No. _____

In the Supreme Court of the United States

CHRIS GILKERS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition concerns the proper standard for evaluating whether a Rule 60(b) motion "alleges" a proper claim for relief from a habeas judgment, and the degree to which Courts of Appeals are limited by the scope of a Certificate of Appealability.

In *Gonzalez v. Crosby*, this Court held that a Rule 60(b) motion seeking relief from a habeas judgment is proper if it "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." Petitioner Chris Gilkers filed a Rule 60(b) motion based on a defect that occurred in his state post-conviction proceedings, which served as the foundation for his federal habeas proceeding. The district court construed Mr. Gilkers's motion as an unauthorized successive habeas petition and dismissed it. In affirming the district court's decision, the Fifth Circuit imposed an unduly high threshold for "alleging" a proper Rule 60(b) claim and improperly engaged in a merits-based analysis to reach its conclusion. The court also exceeded the scope of the COA that was granted, which was limited to the issue of whether the district court erred in its construction of Mr. Gilkers's motion. As a result of its unnecessary and improperly broad analysis, the Fifth Circuit generated a fractured but precedential opinion that will cause confusion and inconsistencies for countless litigants in the future. The questions presented are:

1. Did the Fifth Circuit violate Petitioner's due process rights by analyzing the merits of his claims in determining whether his Rule 60(b) motion was properly construed as a successive habeas petition?
2. Did the Fifth Circuit violate Petitioner's due process rights by deciding issues that were outside the scope of the Certificate of Appealability that was granted in his case?
3. Did the Fifth Circuit improperly apply this Court's holding in *Gonzalez v. Crosby*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IN THE
SUPREME COURT OF THE UNITED STATES

CHRIS GILKERS, *Petitioner*,

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On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Chris Gilkers respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

The published opinion of the United States Court of Appeals for the Fifth Circuit was reported at *Chris G. Gilkers v. Darrel Vannoy*, 904 F.3d 336 (5th Cir. 2018), and is reprinted at Appendix 1A.

JURISDICTION

The Fifth Circuit entered its judgment on September 13, 2018. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 60(b) provides:

> **Rule 60. Relief From a Judgment or Order**
>
> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.**
>
> 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.

STATEMENT OF THE CASE

On May 16, 2001, Petitioner Chris Gilkers was convicted of second degree murder in Louisiana state court and sentenced to life in prison without the possibility of parole. His conviction was affirmed on appeal. Mr. Gilkers pursued post-conviction relief in Louisiana state court, raising a number of challenges to his trial proceedings, his conviction, and the effectiveness of his counsel. On December 5, 2003, all of his post-conviction claims for relief were denied by the state trial court. Ten days later, the Louisiana Fifth Circuit Court of Appeals ("Louisiana Fifth Circuit") issued a two-sentence order affirming the trial court's ruling and denying his claims. On January 14, 2005, the Louisiana Supreme Court denied Mr. Gilkers's application for a supervisory writ. After exhausting his post-conviction avenues in state court, Mr. Gilkers filed a federal habeas petition seeking relief from the U.S. District Court for the Eastern District of Louisiana. On May 30, 2006, the district court denied Mr. Gilkers's petition. He was also denied a Certificate of Appealability ("COA") by both the district court and the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit").

In May of 2007, Jerrold Peterson, the former Central Staff Director for the Louisiana Fifth Circuit, committed suicide. In a letter written shortly before his death, Mr. Peterson revealed that, over the past several years, post-conviction filings submitted by *pro se* prisoners to the Louisiana Fifth Circuit were not actually reviewed by judges. Instead, Mr. Peterson revealed that *he* had been preparing the rulings on all *pro se* writ applications during that time—a time frame that encompassed Mr. Gilkers's filings—and that "not one criminal writ application filed by an inmate *pro se* had been reviewed by a Judge on the Court" during that time. *See Severin v. Jefferson Parish*, No. 09–2766, 2009 WL 1107713, at *2 (E.D.L.A. Apr. 23, 2009). In other words, *pro se*

petitioners were systematically denied judicial review of their post-conviction applications by the Louisiana Fifth Circuit.

