva and his co-defendant Brandon Bernard guilty of four capital crimes.¹ *See United States v. Bernard*, 299 F.3d 467, 473 (5th Cir. 2002). On June 13, 2000, the jury recommended the death sentence for Petitioner on three of the counts against him. *See id.* United States District Judge Walter Smith, Jr. sentenced Petitioner to life imprisonment on one of the counts and death on the remaining three counts. *See id.* The Fifth Circuit affirmed the conviction and sentences on direct appeal. *See id.* at 489.

¹ Petitioner’s co-defendant has also filed a petition for certiorari, and the petition is pending as *Bernard v. United States*, No. 18-6992 (filed Dec. 11, 2018).

On June 14, 2004, Petitioner filed a post-conviction motion under 28 U.S.C. § 2255 seeking review of his conviction and sentences. ROA 959-2076.² One of Petitioner's claims was that his court-appointed lawyer had a conflict of interest because he was actively seeking employment with the United States Attorney's office while representing Petitioner at trial. Petitioner claimed that Judge Smith had failed to follow statutory requirements and policies established by the Judicial Conference regarding selection and appointment of counsel. Petitioner supported his § 2255 motion with affidavits and other proffers of evidence. Petitioner also sought the district court's permission to conduct discovery, including a deposition of his appointed counsel, who had since joined the United States Attorney's office. ROA 2168-2186. The lawyer had declined to provide an affidavit in connection with Petitioner's § 2255 motion and had failed to preserve files relating to the representation of Petitioner at trial. ROA 2175-2176.

The United States filed an opposition denying the factual allegations in Petitioner's § 2255 motion. ROA 2187-2193. It did not proffer any evidence in support of its opposition. Nor did the United States move for summary judgment. Petitioner filed a reply in support of his § 2255 motion, and the motion was fully briefed.

Judge Smith presided over the proceedings on Petitioner's § 2255 motion even though Petitioner had alleged Judge Smith violated the law in appointing his trial counsel. Judge Smith did not resolve any of

² Citations to "ROA" refer to the appellate record from the United States Court of Appeals for the Fifth Circuit.

the ancillary motions Petitioner filed in connection with his § 2255 motion, including Petitioner's requests for discovery. On September 28, 2012, without allowing discovery or holding an evidentiary hearing, Judge Smith summarily denied Petitioner's motion. Judge Smith also summarily denied all pending ancillary motions. The summary denial came after more than seven years with no activity in the case. ROA 2620-2682.

Judge Smith's denial of the § 2255 motion resolved numerous factual questions against Petitioner. The court ruled, for example, that alleged deficiencies in counsel's performance were actually strategic decisions. ROA 2647. On the issue of his own failure to follow statutory requirements and Judicial Conference policies concerning the appointment of counsel, Judge Smith admitted he did not follow the rules but held the failure did not prejudice Petitioner. ROA 2634-2635. Judge Smith terminated the proceeding, denied all relief, and denied a Certificate of Appealability (COA). ROA 2620-2682. The Fifth Circuit denied review, holding that Petitioner's claims were "meritless" based solely on the briefing that addressed whether a COA should issue. *See United States v. Bernard*, 762 F.3d 467 (5th Cir. 2014).

In September 2014, after the Fifth Circuit had denied Petitioner's appeal in this case, a court employee lodged a complaint alleging that Judge Smith made inappropriate and unwarranted sexual advances in 1998. *See Order of Mem. & Reasons, In re Compl. of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr.*, No. 05-14-90120 (Sept. 28, 2016) at 1. In 2015, the Judicial Council of the Fifth Circuit imposed "severe sanctions" against Judge Smith after investigating the allegations. ROA

3496. The investigation uncovered evidence that Judge Smith had significant problems with alcohol abuse—problems that impacted Judge Smith’s decision-making. One court employee described Judge Smith as having a “reputation for drinking” and described him as having been intoxicated during the work day. App. 4a. One of Judge Smith’s law clerks asked the employee for help managing Judge Smith’s behavior, complaining that he was “not functioning” and “falling apart.” The law clerk stated that Judge Smith was not even able to get himself to the courthouse. App. 4a.

