No. 18-_____

In the

Supreme Court of the United States

JOEL DARNELL PATTON,
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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Does a district court have the authority to reconsider the merits of a 28 U.S.C. § 2255 action in response to a prisoner's timely post-judgment motion under Federal Rule of Civil Procedure 59(e)?

II

Assuming that the prisoner's notice of appeal would otherwise be timely under Federal Rule of Appellate Procedure 4(a)(4)(A), does the court of appeals's subsequent decision that the post-judgment motion was, in substance, a successive "claim" for relief render the appeal of the original judgment untimely and deprive that court of jurisdiction over the appeal?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Joel Darnell Patton was the defendant and movant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff and respondent in the district court, the appellee in the court below, and is the Respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joel Darnell Patton asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

All of the opinions in this action were unpublished. The Appendix contains copies of the Fifth Circuit's order authorizing a successive § 2255 motion (Pet. App. 11a–12a); the district court's order dismissing Petitioner's authorized § 2255 motion (Pet. App. 13a–14a); the district court's order refusing to reopen the case (Pet. App. 28a); the Fifth Circuit order granting a certificate of appealability (Pet. App. 31a–32a); the Fifth Circuit's opinion and order dismissing the appeal (Pet. App. 1a–9a); and the Fifth Circuit order denying rehearing (Pet. App. 10a).

JURISDICTION

The Fifth Circuit dismissed Mr. Patton's appeal on September 10, 2018. Pet. App. 1a. The court denied Mr. Patton's timely petition for rehearing on October 12, 2018. Pet. App. 10a. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. §§ 2107, 2244, and 2255; Federal Rule of Appellate Procedure 4(a); Rules 9, 11, and 12 of the Rules Governing Section 2255 Proceedings in U.S. District Courts; and Federal Rules of Civil Procedure 59 and 60. These provisions are reprinted in the Appendix. Pet. App. 34a–61a.

STATEMENT OF THE CASE

After the district court dismissed and denied Petitioner's motion to vacate his sentence, Petitioner promptly asked that court to reconsider its decision. Pet. App. 19a–27a. According to the Fifth Circuit, during the five-month period the district court mulled his request, Petitioner inadvertently and unknowingly lost forever his ability to appeal the adverse decision.

The district court enhanced Petitioner's 2001 sentence for unlawful possession of a firearm under ACCA based on four convictions for Texas simple robbery. For many years, that crime was deemed a violent felony under the Armed Career Criminal Act's delphic residual clause. *See,* e.g., *United States v. Davis*, 487 F.3d 282, 285–286 (5th Cir. 2007); *accord United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379–381 & n.3 (5th Cir. 2006) (recognizing that—unlike most jurisdictions—Texas defines robbery without reference to force).[1] After this Court struck down ACCA's residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Petitioner sought—and the Fifth Circuit granted—authorization to file a successive motion to vacate under 28 U.S.C. § 2255(h). Pet. App. 12a. That authorization order directed the Fifth Circuit Clerk to transfer Mr. Patton's motion for authorization and all

[1] As of the date this Petition is filed, the post-*Johnson* analysis of Texas simple robbery is actively being litigated in the court below. See, e.g., *United States v. Fennell*, No. 3:15-CR-443, 2016 WL 4491728, at *6 (N.D. Tex. Aug. 25, 2016), *reconsideration denied*, 2016 WL 4702557 (N.D. Tex. Sept. 8, 2016); *aff'd,* 695 F. App'x 780 (5th Cir. 2017) (Texas simple robbery does not satisfy ACCA's elements clause.); *United States v. Burris*, 896 F.3d 320 (5th Cir. 2018) (same), *withdrawn*, 908 F.3d 152 (5th Cir. 2018). Upon granting this Petition, the Court could reach and resolve that question, but it need not.

"related pleadings" to the district court for filing as a successive § 2255 motion. Pet. App. 12a.

Unfortunately, Petitioner's motion for authorization was not immediately docketed in the district court. *See* Pet. App. 16a at docket entry 2 (noting that the authorization order was docketed on August 1, 2016, but additional Fifth Circuit pleadings were not filed until February 15, 2017). On February 9, 2017—without the benefit of Petitioner's detailed argument in support of his § 2255 claim—the district court "dismissed and denied" his authorized motion after finding that he "failed to make the showing required to file his successive motion." Pet. App. 13a–14a. The court also denied a certificate of appealability. Pet. App. 14a.