After the suicide letter became public, the Louisiana Supreme Court received hundreds of writ applications from petitioners whose *pro se* applications were denied by the Louisiana Fifth Circuit during the relevant time period. The applications claimed that the internal operating procedures of the Louisiana Fifth Circuit effectively deprived the litigants of supervisory review of district court judgments denying post-conviction relief. Mr. Gilkers was among those applicants. The Louisiana Supreme Court also received from the Louisiana Fifth Circuit an en banc resolution recommending that the Louisiana Supreme Court transfer to the Louisiana Fifth Circuit all of the affected applications for review by an independent, randomly-selected three-judge panel, selected from a set of judges who "had no hand in the process by which this court earlier handled" the previous writ applications. *See State v. Cordero*, 993 So. 2d 203, 205 (La. 2008). On October 3, 2008, the Louisiana Supreme Court ordered that applications raising claims related to the Louisiana Fifth Circuit's post-conviction review procedures be transferred to the Louisiana Fifth Circuit for consideration by new three-judge panels, who would be insulated from all persons other than their staff, in accordance with the en banc resolution. *Id.* at 204-05.

On April 24, 2009, Mr. Gilkers's post-conviction writ application that was denied in 2003 was transferred back to the Louisiana Fifth Circuit for consideration, pursuant to *Cordero*. *See State ex rel. Gilkers v. State*, 7 So. 3d 1203 (La. 2009). On January 28, 2010, a three-judge panel for the Louisiana Fifth Circuit issued a five-page decision addressing the merits of Mr. Gilkers's post-conviction claims but ultimately denying Mr. Gilkers relief. The Louisiana Supreme Court denied Mr. Gilkers's writ application seeking review of that ruling on February 25, 2011.

On May 10, 2011, Mr. Gilkers filed a new habeas petition under 18 U.S.C. § 2254. Mr. Gilkers asserted that the petition was not a second or successive petition because it was based on a new, intervening state court judgment. The district court transferred the petition to the Fifth Circuit for a determination of whether Mr. Gilkers needed authorization to file it as a second or successive habeas petition. The Fifth Circuit determined that the petition was successive, concluding that the new Louisiana Fifth Circuit decision did not impose a new sentence but rather reaffirmed the previous denial of post-conviction relief, and denied Mr. Gilkers authorization to file a successive habeas petition.

On June 27, 2011, Mr. Gilkers filed a Rule 60(b) motion seeking review of the Louisiana Fifth Circuit's new judgment, which Mr. Gilkers described as "the last state court judgment which issued a reasoned opinion." Mr. Gilkers argued that, in light of the *Cordero* issues, his claims were not previously exhausted and he should be able to challenge the new state judgment through a federal habeas petition. Although captioned as a Rule 60(b) motion, the caselaw cited in the motion related exclusively to habeas petitions, not Rule 60(b) motions. The district court construed Mr. Gilkers's Rule 60(b) motion as an unauthorized successive habeas petition and denied it on March 15, 2012. The district court and Fifth Circuit also denied Mr. Gilkers a COA.

On May 21, 2015, Mr. Gilkers filed a second Rule 60(b) motion with the district court, seeking to "re-open the final judgment" of the district court on Mr. Gilkers's original habeas petition in light of the *Cordero* issue, which cast "doubt on the validity of certain state habeas procedures followed by the Louisiana Fifth Circuit Court of Appeal." The district court construed this Rule 60(b) motion as an "attempt to file a prohibited successive petition" and denied it because Mr. Gilkers had not received authorization from the Fifth Circuit to file a successive habeas petition. The district court denied Mr. Gilkers a COA on the issue.

On March 16, 2017, the Fifth Circuit granted a COA on the issue of whether the district court erred in construing Mr. Gilkers's Rule 60(b) motion as an unauthorized successive habeas application. On September 13, 2018, following briefing and oral argument, the Fifth Circuit affirmed the district court's judgment, concluding that the district court did not err in construing Mr. Gilkers's Rule 60(b) motion as a successive habeas petition. *See Gilkers*, 904 F.3d at 336. The majority determined that the Louisiana Fifth Circuit's original decision denying Mr. Gilkers relief "had no impact" on his federal habeas judgment, because the district court properly applied the "look through" approach espoused by this Court in *Wilson v. Sellers*, "and, thus, did not compromise the integrity of his federal habeas proceedings." *Id.* at 344. The majority further held that Mr. Gilkers "would not be entitled to any relief under either Rule 60(b)(5) or Rule 60(b)(6)," even if his motion qualified as a proper Rule 60(b) motion. *Id.* at 346. The majority stated that "[a]lthough this Court cannot deny that the circumstances leading to *Cordero* were unusual, Gilkers cannot show that these circumstances were 'extraordinary' under Rule 60(b)(6) to justify the reopening of the district court's judgment denying him § 2254 relief." *Id.*

