No. 18–9265

IN THE
Supreme Court of the United States

JUAN RAMON MEZA SEGUNDO,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

ERICH DRYDEN
Assistant Attorney General
Criminal Appeals Division
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711–2548
(512) 936–1400
erich.dryden@oag.texas.gov

Attorneys for Respondent

QUESTIONS PRESENTED

Juan Ramon Meza Segundo was convicted and sentenced to death for sexually assaulting and strangling eleven-year-old Vanessa Villa. The trial evidence also showed Segundo had a history of sexually assaulting and strangling other women. Segundo's direct, state habeas, and federal habeas appeals were all unsuccessful. Shortly before his scheduled execution date, Segundo filed a motion in federal court to reopen his federal habeas proceedings pursuant to Federal Rule of Civil Procedure 60(b). Although Segundo alleged a procedural defect pertaining to the district court's prior denial of his motion for investigative funding, the district court construed the motion to be a successive petition because Segundo raised claims of ineffective assistance of counsel, intellectual disability, and conflicts of interest among his various attorneys. In the alternative, the court determined that Segundo failed to demonstrate "extraordinary circumstances" sufficient to warrant Rule 60(b) relief. Segundo appealed, and the Fifth Circuit affirmed the district court's judgment concluding that Segundo's motion is successive because it attempted to raise and relitigate various substantive claims. Segundo now alleges that certiorari review is warranted because a circuit split exists regarding whether an appellate court can consider the merits in determining if Rule 60(b) relief is appropriate and that the Fifth Circuit's decision exceeds the boundaries of this Court's precedent. This history gives rise to the following questions:

> Was the Fifth Circuit's conclusion that Segundo's motion is a successive petition in disguise correct under this Court's precedent?
>
> Does a circuit split exist because some courts will occasionally consider the underlying merits in resolving true Rule 60(b) motions even though all circuits have held that using such motions to raise new claims or relitigate older claims circumvents AEDPA's restriction on successive petitions?
>
> Does the Fifth Circuit's analysis exceed the limits of this Court's precedent regarding Rule 60(b) motions simply because it led to an unfavorable result for Segundo?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Constitutional Provisions

BRIEF IN OPPOSITION

Petitioner Juan Ramon Meza Segundo (Segundo) seeks certiorari review from the Fifth Circuit's decision to affirm the federal district court's judgment after the district court dismissed Segundo's Rule 60(b) motion as successive and, in the alternative, found that Segundo failed to demonstrate "extraordinary circumstances" warranting Rule 60(b) relief. The trial evidence showed Segundo's lengthy history of murder, rape, violence, and molestation. Specifically, Segundo sexually assaulted and then strangled three women or girls, including the victim in the instant case—eleven-year-old Vanessa Villa. Segundo also attempted two additional sexual assaults before being driven off—again trying to strangle his victims. He repeatedly molested a girlfriend's five-year-old daughter and physically abused his son's mother.

A Texas jury subsequently convicted Segundo of capital murder and sentenced him to die. Following unsuccessful direct appeal and state habeas proceedings, Segundo sought habeas relief in federal district court. In his petition, Segundo raised claims that he was intellectually disabled under *Atkins v. Virginia*[1] and that his trial attorneys were ineffective for failing to investigate and present evidence of that disability. The district court denied

[1] 536 U.S. 304 (2002).

relief and a certificate of appealability (COA), finding the free-standing *Atkins* claim meritless and Segundo's ineffective-assistance-of-trial-counsel (IATC) claim procedurally defaulted as well as insufficiently substantial to circumvent the default under *Martinez*.[2] Alternatively, the district court found the IATC claim to be meritless. The Fifth Circuit likewise denied a COA on the IATC claim, finding that neither the district court's procedural ruling nor its resolution of the underlying claim were debatable among reasonable jurists.