Thirteen days later—after discovery and correction of the district court clerk's filing error (Pet. App. 16a)—Petitioner asked the district court to reopen the case under Federal Rules of Civil Procedure 52(b) and 59(a) & (e). Pet. App. 19a–27a. In addition to pointing out the administrative error, Pet. App. 20a n.1, the motion also cited decisions rendered both before and after the judgment that supported Petitioner's claim. After considering the motion for more than five months, the district court denied it on August 8, 2017. Pet. App. 28a–30a. Mr. Patton filed a notice of appeal on August 23, 2017, challenging both the original judgment and the ruling on his post-judgment motion. Pet. App. 33a.

Because he had already served more than ten years in prison (the default, non-ACCA maximum), and because his post-conviction action had been pending for more than two years, Mr. Patton asked the Fifth Circuit for expedited consideration of his

appeal. Pet. App. 32a. The Fifth Circuit granted that request and granted COA on whether Mr. Patton remained an Armed Career Criminal after *Johnson*. Pet. App. 32a. The court also raised a potential "jurisdictional" problem with the appeal: if Mr. Patton's post-judgment motion were re-classified as an unauthorized successive habeas application under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), then his (otherwise timely) notice of appeal might be *untimely*. Pet. App. 31a–32a.

After extensive briefing and oral argument, the Fifth Circuit decided that it lacked jurisdiction over the appeal. Pet. App. 1a–9a. In that court's view, the district court's dismissal order contained both a "procedural, threshold determination" (that Mr. Patton had not satisfied his gatekeeping burden) and an "alternative" ruling "*on the merits*." Pet. App. 6a. While the post-judgment motion identified a defect in the § 2255 proceeding—the filing error—the Fifth Circuit faulted Petitioner for putting that notification in a footnote of the motion. Pet. App. 8a n.5. "The entire body of the motion is focused on the alleged error in the district court's conclusion that Patton's robbery convictions qualified as violent felonies under the force clause—a merits determination." Pet. App. 8a n.5. The court also held, over Petitioner's objection, that the involuntary reclassification of his post-judgment motion rendered the appeal untimely, depriving the Fifth Circuit of jurisdiction.

REASONS TO GRANT THE PETITION

Congress enacted AEDPA "to 'streamline and simplify' the federal habeas system." *Pace v. DiGuglielmo*, 544 U.S. 408, 427 (2005) (Stevens, J., dissenting) (quoting *Hohn v. United States*, 524 U.S. 236, 265 (1998) (Scalia, J., dissenting)). Instead of "simplicity," that law has given rise to several doctrines that resemble Nero

Wolfe's orchids: "insipid, expensive, parasitic and temperamental." Rex Stout, *The League of Frightened Men* 6 (Bantam 1995). The rule announced in *Gonzalez v. Crosby*, 545 U.S. at 531, has blossomed into the most difficult and delicate in this garden. The basic premise is sound: AEDPA imposes restrictions on "second or successive" habeas petitions, and it "would be inconsistent with the statute" to allow state prisoners to use Federal Rule of Civil Procedure 60(b) to avoid those restrictions when filing new or additional habeas claims. *Gonzalez*, 545 U.S. at 531–532.

The trouble comes when trying to decide *which* post-judgment motions are properly filed under Rule 60(b), and which ones must satisfy the additional substantive and procedural requirements of 28 U.S.C. § 2244(b). "In most cases," the *Gonzalez* Court predicted,

> determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief, as in Harris, supra, will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.

Gonzalez, 545 U.S. at 532.