Judge Stuart Kyle Duncan filed a separate opinion, in which he concurred with the majority "only to the extent [the majority opinion] concludes that Gilkers's purported Rule 60(b) motion does not actually attack a 'defect in the integrity of [his] federal habeas proceedings,' and is thus subject to the limits on successive habeas petitions." *Id.* at 347 (Duncan, J., concurring in part and concurring in the judgment) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). In his concurrence, Judge Duncan identified several points on which he disagreed with discussions or suggestions by the majority, but noted that he did not believe those points to be part of the majority's holding. *Id.* at 347-49.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's ruling on Mr. Gilkers's Rule 60(b) motion reflects the court's ongoing practice of conflating merits-based analyses with threshold procedural and jurisdictional questions in reviewing requests for post-conviction relief. Instead of focusing on the nature and substance of a petitioners' allegations, the Fifth Circuit regularly looks to the merits of petitioners' claims in deciding whether they have met the threshold requirement of "alleging" or "asserting" a proper claim for relief under the relevant rule or statute. This practice of prematurely dismissing requests for relief violates petitioners' due process rights by permitting merits-based rulings without affording the petitioners a full and fair opportunity to litigate those merits before the district court.

The Fifth Circuit's ruling on Mr. Gilkers's Rule 60(b) motion also reveals the court's continued misinterpretation and misapplication of the Certificate of Appealability statute, 28 U.S.C. § 2253(c). This Court has already reversed the Fifth Circuit multiple times for engaging in merits-based analyses at the COA stage. In this case, the Fifth Circuit ran afoul of the COA statute in another way—by deciding issues outside the scope of the COA. In doing so, the Fifth Circuit not only violated its own precedent and Mr. Gilkers's due process rights, but it also created far-reaching and problematic circuit precedent. The Fifth Circuit's decision to go outside the scope of the COA resulted in a precedential decision in which the court unnecessarily interpreted and applied this Court's Rule 60(b)(6) jurisprudence without engaging in a full analysis of the issues.

The need for this Court's guidance on the issues presented in this petition is further illuminated by the fact that this was a fractured opinion. Although Judge Duncan concurred in the judgment, he submitted a separate opinion in which he expressed reservations about many of the issues addressed by the majority. His concurrence further demonstrates the degree to which the

Fifth Circuit's approach to Mr. Gilkers's Rule 60(b) went beyond the pale, and the extent to which the Fifth Circuit's practices create confusion and inconsistencies, even internally within the circuit.

I. The Fifth Circuit continues to inject merits-based analyses into threshold procedural questions, in violation of litigants' due process rights.

A. The Fifth Circuit improperly considered the merits of Mr. Gilkers's Rule 60(b) motion in determining whether to construe it as an unauthorized, successive habeas petition.

In *Gonzalez v. Crosby*, this Court considered whether a Rule 60(b) motion filed by a habeas petitioner should be construed as a successive habeas petition. 545 U.S. 524, 530 (2005). The Court ultimately drew a line between (a) motions that raise substantive claims for relief, either by asserting new grounds for relief or attacking a federal court's previous resolution of a habeas claim on the merits, and (b) motions that "attack[], 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." *Id.* at 532. According to the Court, the former category should be construed as successive habeas petitions while the latter category comprises true Rule 60(b) motions. In other words, the proper construction of the motion turns on the nature of the error that is alleged. In *Gonzalez*, the Court determined that a Rule 60(b) motion "alleg[ing] that the federal courts misapplied the federal statute of limitations set out in § 2244(d)" qualified as a true Rule 60(b) motion. *Id.* at 533.