Over the course of the investigation, there were additional allegations against Judge Smith. The Judicial Council determined that Judge Smith had knowingly allowed others to make “false factual assertions” on his behalf. ROA 3496. Judge Smith also allowed the lawyer who was personally representing him in connection with the judicial-misconduct investigation to continue to appear before him in court. ROA 3497. Judge Smith did not recuse himself from cases involving his personal lawyer. Nor did Judge Smith disclose the conflict to opposing counsel in his cases. ROA 3496-3497. The Judicial Council criticized Judge Smith for failing to “understand the gravity of such inappropriate behavior and the serious effects that it has on the operation of courts.” ROA 3499. It ordered Judge Smith to desist from his misconduct. ROA 3497 n.1. While an extended investigation into Judge Smith’s misconduct was proceeding, Judge Smith resigned from the federal bench on September 14, 2016. *See* Order of Mem. & Reasons at 3. The Judicial Council ended the proceedings after determining that it could not impose sanctions on Judge Smith after he resigned. *See id.*

In light of the revelations about Judge Smith’s problems with alcohol and misconduct on the bench, Petitioner moved under Rule 60(b) to reopen the judgment denying habeas relief. The allegations of misconduct against Judge Smith dated from 1998, shortly before Judge Smith presided over Petitioner’s capital trial. Judge Smith’s alleged wrongdoing persisted through 2015, a few years after the district court abruptly and summarily denied Petitioner’s § 2255 motion. The evidence that Judge Smith was impaired and unable to perform his duties as a federal judicial officer provided important context to Judge Smith’s seven-year delay in acting on Petitioner’s § 2255 motion and other procedural irregularities.

The district court dismissed Petitioner’s Rule 60(b) motion for lack of jurisdiction. App. 16a. The court determined that the Rule 60(b) motion was successive for purposes of 28 U.S.C. § 2255(h) and § 2244(b). App. 21a. The district court’s six-page order barely addressed the allegations of wrongdoing against Judge Smith, noting in a footnote that Judge Smith’s alleged impairments included “a reputation for drinking and having a temper.” App. 17a n.2. The Fifth Circuit denied a COA, holding that Petitioner’s Rule 60(b) motion was “merits-based,” App. 11a, and that his allegations against Judge Smith lacked sufficient evidentiary support, App. 10a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Applied An Inappropriate, Outcome-Based Standard For Determining Whether A Rule 60(b) Motion Must Be Dismissed As Successive Under § 2255(h).

The Fifth Circuit established an outcome-based rule for determining whether a Rule 60(b) motion is

permissible. Under the Fifth Circuit’s approach, a motion “that ‘in effect ask[s] for a second chance to have the merits determined favorably’ must be construed as [a] successive habeas petition[],” even if characterized as a procedural attack. App. 8a (quoting *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010)). That is, even a motion presenting purely procedural arguments must be dismissed as successive if its ultimate outcome might be to require a court to re-examine previously-dismissed claims. This approach is flatly inconsistent with the Court’s precedent in *Gonzalez v. Crosby*. It is also inconsistent with decisions from other federal courts of appeals. The outcome-based standard also deprives broad categories of petitioners of any mechanism for seeking relief from serious constitutional violations, like those alleged by Petitioner here.

A. The Outcome-Based Standard Applied By The Fifth Circuit Is Contrary To This Court’s Precedent In *Gonzalez v. Crosby*.