A review of recent appellate decisions demonstrates that the inquiry is never as "simple" as *Gonzalez* predicted. Federal district courts spend considerable time and effort analyzing every Rule 60 motion filed by a prisoner, and that analysis must be repeated in the Court of Appeals. *See*, *e.g., Adams v. United States*, 911 F.3d 397

(7th Cir. 2018) (discussing *Bradley v. Lockett*, 549 F. App'x 545, 549–551 (7th Cir. 2013)); *United States v. McDaniels*, 907 F.3d 366, 368–370 (5th Cir. 2018) & *id.* at 372 (Graves, J., concurring in part); *Barnett v. Roper*, 904 F.3d 623, 632–633 (8th Cir. 2018); *United States v. Vialva*, 904 F.3d 356, 360–363 (5th Cir. 2018), pet. for cert. docketed, No. 18-6992 (U.S. Dec. 7, 2018).

Given the complexity surrounding the application of *Gonzalez*, this Court should be suspicious of any attempt to expand either its *scope* or the *consequences* of its application. The Fifth Circuit has done both: it has applied the doctrine to Rule 59 motions, and it has dismissed otherwise timely appeals based on re-classification of post-judgment motions. This Court's prompt intervention is necessary to contain the damage.

I. This Court should grant the petition and resolve the dispute about *Gonzalez*'s application to Rule 59 motions.

A. The Circuits are divided.

Gonzalez was a case about a state prisoner's post-judgment motion under Federal Rule of Civil Procedure 60(b). *Gonzalez*, 545 U.S. at 526. The Court reserved judgment on how the doctrine applied to *federal* prisoners. *Id.* at 530 n.3. The opinion was also silent on whether Rule 59 motions trigger the same "successive petition" scrutiny as Rule 60 motions.

The lower courts "have split on whether *Gonzalez*'s holding extends to Rule 59(e) motions." *Rishor v. Ferguson*, 822 F.3d 482, 490–491 (9th Cir. 2016). The split is entrenched and acknowledged. *Id.*; *see also Blystone v. Horn*, 664 F.3d 397, 412 (3d Cir. 2011) ("Our sister Circuits have split on the issue of whether a Rule 59(e) motion

to alter or amend judgment that raises a cognizable habeas claim is properly construed as a second or successive habeas petition.").

The Fifth Circuit applies "the *Gonzalez* framework to post-judgment motions under Rule 59(e)." Pet. App. 5a (quoting *Williams v. Thaler*, 602 F.3d 291, 303–305 (5th Cir.2010)). The Eighth and Tenth have done the same in published opinions. *See Ward v. Norris*, 577 F.3d 925, 935 (8th Cir.2009); *United States v. Pedraza*, 466 F.3d 932, 934 (10th Cir.2006). By contrast, the Third, Sixth, and Seventh Circuits have all reached the opposite conclusion—they have held that Rule 59 motions are *not* subject to the same framework as Rule 60(b) motions. *See Blystone*, 664 F.3d at 415 ("But we, nonetheless, disagree with the Court of Appeals for the Fifth Circuit's holding because we do not believe that the differences between Rules 60(b) and 59(e) are merely technical."); *Howard v. United States*, 533 F.3d 472, 475–476 (6th Cir.2008); *Curry v. United States*, 307 F.3d 664, 665 (7th Cir. 2002).

The Ninth Circuit also allows prisoners to seek *reconsideration* of their claims via a Rule 59 motion, but not to raise *new* claims:

> we hold that a motion for reconsideration filed within twenty-eight days of judgment that raises a new claim, including one based on newly discovered evidence or an intervening change in substantive law, is subject to AEDPA's second-or-successive petition bar. However, a timely motion for reconsideration that asks the district court to reconsider a previously adjudicated claim on grounds already raised should not be construed as a second or successive habeas petition subject to AEDPA's additional restrictions.

Rishor, 822 F.3d at 493–494. For present purposes, the Ninth Circuit's "hybrid" approach can be joined to those of the Third, Sixth, and Eighth Circuits. Mr. Patton did not attempt to raise any *new* claims in his post-judgment motion; he merely asked

the Court to reconsider its decision in light of other courts' opinions on the same or related questions.

These divergent approaches to jurisdiction cannot be reconciled. When a defendant asks a district court to reconsider its ruling, the district court either has the authority to correct its errors under Rule 59, or it lacks the authority. For matters of federal-court jurisdiction, the Constitution permits no middle ground: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

B. The Third, Sixth, Seventh, and Ninth Circuits have the better view: a motion to reconsider under Rule 59 is part of the § 2255 proceeding, not a successive motion to vacate.