Several months before his scheduled execution, Segundo filed a motion under Rule 60(b)(6) seeking to reopen the district court's previous judgment. Segundo argued that he was entitled to Rule 60(b)(6) relief due to this Court's recent decision in *Ayestas v. Davis*.[3] He argued that the district court improperly denied him investigative funding under 18 U.S.C. § 3599 because it utilized the improper "substantial need" standard abrogated by *Ayestas*. Then, he alleged that *Ayestas*, combined with the purported strength of his IATC/*Atkins* claims and claims that he received conflicted representation throughout all phases of his case, supported readjudication. The district court denied the motion holding that it was actually a successive habeas petition not authorized by the Fifth Circuit under 28 U.S.C. § 2244(b)(3). The court

---

[2] *Martinez v. Ryan*, 566 U.S. 1 (2012).

[3] 138 S. Ct. 1080 (2018).

transferred the motion to the Fifth Circuit. In the alternative, the court determined that Segundo failed to demonstrate "extraordinary circumstances" sufficient to warrant Rule 60(b) relief. The Fifth Circuit affirmed the district court's judgment concluding that Segundo's Rule 60(b) motion is a successive habeas petition.

Segundo now seeks certiorari review arguing that (1) this Court should resolve a circuit split because, unlike the Fifth Circuit, some circuits do take the underlying merits into account in determining whether, as a matter of equity, a petitioner should be granted Rule 60(b) relief and (2) that the Fifth Circuit employs a Rule 60(b) standard that is too strict and exceeds the boundaries of this Court's decision in *Gonzalez v. Crosby*.[4] These are meritless arguments.

First, the Fifth Circuit properly construed Segundo's Rule 60(b) motion to be a successive petition because, despite his claim of a procedural defect in the denial of investigative funding, Segundo's motion was laced throughout with substantive claims of IATC, intellectual disability, and purported conflicts of interest involving all his prior attorneys. Under the clear rule in *Gonzalez*, this was an attempt to relitigate old claims and raise new ones and, thus, it is a successive petition. The Fifth Circuit correctly applied the law;

---

[4] 545 U.S. 524 (2005).

Segundo is merely displeased with the lower court's application of the law to the facts, which is insufficient to invoke this Court's certiorari jurisdiction.

Second, there is no circuit split that must be resolved. Although some circuits have held that the underlying merits may, in some cases, be considered regarding whether a petitioner is entitled to Rule 60(b) relief, this analysis occurs *only after* the appellate court has satisfied itself that the petitioner is not attempting to use Rule 60(b) to circumvent AEDPA's restriction on successive petitions by raising old or new claims. This is precisely what Segundo tried via his motion. No circuit has held that the merits may be considered in some cases to sidestep *Gonzalez*. Moreover, the circuit cases Segundo cites are either factually distinct from his or irrelevant.

Third, Segundo argues that the Fifth Circuit's analysis of Rule 60(b) motions is too strict because the appellate court will deem any discussion of the merits as constituting a successive petition and will not consider any alleged procedural defect to be "extraordinary." But the Fifth Circuit's analysis is no different than that of any other circuit. What Segundo is actually alleging—in fact conceding—is that the purported procedural defect here is not extraordinary unless the court considered the merits of his substantive claims, which is not permissible under *Gonzalez*. Thus, in effect, he is seeking a rule change—or at least relaxation of the requirements—to garner relief.

Certiorari review is not merited simply because Segundo believes it is unfair he cannot meet his burden under existing law.

Finally, in the alternative, Segundo was not entitled to Rule 60(b) relief because he failed to demonstrate "extraordinary circumstances." A change in decisional law, such as *Ayestas*, is not an "extraordinary circumstance" under the rule, and the district court properly held that *Ayestas* would not have altered the outcome of Segundo's motion for funding or allowed Segundo to obtain evidence that would have rendered his prior claims meritorious. For these reasons, certiorari review is unwarranted.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) summarized the facts of the crime as follows:

> This "cold case" prosecution involved the 1986 rape and murder of eleven-year-old Vanessa Villa. [Segundo] was not a suspect until 2005 when, during a routine CODIS[5] computer run, his DNA profile "matched" that from sperm found in Vanessa's vagina.
>
> Vanessa lived with her mother, Rosa Clark, her one-year-old brother, Enrique, her aunt, Alicia Avila, and her aunt's three children in a small house in northwest Fort Worth. On August 2, 1986, Vanessa came home at about 5–6 p.m. after working at a flea market. She fell asleep, fully clothed, in the bedroom that she shared with her mother and baby brother. At about 10 p.m., her mother and aunt left to run some errands. When they returned an

[5] CODIS is the acronym for Combined DNA Index System.

hour later, Rosa went into her bedroom, and she "hollered" to Alicia. When Alicia came into the bedroom, she saw a comatose Vanessa lying on the bed. Her blouse and bra were pushed up, she was naked from the waist down, and her bare legs were slightly separated. The window fan was on a bedroom chair and the window screen was hanging loose. Alicia saw what she thought was semen on Vanessa's legs.