In *Gonzalez*, the Court articulated the standard for determining whether a motion under Rule 60(b) should be considered “successive” for purposes of § 2244(b). The Court explained that a Rule 60(b) motion advancing one or more “claims,” as that term is used in § 2244(b), ordinarily will qualify as “successive” and therefore subject to the requirements of § 2244(b)(1-3). *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (citing *Harris v. United States*, 367 F.3d 74, 80-81 (2d Cir. 2004)). Similarly, a motion would qualify as a successive “claim” if the motion “attacks the federal court’s previous resolution of a claim *on the merits*.” *Gonzalez*, 545 U.S. at 532 (emphasis in original). The Court defined an attack on the merits as an argument “that there exist or do not exist grounds

entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d).” *Id.* at 532 n.4. The Court observed that this inquiry would be “relatively simple” in most cases. *Id.* at 532.

On the other hand, “[w]hen no ‘claim’ is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application.” *Id.* at 533. When the 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,” then a district court may consider the motion without attending to the requirements in § 2244(b) that apply to second or successive habeas petitions. *Id.* The focus of the Court’s inquiry was on the character of the arguments in the motion, not the potential outcomes if the motion were granted.

This distinction in *Gonzalez* between merits-based claims (barred as successive) and procedural motions (available under Rule 60(b)) provides the answer for resolving Petitioner’s motion in this case. Notably, the Court in *Gonzalez* did not draw the outcome-based distinction adopted by the Fifth Circuit in this case. Instead, the Court recognized that procedural arguments, available to petitioners under Rule 60(b), might require a court to re-examine dismissed claims.

Indeed, the Court addressed just such a scenario in *Gonzalez*, stating that “[f]raud on the federal habeas court is one example” of a defect that might be raised under Rule 60(b). *Gonzalez*, 545 U.S. at 532 n.5. The Court noted that “an attack based on the movant’s own conduct, or his habeas counsel’s omissions ... ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to

have the merits determined favorably.” *Id.* But the Court expressly recognized that fraud on the court, a claim with the potential to reopen the merits of a closed case, is a proper basis for a Rule 60(b) motion.

Like an argument of fraud on the court, Petitioner’s Rule 60(b) motion raised a basic defect in the integrity of Petitioner’s capital conviction and habeas proceedings: namely, there is compelling evidence that the federal judge who presided over both cases was significantly impaired and unfit meaningfully to resolve the claims and defenses in these matters. The basis for Petitioner’s motion comes from records of public investigations into Judge Smith’s conduct by the Judicial Council of the Fifth Circuit—investigations cut short by the judge’s abrupt resignation from the federal bench.

The investigations shed new light on questionable rulings and questionable behavior by Judge Smith that tainted Petitioner’s capital trial and post-conviction proceedings. The questionable behavior included a delay by the judge of more than seven years before issuing a summary denial of relief in Petitioner’s habeas case. While the facts concerning Judge Smith’s impairment were truly extraordinary, the availability of Rule 60(b)(6) as a mechanism for seeking relief should have been uncontroversial.

Both the district court and the Fifth Circuit ruled, however, that it was not even reasonably debatable whether the district court could resolve Petitioner’s Rule 60(b) motion. The district court applied an outcome-based standard, holding that Petitioner’s Rule 60(b) motion was “the very definition of a successive motion” under § 2255(h) because its ultimate objective was securing relief from the adverse

judgment denying habeas relief. App. 20a. Even though Petitioner’s arguments raised defects that went to the heart of the procedural integrity of the habeas proceedings—namely, the ability of the presiding judge meaningfully to resolve the habeas claims—the district court found the arguments were “substantive rather than procedural.” App. 21a. According to its outcome-based standard, the district court reasoned that the “true intent” of the Rule 60(b) motion was “to resurrect the numerous constitutional claims adjudicated on the merits in the original Section 2255 proceedings.” App. 20a.