"The purposes behind Rule 59(e), as well as the mechanics of its operation, counsel in favor of the nonapplicability of second-or-successive limitations." *Howard v. United States*, 533 F.3d 472, 474 (6th Cir. 2008). Rule 59(e) codifies a district court's power "to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 450 (1982). As the Third Circuit recognized, this laudable purpose is distinct from the authority found in Rule 60(b) to collaterally attack a civil judgment long after the period for appeal has run:

> Viewed against this backdrop, we think it clear that applying AEDPA's limitations on successive collateral attacks to Rule 59(e) motions would unduly interfere with the prompt reconsideration of just-entered judgments. That is to say, it would frustrate Rule 59(e)'s intention to allow the district court to correct obvious errors in its reasoning readily, which in turn "further[s] the

> important goal of avoiding piecemeal appellate review of judgments." We are unwilling to attribute to Congress the "unlikely intent" to so impede Rule 59(e)'s operation by way of AEDPA's "second or successive" restrictions.

Blystone, 664 F.3d at 414 (internal citations omitted). In other words, a promptly filed reconsideration motion actually *advances* the goals of AEDPA. It allows the district court to correct its own mistakes *before* the case is reviewed on appeal. The approach of the Fifth, Eighth, and Tenth Circuits actually multiplies litigation by requiring a motion for certificate of appealability and an appeal in an entirely new court before obvious mistakes can be corrected.

A timely Rule 59(e) motion also suspends the finality of the judgment. *See* Fed. R. App. P. 4(a)(4)(A)(iv). It should therefore be classified as "part of the one full opportunity for collateral review that AEDPA ensures to each petitioner." *Blystone*, 664 F.3d at 415; *accord Curry*, 307 F.3d at 665. For all these reasons, the Fifth Circuit was wrong to apply the *Gonzalez* doctrine to Petitioner's post-judgment motion under Rule 59.

C. If Petitioner prevails on the first question, that will change the outcome.

By granting a COA, the Fifth Circuit recognized that Petitioner made a substantial showing on the merits that his constitutional rights were denied. Pet. App. 31a–32a. The court only dismissed the case because it re-characterized and ignored his post-judgment motion under Rule 59. Petitioner had urged the Court *not* to apply the *Gonzalez* doctrine to Rule 59 motions (Patton Initial Br. 11 & n.1), but that argument was foreclosed.

It is undisputed that the post-judgment Rule 59 motion was timely and that the notice of appeal was timely filed within 60 days of the district court's denial of the post-judgment motion. Pet. App. 8a. Under a straightforward application of Federal Rule of Appellate Procedure 4(a)(4)(A), the appeal was timely. The only way to avoid that result is to ignore the Rule 59 motion. Under the authority of binding decisions in the Third, Sixth, Seventh, and Ninth Circuits, the Court of Appeals *could not* ignore that motion. Petitioner's appeal would have been timely.

II. This Court should grant the petition to address whether a timely post-judgment motion that would *otherwise* suspend finality continues to have that effect, though barred by *Gonzalez*.

The Fifth Circuit dismissed an otherwise timely appeal based on a post-hoc, involuntary re-characterization of Petitioner's post-judgment motion. That unjust outcome goes well beyond the holding of *Gonzalez*, which had no occasion to consider the finality-delaying provisions of Appellate Rule 4(a)(4). By extending the *effect* of *Gonzalez*, the Fifth Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c). More importantly, the Fifth Circuit "decided" that question "in a way that conflicts with" this Court's rulemaking decisions in Federal Rule of Appellate Procedure 4(a)(4). *Id.*

A. Under Federal Rule of Appellate Procedure 4(a)(4), specified post-judgment motions filed within tight time limits suspend a civil judgment's finality (or extend the deadline to appeal), even if that post-judgment motion turns out to be meritless.