They called the police. Vanessa was taken to the hospital, but she was pronounced dead shortly thereafter. According to the medical examiner, the cause of her death was manual strangulation. Vanessa also had abrasions and bruises on her face consistent with a hand pushing down on her mouth and nose. There was muddy debris on her thighs, consistent with a hand grabbing her thigh, abrasions on her left breast, and a bruise on her right arm. She had a "huge tear" on the back wall of her vagina, and there was blood around her external genitalia. The medical examiner thought that these injuries were "perimortem"—caused right around the time she died. Sperm was found on the bedspread, the fitted sheet she was lying on, and in Vanessa's vagina. The medical examiner agreed that sperm can remain in the vaginal vault for anywhere from 48–72 hours.

Although the Fort Worth police investigated several possible suspects, three of them were eliminated when their DNA profiles did not match the DNA from the crime scene semen samples, and the investigation of other suspects led nowhere. Vanessa's rape and murder eventually became an unsolved "cold case."

In 2000, a DNA blood sample was taken from [Segundo].[6] His DNA profile was entered in the Texas CODIS computer database. In March 2005, a DNA profile from the semen samples taken from Vanessa was also entered into the CODIS system. Two days later, a routine "search and match" computer test matched [Segundo's] DNA profile with that of the semen. A verification test was performed the next month. Another DNA specimen was obtained from [Segundo], and, once again, his DNA matched that found in Vanessa's vagina and on her bedspread. The odds of

---

[6] The jury was not informed that [Segundo's] blood sample was taken in prison pursuant to statute.

> another random DNA match to some other person were astronomical because [Segundo] has a rare micro-allele in his DNA.
>
> Although [Segundo] had never been a suspect in Vanessa's rape and murder, he did know her family. Vanessa's mother and aunt worked with [Segundo's] wife at a nursing home. [Segundo] would sometimes drive his wife over to Rosa's home. Alicia remembered that he had attended Vanessa's wake and had signed the guest book.
>
> During the guilt phase, the State offered evidence of a second rape-murder [Segundo] committed in 1995. During the punishment phase, the State offered evidence of a third rape-murder [Segundo] committed in 1994. In both of these cases, the women were strangled, and semen containing [Segundo's] DNA profile was found in the victims' vagina or mouth.

Segundo v. State, 270 S.W.3d 79, 83–84 (Tex. Crim. App. 2008) (footnotes in original).

II. Facts Pertaining to Punishment

The CCA also described the following punishment-related evidence:

> [. . .][I]n 1987, [Segundo] burglarized the home of Irene Perez by entering her bedroom through an open window one night. He grabbed her, hit her face, choked her, and covered her mouth. She thought she was going to die, but she fought him off, turned on the light, and recognized him as someone she used to work with. He did not have his pants on. He escaped and fled in a small black car.
>
> Three years later, [Segundo] burglarized Sandra Holleman's apartment, coming in through a living-room window, as she and her two small children were asleep on a mattress in the living room. Ms. Holleman woke up to see [Segundo] lying naked beside her, trying to pull her pants down. As she screamed, he tried to choke her. He escaped by climbing back out the living-room

window. She thought that she recognized him as someone who had once lived in the same apartment complex.

The State also offered evidence that [Segundo] repeatedly molested his girlfriend's five-year-old daughter in the late 1980's. When he babysat her, he would buy her candy and then make her give him oral sex. Afterwards, [Segundo] said that if she ever told her mother he would kill her and her mother. She was too afraid to tell her mother what [Segundo] had done until she was sixteen years old.