In affirming the district court, the Fifth Circuit also applied an outcome-based standard, holding that Petitioner’s arguments were “clearly merits-based attacks [that] have already been reviewed and rejected by th[e] court.” App. 11a. In support of the Rule 60(b) motion, Petitioner had pointed to errors and procedural irregularities in how Judge Smith administered the cases. App. 11a. Petitioner referred to this procedural history as further evidence that Judge Smith was impaired while presiding over Petitioner’s capital trial and habeas proceedings. But the Fifth Circuit seized upon Petitioner’s references to these irregularities as justification for holding the motion was actually an effort “to transform these previously unsuccessful merits-based claims into a claim of procedural defect.” App. 12a.

In applying its outcome-based standard, the Fifth Circuit’s analysis of Petitioner’s Rule 60(b) motion was completely backwards. Petitioner was not arguing for relief based upon errors that Judge Smith had committed during the hearing. Instead, Petitioner was raising the more fundamental, procedural claim that Judge Smith was impaired during Petitioner’s

capital trial and habeas proceedings, and that this impairment deprived Petitioner of any meaningful habeas review. The errors and irregularities Petitioner cited in support of his Rule 60(b) motion were not independent, *substantive* claims for relief. Rather, the history of Judge Smith’s questionable decision-making in the case—along with the public-record disclosures about Judge Smith’s questionable conduct while in office—supported Petitioner’s *procedural* claim that there was a defect in the integrity of his habeas proceedings.

The Fifth Circuit’s ruling in this case would leave Petitioner with effectively no remedy for allegations of serious judicial misconduct. This Court long has recognized that Rule 60(b)(6) “provides courts with authority ‘adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,’” *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)), and the Court has more recently affirmed that “Rule 60(b) has an unquestionably valid role to play in habeas cases,” *Gonzalez*, 545 U.S. at 534. Petitioner has presented serious allegations, backed by evidence in the public record, that his death sentence and denial of habeas relief resulted from proceedings where the presiding judge was impaired. Petitioner promptly brought his Rule 60(b) motion after the basis for his allegations became public. However various circuit courts may draw the line between Rule 60(b) motions and successive § 2255 applications, these issues warrant meaningful consideration by the federal courts. The Fifth Circuit’s denial of review, in a published opinion holding that its conclusion was not even debatable, justifies certiorari review by this Court.

**B. The Outcome-Based Standard Applied By
The Fifth Circuit Is Inconsistent With
Decisions Of Other Courts of Appeals.**

The outcome-based approach applied by the district court and the Fifth Circuit in this case is also contrary to the standard applied in other federal courts of appeals. Unsurprisingly, other courts of appeals recognize that procedural arguments under Rule 60(b) ultimately may affect the merits of a habeas claim without requiring dismissal of the Rule 60(b) motion as impermissibly successive.

The Tenth Circuit, for example, has explicitly disavowed earlier dictum that purported to apply a rule like the Fifth Circuit's outcome-based standard. In *Spitznas v. Boone*, the court had opined that a permissible Rule 60(b) motion "challenges a defect in the integrity of the federal habeas proceeding, provided that such a challenge does not itself lead itself inextricably to a merits-based attack on the disposition of a prior habeas petition." *Spitznas*, 464 F.3d 1213, 1215-16 (10th Cir. 2006) (citation omitted). More recently, however, the court characterized its observations in *Spitznas* as dicta and cautioned that "[t]he words *lead inextricably* should not be read too expansively." *In re Pickard*, 681 F.3d 1201, 1205-206 (10th Cir. 2012) (emphasis in original).

In reasoning that is directly relevant to the Fifth Circuit's ruling in this case, the Tenth Circuit said of its earlier reference to "leading inextricably" that it:

... certainly should not be read to say that a motion is an improper Rule 60(b) motion if success on the motion would ultimately lead to a claim for relief under § 2255. What else could be the pur-

pose of a 60(b) motion? The movant is always seeking in the end to obtain § 2255 relief. The movant in a true Rule 60(b) motion is simply asserting 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.