Under 28 U.S.C. § 2072(c), this Court has the power to define, by rule, "when a ruling of a district court is final for the purposes of appeal under" 28 U.S.C. § 1291. For *civil* suits, this Court has exercised its power in Federal Rule of Appellate

Procedure 4(a)(4). That rule specifies six kinds of motions that suspend the finality of a civil judgment. *See* Fed. R. App. P. 4(a), advisory committee notes to 1979 amendment (A specified post-judgment motion "destroy[s]" the finality of the judgment when filed); *accord Stone v. I.N.S.*, 514 U.S. 386, 402–403 (1995) ("The majority of post-trial motions, *such as Rule 59*, render the underlying judgment nonfinal." (emphasis added)).

"[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58–61 (1982). To avoid confusion and overlapping jurisdiction, this Court has repeatedly amended Appellate Rules 4(a)(2) and 4(a)(4). These amendments represent a steady march *toward clarity* and *away from surprise*. *See* Fed. R. App. P. 4(a)(4), advisory committee notes to 1979, 1993, 1995, 1998, 2002, 2009, and 2016 Amendments. The most recent amendment, in 2016, clarified that a motion filed within the tightly-controlled time limits (28 days or less) "re-starts the appeal time" when the motion is resolved. Fed. R. App. P. 4(a)(4), advisory committee note to 2016 amendment.

Under the current version of the rule, six *finality-suspending* motions are specified, and all of them *must be filed* before an appeal would otherwise be due:

> (i) for judgment under Rule 50(b) ["No later than **28 days after the entry of judgment**—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged." Fed. R. Civ. P. 50(b)];
>
> (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment ["On a party's motion filed no later than **28 days after the entry of judgment**, the court may amend its findings—or

> make additional findings—and may amend the judgment accordingly." Fed. R. Civ. P. 28(j)];
>
> (iii) for attorney's fees under Rule 54 [if "filed no later than **14 days after the entry of judgment**," Fed. R. Civ. P. 54(d)(2)(B)(i)] if the district court extends the time to appeal under Rule 58 ["[I]f a timely motion for attorney's fees is made under Rule 54(d)(2), the court may **act before a notice of appeal has been filed and become effective** to order that the motion have the same effect under Federal Rule of Appellate Procedure 4 (a)(4) as a timely motion under Rule 59." Fed. R. Civ. P. 58(e)];
>
> (iv) to alter or amend the judgment under Rule 59 ["no later than **28 days after the entry of judgment,**" Fed. R. Civ. P. 59(e)]; or
>
> (v) for a new trial under Rule 59 ["no later than **28 days after the entry of the judgment**," Fed. R. Civ. P. 59(b)]; or
>
> (vi) for relief under Rule 60 if the motion is filed no later than **28 days after the judgment is entered.**

Fed. R. App. P. 4(a)(4)(A) (emphasis added); *see also* Advisory Committee notes on 2016 Amendment.

The 1993 Amendment illustrates the high value placed on *clarity* and *predictability*. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), this Court held that a notice of appeal filed *before* a post-judgment motion ceases to have any effect. "Many litigants, especially pro se litigants," were unaware of that interpretation and "fail[ed] to file the second notice of appeal." Fed. R. App. P. 4(a)(4), Advisory Committee Notes on 1993 Amendment. This Court amended the rule:

> The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the

> motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Id.

B. *Gonzalez* did not address the finality-suspending effect of post-judgment motions.

These finality-suspending provisions were never at issue in *Gonzalez*. About 16 months *before* Gonzalez filed his post-judgment motion, "[a] judge of the Eleventh Circuit denied a certificate of appealability (COA) on April 6, 2000." *Gonzalez*, 545 U.S. at 527. In other words, by the time he filed that Rule 60 motion, he had no further right to appeal the original judgment. It thus makes sense to classify *his* motion as a truly *successive* petition.

To be sure, *Gonzalez* limits *whether a post-judgment motion may be granted*. This Court held that it would be "inconsistent with" § 2244 to permit a prisoner to "vindicate" new claims raised in a post-judgment motion without first requiring him to satisfy the requirements for a successive application. *Gonzalez*, 545 U.S. at 532. If a post-judgment motion is "in substance a successive habeas petition," it "should be treated accordingly." *Id.* at 531. But, where *Gonzalez* applies, the Court must "subject" the post-judgment motion "to the same requirements" as a successive habeas petition. 545 U.S. at 531.

Gonzalez thus does not address whether a post-judgment motion filed *within* the tight time constraints of Appellate Rule 4(a)(4) will toll the finality of the original judgment.