Other evidence showed that [Segundo] was arrested in 1993 when an officer saw him and another man pointing guns at each other on a Fort Worth street at 2:00 a.m. [Segundo's] gun, a Larcin semi-automatic, was loaded with one round in the chamber and six more in the magazine. While [Segundo] was in prison in 1998, guards found four metal rods, in the process of being sharpened into "shanks," in the cell occupied by [Segundo] and another man.

During the defense punishment case, [Segundo's] brother, Val Meza, testified that [Segundo] and his two brothers grew up in "a ghetto area" of El Paso. They moved from California with their mother because [Segundo's] father physically abused their mother. They were very poor and had to scavenge for food when their mother disappeared for days at a time. [Segundo] fell down some stairs when he was about one, but he did not receive medical attention for that injury. [Segundo] seemed "slow" and "always in a daze" after that. Shortly thereafter, [Segundo] and his brothers were taken to an orphanage, but they were eventually reunited with their mother, who remarried in 1967. Three years later, they moved to Fort Worth with their mother and stepfather, who was a physically abusive alcoholic.

Mr. Meza testified that [Segundo] called him in 2000 from a halfway house and asked if he could stay with him. When Mr. Meza went to pick [Segundo] up, he didn't recognize his brother, he "looked so broken down and so pitiful." Mr. Meza took him in on certain conditions, including attending church and getting a job. [Segundo] got a job, got married, and re-established a relationship with his son, Joe Segundo, whom he had not seen

> since 1982.[7] One of [Segundo's] employers, the director of a non-profit church entity, testified that [Segundo] turned his life around after 2000. Several other witnesses also testified that [Segundo] was now a "good person," a faithful member of his church, and sincere in making personal changes.
>
> A clinical neurologist, Dr. Hopewell, testified that [Segundo's] "extensive history of inhalant abuse" and his failure to have "a stimulating background upbringing" may have caused significant brain dysfunction. [Segundo's] IQ tested at 75, and his memory is impaired, but he is not [intellectually disabled]. Dr. Hopewell stated that [Segundo] had "very poor" insight, "poor" judgment, and "significant difficulty" with executive functioning.

Segundo v. State, 270 S.W.3d at 84–85 (footnote in original).

III. Trial, Direct Appeal, And Postconviction Proceedings

A Texas jury convicted and sentenced Segundo to death for the capital murder of Vanessa Villa. 4 CR 1045–51.[8] The CCA affirmed the conviction and sentence, granted rehearing, but again affirmed the conviction and

---

[7] In rebuttal, the State called Joe Segundo's mother, [Segundo's] first wife, who testified that, in 1981, [Segundo] used to hit her with a boot, belt, or his fists, and he kicked her when he was angry. At least twice he put his hands around her neck and threatened to kill her. Once he cut her with a kitchen knife. But when she saw him again after 2000, he was a completely different person.

[8] "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, preceded by volume number and followed by page number(s). "RR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number(s). "SHCR" refers to the state habeas clerk's record of Segundo's state habeas proceeding, preceded by volume number and followed by page number(s). "SHRR" refers to the state habeas hearing record, preceded by volume number(s).

sentence. *Segundo v. State*, 270 S.W.3d 79. This Court denied certiorari review. *Segundo v. Texas*, 558 U.S. 828 (2009).

Segundo then filed a state habeas application. *Ex parte Segundo*, No. WR–70,963–01, 2009 WL 190162, at *1 (Jan. 28, 2009) (per curiam) (unpublished). The convicting court appointed a psychologist to aid Segundo in his application, 1 SHCR 136, and held a live hearing on the issue of intellectual disability, 1–6 SHRR. The court issued findings and conclusions recommending that relief be denied, 4 SHCR 575–83, which were adopted by the CCA. *Ex parte Segundo*, No. WR–70,963–01, 2010 WL 4978402, at *1 (Tex. Crim. App. Dec. 8, 2010) (per curiam) (unpublished).