Id. at 1206. The court went on to clarify “that a Rule 60(b) motion is actually a second-or-successive petition if the success of the motion depends on a determination that the court had incorrectly ruled on the merits in the habeas proceeding.” *Id.* Under this reasoning, and assuming the truth of the defendants’ allegations that the prosecution had committed a fraud in connection with defendants’ § 2255 proceedings, the court found that “[d]efendants have stated a proper Rule 60(b) motion.” *Id.* The Tenth Circuit remanded for the district court to consider in the first instance the defendants’ claims that a prosecutor’s false statement prevented them from obtaining relevant discovery in their § 2255 proceedings. *Id.* at 1207.

The Fifth Circuit’s decision in this case cannot be reconciled with the Tenth Circuit’s decision in *Pickard*. Under the Fifth Circuit’s outcome-based approach, the defendants’ Rule 60(b) motion would have been dismissed as successive because its ultimate objective was to cause the district court to reconsider its denial of relief under § 2255. But the Tenth Circuit expressly rejected that approach and directed the district court to address the substance of the defendants’ Rule 60(b) motion.

The Tenth Circuit’s decision in *Pickard* is consistent with other circuit-court rulings allowing Rule 60(b) motions to proceed over objections that they should be dismissed as successive. *See, e.g., United States v. Winestock*, 340 F.3d 200, 207 (4th Cir. 2003) (stating “an example of a proper Rule 60(b) claim is an allegation that government agents perpetrated a fraud on the court during the collateral review proceedings”); *Zakrzewski v. McDonough*, 490 F.3d 1264, 1267 (11th Cir. 2007) (per curiam) (reversing dismissal of Rule 60(b) motion premised on allegations of fraud on the court in connection with appointment of counsel).

In support of the outcome-based approach it applied in this case, the Fifth Circuit relied upon a decision from the Ninth Circuit holding that a petitioner’s Rule 60(b) motion was actually a successive habeas claim. *See* App. 8a-9a (citing *United States v. Washington*, 653 F.3d 1057, 1064 (9th Cir. 2011)). Even the decision in that case acknowledged that allegations of serious judicial misconduct might rise to the level of a “defect in the integrity of the federal habeas proceeding[].” *Washington*, 653 F.3d at 1064 (alteration in original; citation omitted).

The petitioner in *Washington* had claimed that a district judge’s failure to develop the record, rule on all claims, and hold an evidentiary hearing was properly the subject of a Rule 60(b) motion. *See id.* The Ninth Circuit rejected the petitioner’s claims, but the court noted that Rule 60(b) may be available in circumstances more like those presented by this case: “[A]llegations that a judge was biased, had a conflict of interest, or otherwise engaged in behavior that gave rise to an appearance of impropriety may be a basis for claiming a defect in the integrity of the pro-

ceedings for Rule 60(b) purposes.” *Washington*, 653 F.3d at 1064 (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)). Accordingly, in the Ninth Circuit as well, Rule 60(b) would be available to the Petitioner in this case to address constitutional violations in Petitioner’s federal habeas proceedings.

II. The Fifth Circuit Imposed An Erroneous And Unreasonably Demanding Standard In Denying A Certificate Of Appealability.

The Fifth Circuit compounded its legal errors in this case by refusing to grant Petitioner a COA. This Court has emphasized time and again that an applicant for a COA need only show 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 v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The Court has also instructed that a claim can be “debatable,” for purposes of granting a COA, “even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 338). Despite this clear instruction, the Fifth Circuit committed two separate and independent errors when it denied Petitioner a COA.