This Court has not explicitly addressed what it means to "allege" a proper basis for relief under Rule 60(b). However, the plain meanings of those words make clear that "alleging" a claim requires only the invocation of a right to relief—not proof of entitlement to such relief. This interpretation is consistent with Black's Law Dictionary, which defines "allege" as "to assert as true . . . though no occasion for definitive proof has yet occurred." Black's Law Dictionary (10th ed. 2014). Black's Law similarly defines "assert" as "to state positively" or "to invoke or enforce a legal right." *Id.* Thus, in the context of a Rule 60(b) motion invoking a right to relief from a

habeas judgment, a motion should be treated as a true Rule 60(b) motion as long as the movant "asserts as true" or "states positively" "some defect in the integrity of the federal habeas proceedings."

In Mr. Gilkers's case, the district court and Fifth Circuit applied a much higher threshold for "alleging" a proper Rule 60(b) claim. Mr. Gilkers asserted in his motion that the circumstances of *Cordero* created a defect in the integrity of his federal habeas proceedings, and he invoked a right to relief under Rule 60(b) on that basis. The district court thus should have treated Mr. Gilkers's motion as a proper Rule 60(b) motion and ruled on its merits. Instead, it construed the motion as a successive habeas petition and dismissed it on jurisdictional grounds. On appeal, the Fifth Circuit should have reversed the district court's determination and remanded the case back to the district court for consideration of the merits of Mr. Gilkers's motion. Instead, it looked to the merits of Mr. Gilkers's claims and, specifically, whether he may ultimately be entitled to relief in determining whether his motion should be construed as a Rule 60(b) motion or a successive habeas petition.

The Fifth Circuit's consideration of the merits of Mr. Gilkers's claim in its threshold analysis of whether his motion "alleged" a proper claim for relief under Rule 60(b) was improper and unconstitutional. In looking past the allegations of Mr. Gilkers's motion and considering the merits of his claim for relief, the Fifth Circuit deprived Mr. Gilkers of the opportunity to fully litigate the merits of his claim. Indeed, the district court's dismissal was based on its construction of the Rule 60(b) motion as an improper habeas petition, and that court did not evaluate the merits of Mr. Gilkers's claim for relief. On appeal, the Fifth Circuit analyzed of the facts underlying Mr. Gilkers's claim—without the benefit of a hearing or full briefing on the issues—and considered whether he may be *entitled to relief* on his claim. After determining that the defects

alleged by Mr. Gilkers's would not entitle him to relief, the Fifth Circuit affirmed the district court's dismissal. *See Gilkers*, 904 F.3d at 346 ("[E]ven if Gilkers's motion satisfied the guidelines set forth in *Gonzalez* for proper consideration as a Rule 60(b) motion, Gilkers would not be entitled to any relief under either Rule 60(b)(5) or Rule 60(b)(6)."). Mr. Gilkers was therefore denied due process of law because the merits of his claims were decided without him ever having the opportunity to litigate his claims before the district court in the first instance.

B. The Fifth Circuit has engaged in a similar practice with respect to the denial of Certificates of Appealability and dismissal of habeas petitions, reflecting a dangerous trend toward premature dismissal of potentially meritorious post-conviction claims.

The Fifth Circuit's practice of conflating merits-based analyses with threshold procedural questions is not limited to Mr. Gilkers's case or Rule 60(b) motions. The court similarly has violated due process in the context the denial of Certificates of Appealability and the dismissal of habeas petitions on procedural grounds.

With respect to Certificates of Appealability, this Court already has, on multiple occasions, struck down the Fifth Circuit for adjudicating the merits of a claim prematurely. *See Buck v. Davis*, 137 S. Ct. 759 (2017); *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Much like the determination of whether a litigant has "alleged" or "asserted" a proper claim for relief, the COA stage demands only a "threshold inquiry" that "does not require full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336. That inquiry "is not coextensive with a merits analysis," and this Court has reversed the Fifth Circuit when it has "phrased its determination in proper terms . . . but [] reached [its] conclusion only after essentially deciding the case on the merits." *See Buck*, 137 S. Ct. at 773. Prior to *Buck*, in *Miller-El*—another case reversing the Fifth Circuit on its COA determination—this Court explained that "[w]hen 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 without jurisdiction." 537 U.S. at 336-37. Similarly here, the Fifth Circuit decided the merits of Mr. Gilkers's appeal and used that analysis to justify a jurisdiction-based dismissal. In doing so, it violated Mr. Gilkers's due process rights and committed similar abuses to those that this Court repeatedly has addressed in the COA context.