C. Contrary to the plain text of Appellate Rule 4(a)(4)(A), the Fifth Circuit held that the Rule 59 motion did not suspend the original judgment's finality.

The Fifth Circuit acknowledged that Rule 59 motions "will ordinarily toll the filing period" for an appeal. Pet. App. 8a. But because the court decided that Petitioner's motion ran afoul of *Gonzalez*, it chose to *ignore* that motion and assume that the period to appeal was running the entire time. Pet. App. 9a; *see also Uranga v. Davis*, 893 F.3d 282, 284 (5th Cir. 2018) ("However, a purported Rule 59(e) motion that is, in fact, a second or successive § 2254 application . . . would not toll the time for filing a notice of appeal.").

This was a surprisingly punitive turn of events. The district court did not classify Petitioner's motion as an unauthorized successive motion to vacate; the court simply denied the motion after finding that Petitioner "failed to meet his burden for showing that this Court should reopen its prior judgment." Pet. App. 29a. The Government likewise remained silent until the Court of Appeals instructed it to brief the issue. If either the court or the Government had *suggested* that the operation of Appellate Rule 4 would be ignored or suspended, then Petitioner would have immediately filed a notice of appeal to preserve his rights.

In *Williams v. Thaler*—the case where the Fifth Circuit extended *Gonzalez* to Rule 59 motions—the court acknowledged that a Rule 59 motion "voids a previously-filed notice of appeal." 602 F.3d at 303. And the leading treatise agrees that a Rule 59 motion tolls the deadline to file an appeal in a federal habeas case:

> Even in cases in which a Rule 60 motion is available and is not subject to the successive petition rules, such a motion has

> disadvantages that may make the filing of a timely Civil Rule 59 motion the preferred course. First, a Civil Rule 60 motion does *not* toll the time for appealing the original judgment unless the motion is served within 28 days after the district court's entry of judgment (and thus, in effect, is a Civil Rule 59 motion).

2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 34.3 at 2093–2094 & n.21 (7th ed. 2017).

Assuming that *Gonzalez* applies to Rule 59 motions in § 2255 proceedings, it is at least debatable whether the Fifth Circuit properly characterized Petitioner's motion as an attack on the *merits*. As Petitioner explained in his Initial and Reply Briefs below, he used the post-judgment motion to call attention to the omitted filing and to challenge a *gatekeeping* determination.

This Court has never considered whether *Gonzalez* applies to Rule 59 or to a § 2255 proceeding, and it certainly has never used the doctrine to divest appellate courts of jurisdiction over otherwise timely appeals. As far as Petitioner could tell from the February 9, 2017 order, the district court made a *threshold* or *gatekeeping* ruling "without reaching the merits." Pet. App. 13a. Petitioner challenged that ruling, and specifically argued that his motion to vacate should have been granted. The Fifth Circuit later characterized the Rule 59 motion as an unauthorized successive motion, contrary to 28 U.S.C. § 2255(h). If that subtle decision is correct, then perhaps the district court was right to deny the motion to reopen. But that does not mean the appeal of the original judgment was untimely. If *Gonzalez* has that effect, this Court should say so in a published opinion. If not, the decision below should be reversed.

D. The Fifth Circuit's re-characterization of Petitioner's motion, over his objection, conflicts with the principles announced in *Castro v. United States*.

Even assuming that the *Gonzalez* analysis was correct, the Fifth Circuit was wrong to re-characterize Petitioner's motion over his objection. This Court considered a very similar situation in *Castro v. United States*, 540 U.S. 375, 381 (2003). In that case, a federal defendant filed a pro se motion "that he called a Rule 33 motion for a new trial." *Id.* at 378. The Government suggested that the motion should sound under 28 U.S.C. § 2255, and (at that time) everyone seemed to agree. *Id.*

Federal courts "sometimes will ignore the legal label that a pro se litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category." *Id.* at 382. Recharacterization of pro se pleadings is permitted "in order to avoid an unnecessary dismissal, to avoid inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a pro se motion's claim and its underlying legal basis." *Id.* at 381–382. But *Castro* sharply limited the authority to re-characterize where the action would "make it significantly more difficult for that litigant" in future proceedings. *Id.* at 382.