First, the Fifth Circuit applied too demanding a standard in ruling as a matter of law that Petitioner’s Rule 60(b) motion was subject to dismissal as successive under § 2255(h). As set forth in detail above, the Fifth Circuit’s ruling was an outlier—inconsistent with precedent of this Court and decisions of other

courts of appeals. Even the Ninth Circuit precedent cited favorably by the Fifth Circuit in this case recognized that a Rule 60(b) motion would be permissible in cases, like Petitioner’s, raising claims of serious judicial misconduct. *See Washington*, 653 F.3d at 1064. Given the weight of authority that is at odds with the Fifth Circuit’s resolution in this case, it was wrong for the court to hold that “jurists of reason could not debate that the district court was correct to construe the petitioners’ filings as successive motions under Section 2255.” App. 13a. The Court should have granted the COA, allowed plenary briefing, and provided the parties an opportunity to be heard.

In a tacit admission that its legal reasoning was at least debatable, the Fifth Circuit feinted in the direction of providing an alternative holding under the appropriate legal standard. The overwhelming majority of the Fifth Circuit’s decision is devoted to bolstering the conclusion that Petitioner “seek[s] to transfer [his] previously unsuccessful merits-based claims into a claim of procedural defect.” App. 12a. But the Fifth Circuit also goes on to acknowledge “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.” App. 10a (emphasis added).

By articulating, but not applying, the proper legal standard, the Fifth Circuit creates even more problems with its decision. As an initial matter, this Court has previously criticized the Fifth Circuit for merely “paying lip-service” to the principles that should govern its resolution of habeas cases. *See Tennard v. Dretke*, 542 U.S. 274, 283 (2004). That criticism is warranted here, as the court articulates the legal standard but offers no real analysis in sup-

port of its conclusion. Instead, the Fifth Circuit rejects Petitioner’s allegations on the merits, without having ever provided an opportunity to develop a factual record in support of the Rule 60(b) motion.

Second, and relatedly, the Fifth Circuit applied the wrong standard when it purported to reject Petitioner’s Rule 60(b) motion on the merits. The court rejected Petitioner’s Rule 60(b) motion on the grounds that it did not “*credibly* allege[] a non-merits defect in the prior habeas proceedings.” App. 10a (emphasis added). It ruled that “evidence from Judge Smith’s misconduct investigation does not *credibly* implicate the procedural integrity of [Petitioner’s] prosecutions or subsequent habeas proceedings.” App. 10a (emphasis added). Indeed, the Fifth Circuit went so far as to fault Petitioner for “offer[ing] no evidence—beyond gross speculation—that Judge Smith was ... ‘impaired’ or ‘unfit’ to oversee the[] 2000 trial and subsequent habeas proceedings.” App. 10a-11a.

The Fifth Circuit’s analysis of the Rule 60(b) motion reprises the same errors that this Court corrected in *Buck v. Davis*, 137 S. Ct. 759 (2017). By ruling that Petitioner’s allegations were not credible and faulting Petitioner for not putting forward more evidence in support of his motion, the Fifth Circuit inverted the statutory order of operations, deciding the merits of Petitioner’s motion without having first granting a COA. The flaw in this approach is clear: “it has placed too heavy a burden on the prisoner *at the COA stage*.” *Id.* at 774 (emphasis in original) (quoting *Miller-el*, 537 U.S. at 336-337)).

It was improper for the Fifth Circuit to make credibility determinations and evidentiary findings without first granting the COA and allowing Petitioner a

fair opportunity to develop his arguments. *See Buck*, 137 S. Ct. at 773. As this Court has held, when a court of appeals sidesteps the COA process “by first deciding the merits of an appeal and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal with jurisdiction.” *Id.* (quoting *Miller-El*, 537 U.S. at 336-37). The Fifth Circuit’s “sidestep” in this case was particularly problematic, as neither the court of appeals nor the district court allowed any opportunity to develop the record or even to present argument in support of the Rule 60(b) motion.

III. This Court Should Exercise Its Supervisory Authority To Direct The Fifth Circuit To Grant The Certificate Of Appealability.