With respect to habeas petitions, the Fifth Circuit has engaged in a practice of dismissing habeas petitions as procedurally barred when the court determines that the "new right" asserted by the petitioner does not entitle the petitioner to relief. This practice has occurred most notably in the context of claims brought under *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *United States v. Williams*, 897 F.3d 660, 662 (5th Cir. 2018), the Fifth Circuit denied a COA to a habeas petitioner who filed a *Johnson* claim challenging his convictions under 18 U.S.C. § 924(c), on the grounds that *Johnson* did not establish a "newly recognized" right applicable to the petitioner's case. That determination clearly was a merits-based assessment of the petitioner's entitlement to relief—not a proper basis for enforcing a procedural timeliness bar.

Indeed, the problematic implications of the Fifth Circuit's practice are not purely hypothetical—they already are apparent. In the aftermath of *Williams*, the Fifth Circuit did, in fact, invalidate § 924(c) pursuant to this Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which was a "straightforward application" of *Johnson*. But, as a result of *Williams*, prospective petitioners who have legitimate claims that their convictions are unconstitutional may be deterred or prevented from filing petitions in light of the Fifth Circuit's improper and incoherent decision in *Williams.* Accordingly, the Fifth Circuit's approach to threshold procedural and jurisdictional questions not only interferes with the rights of the litigants who are directly affected, such as Mr. Gilkers, but it creates bad law that affects the rights of countless others.

II. The Fifth Circuit continues to violate constitutional due process rights and Supreme Court precedent in its application of the Certificate of Appealability statute—this time, by deciding issues that clearly were outside the scope of the COA.

A. There currently is a circuit split, as well as intra-circuit debate, regarding whether Courts of Appeals may decide issues outside the scope of a COA.

The Fifth Circuit has repeatedly held that it cannot address issues that fall outside the scope of a granted COA—making it even more concerning that the court did so in Mr. Gilkers's case. *See, e.g.*, *United States v. Daniels*, 588 F.3d 835, 836 n.1 (5th Cir. 2009) ("We have jurisdiction to address only the issue specified in the COA." (citing *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997)); *Simmons v. Epps*, 654 F.3d 526, 535 (5th Cir. 2011) ("Because [appellant's] argument falls outside the scope of the COA, we may not address it here."). Other circuit courts—including the Ninth, Eleventh, and Tenth Circuits—have similarly held that, where a COA is required, appellate review is limited to the issues for with a COA was granted. *See, e.g.*, *Hiivala v. Wood*, 195 F.3d 1098, 1102 (9th Cir. 1999) ("[AEDPA] limits the scope of review in a habeas appeal to issues specified in the COA."); *Murray v. United States*, 145 F.3d 1249, 1250 (11th Cir. 1998) ("[I]n an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the COA."); *Grossman v. Bruce*, 447 F.3d 801, 805 n.3 (10th Cir. 2006) (stating that a challenge that was "outside the scope of our grant of a COA" was "barred").

By contrast, several other circuits—including the First, Third, and Eighth Circuits—have held that the Courts of Appeals have discretion to consider *sua sponte* issues outside the scope of a COA. *See, e.g.*, *Holmes v. Spencer*, 685 F.3d 51, 58 (1st Cir. 2012) ("[T]his Court has the discretion to expand the scope of the COA *sua sponte*, particularly for an issue the parties have adequately briefed."); *Villot v. Varner*, 373 F.3d 327, 337 n.13 (3d Cir. 2004) ("We may not consider issues on appeal that are not within the scope of the [COA]. However, the merits panel may expand the scope of the COA beyond the scope announced by the motions panel. The fact

that Villot did not request expansion is not controlling - the merits panel may expand the COA *sua sponte*." (internal citations omitted)); *United States v. Morgan*, 244 F.3d 674, 675 (8th Cir. 2001) (holding that a panel has the "the right . . . to exercise its discretion to consider *sua sponte* issues beyond those specified in a certificate of appealability, whether the certificate was issued by a district court or by an administrative panel of this court").[1]

Thus, there is a clear split among the circuits regarding whether Courts of Appeals may *sua sponte* consider issues outside the scope of the COA, without the petitioner seeking an expansion of the issues on appeal. Not only that, but there are *intra*-circuit debates regarding the degree to which COAs limit the scope of review. For example, in *Scott v. Collins*, there was panel disagreement regarding the proper scope of the COA. 286 F.3d 923 (6th Cir. 2002), *abrogated on other grounds by Day v. McDonough*, 547 U.S. 198 (2006). The majority considered several arguments raised by the appellant that, in its view, "relate[d] to" the single issue for which COA was granted. *Id.* at 926 n.2. However, a dissenting judge had a more restrictive view of the COA's limitations, explaining:

> Issues not certified for appeal, either by the district court or by this court on motion under Sixth Circuit Rule 22(a), cannot be heard on appeal. Because the operative COA in this case mentions only the issue of timeliness under 28 U.S.C. § 2244(d), I believe that we exceed the scope of the COA when we address the issues articulated by the petitioner.

Id. at 932 (Stafford, J., dissenting) (internal citations omitted).

In a similar case, judges on a panel for the Tenth Circuit disagreed about whether the court had discretion to remand a case for an evidentiary hearing where the appellant's counsel did not

[1] *See also Armstrong v. Hobbs*, 698 F.3d 1063, 1068 (8th Cir. 2012) (stating that the Supreme Court's decisions in Miller-El and Gonazalez "leave undisturbed" the en banc ruling in *Morgan*).

ask for a COA on the district court's denial of the appellant's request for an evidentiary hearing. In that case, the COA was limited to an ineffective assistance of counsel claim, and appellant's counsel argued in his brief that an evidentiary hearing, if held, would have revealed evidence supporting that claim. *See Young v. Sirmons*, 551 F.3d 942, 974 n.1 (10th Cir. 2008) (Henry, C.J., concurring in part and dissenting in part). The dissenting judge believed that the court had discretion to remand the case for an evidentiary hearing, but the majority concluded that "from a procedural standpoint," the question of whether the district court abused its discretion in denying the request for an evidentiary hearing was "not properly before" the court because "[n]o COA has been requested or granted" on the issue. *Id.* at 970, 974 n.1.

These circuit splits and intra-circuit disagreements highlight the lack of clarity and consistency among circuit courts regarding the degree to which COAs limit the authority of Courts of Appeals to decide issues. The confusion and inconsistencies are further evident from the fact that the Fifth Circuit appears to have strayed from its own precedent in Mr. Gilkers's case. For these reasons, this Court's guidance is needed to clarify the limitations that COAs impose on federal Courts of Appeals.

B. The decision of issues outside the scope of a COA violates litigants' due process rights and conflicts with this Court's precedent, but this Court has not weighed in on the issue.

This Court has not weighed in on the question of whether federal Courts of Appeals are precluded from considering and deciding issues that were not included in a granted COA. But this Court's precedent regarding the proper application of the 28 U.S.C. § 2253(c) (the COA statute) is informative and suggests that Courts of Appeals *should not* decide issues that exceed the scope of the COA. For example, this Court has repeatedly held that "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *see also Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012).

And in *Buck v. Davis*, this Court noted that "[w]ith respect to *this Court's review*, § 2253 does not limit the scope of our consideration of the underlying merits[.]" 137 S. Ct. at 774-75 (emphasis added). Accordingly, this Court's precedents suggest that the COA statute *does* limit the scope of consideration of issues by the federal Courts of Appeals. Indeed, it is inconceivable that the law would prevent appellants from seeking review of issues outside the scope of a COA, but allow the Courts of Appeals to decide the same issues *sua sponte* without prior warning.

C. The need for Supreme Court guidance on this issue is underscored by the Fifth Circuit's disregard for its own precedent in Mr. Gilkers's case, and the dangerous circuit law that was created as a result.

As discussed above, Fifth Circuit precedent is clear that the court lacks jurisdiction to consider issues outside the scope of the COA. Here, the COA clearly was limited to the proper construction of Mr. Gilkers's Rule 60(b) motion. That was the only ruling by the district court, and it was the basis for the Fifth Circuit affirming the district court's judgment dismissing Mr. Gilkers's motion. But, despite its own precedent to the contrary, the Fifth Circuit went further and addressed the merits of Mr. Gilkers's claim—specifically, whether the factual circumstances underlying his request for relief could qualify as "extraordinary circumstances" warranting relief under Rule 60(b)(6). This clearly was improper.