Castro's limitation on "lower courts' recharacterization powers" *does not* depend on whether the pro se filing is "in substance" or "in fact" a § 2255 application. *Id.* at 382–383. The decision pre-supposes that re-characterization would make a "better fit" between the arguments raised and the legal vehicle. Even so, where that

re-characterization would limit a defendant's future options at litigation, courts must obtain his consent. *Id.*

Here, the Fifth Circuit decided that the district court lacked authority over Petitioner's post-judgment motion because it was—in substance—a successive motion to vacate. If so, that was a reason to deny the motion, or to affirm the district court's denial. But the court was not permitted to delete the filing without Petitioner's consent.

The Court of Appeals concluded that *Castro*'s protections only applied to *pro se* motions. But if that is true, it is only because courts *lack* the power to recharacterize counseled motions. *C.f. Castro*, 540 U.S. at 381. The logic of the *restriction* does not depend on whether a motion is pro se. Under *Castro*, there is a difference between recognizing that a motion is *in substance* a post-conviction application, and actually re-labeling it as a post-conviction application. Even if Petitioner's motion is correctly characterized as a new post-conviction "application" *in substance*, the Fifth Circuit cannot re-label the pleading to his detriment.

E. Contrary to the ruling below, this novel application of *Gonzalez* does not carry *jurisdictional* significance.

The Fifth Circuit believed it had discovered a *jurisdictional* defect. Pet. App. 8a (citing *Bowles v. Russell*, 551 U.S. 205, 214 (2017)). But not all timeliness questions in *civil appeals* are jurisdictional:

> The statement was correct as applied in *Bowles* because, as the Court there explained, the time prescription at issue in *Bowles* was imposed by Congress. 551 U.S., at 209–213, 127 S.Ct. 2360. But "mandatory and jurisdictional" is erroneous and confounding terminology where, as here, the relevant time prescription is

> absent from the U.S. Code. Because Rule 4(a)(5)(C), not § 2107, limits the length of the extension granted here, the time prescription is not jurisdictional.

Hamer v. Neighborhood Hous. Services of Chi., 138 S. Ct. 13, 21 (2017). The relationship between post-judgment motions and appeal deadlines is not "limited" by any statute. On the contrary, the Rules Enabling Act delegates to this Court the authority to "define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." 28 U.S.C. § 2072(c).

The provisions of Rule 4(a)(4) implement this authority. But they also govern, in part, the district court's authority to *extend* the appellate deadline provided by 28 U.S.C. § 2107(c). That provision gives district courts the ability to "extend the time for appeal upon a showing of . . . good cause." *Id.* For reasons other than lack-of-notice, "the statute does not say how long an extension may run." *Hamer*, 138 S. Ct. at 19.

Whether Rule 4(a)(4) is seen as a rule governing when a judgment becomes *final* and appealable, under § 2072(c), or as specific type of "good cause" extension under § 2107(c), the Rule is not truly "jurisdictional." *See Hamer*, 138 S. Ct. at 22. Because the rule is non-jurisdictional, then it can be forfeited by the Government and is subject to equitable exceptions. On forfeiture, or waiver, the Government did not respond to Petitioner's post-judgment motion, and it did not raise the issue of timeliness in its response to his Motion for COA. The Government only raised the so-called jurisdictional argument after the Fifth Circuit raised the matter on its own. *C.f. Hamer*, 138 S. Ct. at 18 ("Nevertheless, the Court of Appeals, on its own initiative,

questioned the timeliness of the appeal and instructed respondents to brief the issue.").

In other words, even if everything else in this petition were wrong—if the *Gonzalez* doctrine applied to Rule 59 motions timely filed by federal prisoners, and if it affects the timeliness of a notice of appeal—that does not mean the Fifth Circuit lacked *jurisdiction* over the appeal. Instead, the Court should weigh the inadvertent failure to file a "timely" notice of appeal against the Government's failure to raise the argument previously, and against the strong equitable considerations in Petitioner's favor.

CONCLUSION

Petitioner respectfully asks that this Court grant certiorari and set the case for a decision on the merits.

Respectfully submitted,

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