This case is the most recent in a series of challenges to the Fifth Circuit’s pattern of denying Certificates of Appealability based upon an inappropriately demanding standard. Time and again, this Court has needed to intervene to prevent the Fifth Circuit from denying a COA to a deserving petitioner. *See, e.g., Buck*, 137 S. Ct. at 774 (holding Fifth Circuit “placed too heavy a burden on the prisoner *at the COA stage*”); *Miller-El*, 537 U.S. at 341 (holding Fifth Circuit applied “too demanding a standard on more than one level”); *Tennard*, 542 U.S. at 283-84 (holding Fifth Circuit’s COA analysis “has no foundation in the decisions of this Court.”). Despite the Court’s repeated intervention, the Fifth Circuit continues to set itself apart from the other federal circuits in denying COAs to capital petitioners. To date, the Fifth Circuit has *never* granted a COA in a case involving a federal prisoner facing the death penalty. *See, e.g., Bernard*, 762 F.3d at 483-84 (denying COA to Petitioner and co-defendant on all issues); *United States*

v. Fields, 761 F.3d 443 (5th Cir. 2014) (denying COA); *United States v. Robinson*, No. 09-70020, ECF No. 00511135322 (5th Cir. June 8, 2010) (same); *United States v. Hall*, 455 F.3d 508 (5th Cir. 2006) (same); *United States v. Webster*, 392 F.3d 787 (5th Cir. 2004) (same); *United States v. Jones*, 287 F.3d 325 (5th Cir. 2002) (same); *United States v. Garza*, 165 F.3d 312 (5th Cir. 1999) (same).

Separate and apart from the merits, this petition presents a particularly strong candidate for an exercise of the Court's supervisory authority for two reasons. First, in contrast to most of the habeas cases that reach the Court on certiorari, this is a case about federal law and the federal system. Petitioner was convicted and sentenced to death in federal court. He is seeking habeas relief under § 2255. While there may be open questions about the interplay between Rule 60(b) and § 2255, *see Gonzalez*, 545 U.S. at 529 n. 3, there was no reason for the Fifth Circuit (or this Court, for that matter) to constrain its review in deference to the processes of a state court system.

Second, and more importantly, the denial of review in this case implicates larger questions about the law as an institution. The Court has recognized that “the risk of injustice to the parties’ and ‘the risk of undermining the public’s confidence in the judicial process’” are factors that a court should consider in determining whether to grant relief under Rule 60(b)(6). *See Buck*, 137 S. Ct. at 778 (quoting *Liljeberg*, 486 U.S. at 863-64). The investigations into Judge Smith’s impairment and misconduct were public investigations, cut short only by Judge Smith’s abrupt resignation from the bench. This case raises the prospect that a criminal defendant may have been sentenced to death, and then denied meaningful

review of that sentence, by a federal judge suffering from an impairment. That prospect, and the Fifth Circuit's decision effectively to foreclose any judicial review of Petitioner's allegations, presents a question of importance for the entire judiciary.

The Fifth Circuit held that granting a COA in this case would open the floodgates of litigation into the validity of decisions from Judge Smith's tenure on the federal bench. *See* App. 11a ("To hold otherwise would implicate every one of Judge Smith's decisions for an undetermined period of time nearly twenty years ago and would justify circumventing the second-or-successive limitations in countless cases."). But the potential breadth of the questions raised by Judge Smith's conduct and his resignation from the federal bench provides no justification for denying legal process and limiting judicial inquiry.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

MICHAEL F. WILLIAMS, P.C.
COUNSEL OF RECORD
SUSAN M. DAVIES, P.C.
ARIEL V. LIEBERMAN
KIRKLAND & ELLIS LLP
1301 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
(202) 389-5000
mwilliams@kirkland.com

SUSAN M. OTTO
MICHAEL LIEBERMAN
OKLAHOMA PUBLIC DE-
FENDER'S OFFICE
215 DEAN A. MCGEE
SUITE 109
OKLAHOMA CITY, OK 73102
(405) 609-5930
Susan_Otto@fd.org

Counsel for Petitioner Christopher André Vialva

March 19, 2019