Litigants are not entitled to rulings on issues that are not included in a COA. When a Court of Appeals *sua sponte* decides issues outside the scope of the COA, it violates the litigant's due process rights by depriving him of fair notice of the issues to be decided and an opportunity to fully prepare litigate the issue. This is especially true in a case like this one, where the district court never addressed the merits of Mr. Gilkers's claims and the issue was decided in the first instance by the Fifth Circuit. And, in light of the Fifth Circuit precedent characterizing COAs as

jurisdictional, Mr. Gilkers had no reason to believe that issues beyond the single issue for which COA was granted would be decided by the Fifth Circuit.

In this case, the implications of the Fifth Circuit's constitutional violations are extremely damaging and far-reaching. The Fifth Circuit unnecessarily decided the question of whether the circumstances underlying *Cordero* could qualify as "extraordinary" under Rule 60(b)(6) to justify reopening Mr. Gilkers's original habeas judgment. In doing so, the court set an impossibly high bar for what qualifies as "extraordinary circumstances" under the rule. While the court did not issue a blanket holding that there is *no case* in which *Cordero* would qualify, its ruling nevertheless created circuit precedent regarding the interpretation of an extremely discretionary standard that was never decided by a district court in the first instance.

No doubt, this case will be used as a sword against future Rule 60(b)(6) movants. This case involved the complete absence of appellate post-conviction review by a state court during a defendant's post-conviction proceedings. The defendant in this case is serving a life sentence without the possibility of parole, and the defective state proceedings served as the foundation for his federal habeas petition. The defect in the proceedings went undetected for over a decade until a court clerk, who was the person actually issuing the appellate decisions, committed suicide and left behind a note revealing the court's fraudulent and unconstitutional practices. In exceeding the scope of the COA, the Fifth Circuit issued a published opinion stating that those circumstances cannot qualify as "extraordinary" in Mr. Gilkers's case, without the issue being fully litigated by the parties or giving Mr. Gilkers notice of the Court's intent to address the issue in its decision. Now, every Rule 60(b)(6) motion filed in the circuit will be confronted with the argument that "if the *Cordero* issue was not an extraordinary circumstance, this situation surely cannot qualify"—despite the fact that this aspect of the decision was unnecessary, improper, and not fully developed.

III. The Fifth Circuit's interpretation of "defect in the integrity of the federal habeas proceeding" as excluding defects in Mr. Gilkers's underlying state post-conviction proceedings violates due process.

As explained above, the Fifth Circuit engaged in an improper merits-based analysis of Mr. Gilkers's motion and improperly exceeded the scope of the COA in this case. These due process violations resulted in an extremely problematic precedential opinion with far-reaching implications. One final aspect of the court's decision that warrants this Court's attention is the Fifth Circuit's interpretation of *Gonzalez*.

In its opinion, the Fifth Circuit suggested that a defect in the integrity of a *state* post-conviction proceeding cannot constitute a defect in the integrity of the *federal* habeas proceeding if the federal district court did not affirmatively rely on the defective state judgment in its initial ruling. *Gilkers*, 904 F.3d at 344-45. The court focused on the district court's application of the "look through" approach in Mr. Gilkers's original habeas proceedings, wherein the court deferred to the state trial court's judgment because the defective Louisiana Fifth Circuit judgment contained no independent reasoning. *Id.* (citing this Court's explanation of the "look through" approach as explained in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018)). According to the Fifth Circuit, the district court's application of the look through approach in its analysis meant that the defective decision "had no impact on the district court's decision" to deny Mr. Gilkers habeas relief, and therefore his argument that the *Cordero* issue "compromised the integrity of his § 2254 proceeding is without merit[.]" *Id.* at 346.

This interpretation of *Gonzalez* cannot be correct. As Judge Duncan recognized in his concurrence in this case, this Court "has not exhaustively defined what it meant by a 'defect in the integrity of the federal habeas proceedings.'" *Gilkers*, 904 F.3d at 349. But a ruling that state defects do not also infect the federal habeas proceedings that follow is wholly inconsistent with 28

U.S.C. § 2254. As noted by Judge Duncan, "deference to state court adjudication is in AEDPA's DNA[.]" *Id.* at 349. Therefore, it was not only unnecessary for the district court to reach this conclusion in light of the limited issue on COA—it was an improper interpretation of this Court's precedent, which will impact countless litigants in state custody in the future.

CONCLUSION

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

Respectfully submitted this 12th day of December, 2018,

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