Segundo then filed a petition for federal habeas corpus relief in the district court. *Segundo v. Thaler*, No. 4:10–CV–970–Y (N.D. Tex.), ECF No. 11. The Director answered, ECF No. 14, but following this Court's opinion in *Trevino*[9], the district court requested additional briefing to address the impact of that decision on Segundo's unexhausted IATC claim. ECF No. 32. Eventually, the district court dismissed the IATC claim as procedurally barred, finding the *Martinez/Trevino* exception inapplicable. ECF No. 48 at 21. Alternatively, the district court found that the underlying IATC claim was meritless. *Id*. Segundo's petition for habeas corpus relief was denied, as was

[9] *Trevino v. Thaler*, 569 U.S. 413 (2013).

a COA on any of the issues. *Id.* at 47. After briefing, the Fifth Circuit likewise denied Segundo a COA. *Segundo v. Davis*, 831 F.3d 345 (5th Cir. 2016). This Court denied Segundo's petition for certiorari review. *Segundo v. Davis*, 137 S. Ct. 1068 (2017).

On May 15, 2018, Criminal District Court Three of Tarrant County, Texas, scheduled Segundo for execution for October 10, 2018. On May 18, 2018, Segundo filed a motion for relief from judgment in the federal district court, pursuant to Federal Rule of Civil Procedure 60(b).[10] ECF No. 86. On September 26, 2018, the district court determined that Segundo's motion constituted a successive habeas petition and, in the interest of justice, transferred it to the Fifth Circuit. *Segundo v. Davis*, No. 4:10–CV–970–Y, 2018 WL 4623106 (N.D. Tex. 2018), ECF No. 98 at 13–14. In the alternative, the district court found that Segundo failed to demonstrate "extraordinary circumstances" that warranted Rule 60(b) relief. ECF No. 98 at 14–20. Segundo then filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), requesting the district court to strike its alternative holding. ECF No. 100. The district court denied the motion. ECF

[10] Also, on September 25, 2018, Segundo filed a subsequent state habeas application in the CCA and a motion to stay his execution. On October 5, 2018, the CCA stayed Segundo's execution. *Ex parte Segundo*, No. 70,963–02 at Order. The CCA remanded the subsequent application to the trial court for reconsideration of Segundo's intellectual-disability claim in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017). *Id.* at Order issued Oct. 31, 2018. That issue is pending.

No. 104. The Fifth Circuit subsequently affirmed the district court's judgment. *In re Segundo*, 757 F. App'x 333 (5th Cir. Dec. 13, 2018).

REASONS FOR DENYING CERTIORARI REVIEW

The questions Segundo presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of jurisdictional discretion, and will be granted only for "compelling reasons." Segundo advances no such special or important reason in this case, and none exists. Here, the Fifth Circuit applied this Court's settled precedent that attempts to litigate new claims or relitigate prior claims under the guise of a Rule 60(b) motion circumvent AEDPA's restrictions on successive petitions and, thus, should be treated as successive. *In re Segundo*, 757 F. App'x at 334–35 (citing *Gonzalez*, 545 U.S. at 531–32). Because Segundo's Rule 60(b) motion clearly attempted to raise a host of claims, the Fifth Circuit's ruling is correct.

Segundo argues that a circuit split exists because some circuits permit an analysis of the underlying merits in resolving Rule 60(b) motions, whereas the Fifth Circuit does not. Segundo is incorrect because this Court has pointed out that "[v]irtually every Court of Appeals to consider the question has held that such a pleading [containing claims], although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Gonzalez*, 545 U.S. at 531. Indeed, as addressed below, Segundo

misinterprets the various circuit cases he cites, and none call into question this Court's holding in *Gonzalez*.

Ultimately, Segundo's argument amounts to a disagreement with the lower court's decision; he fails to demonstrate any misapplication of the law. Thus, no special or important reason exists to merit certiorari review.

I. Segundo's Rule 60(b) Motion Is a Successive Petition.

For federal habeas corpus purposes, a filing that seeks an adjudication of the merits of a constitutional claim is a habeas corpus application. *See Gonzalez*, 545 U.S. at 530 (citing 28 U.S.C. § 2244(b); *Woodford v. Garceau*, 538 U.S. 202, 207 (2003)). In *Gonzalez*, this Court held that using Rule 60(b) to "present new claims for relief from a state court's judgment of conviction—*even claims couched in the language of a true Rule 60(b) motion*—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." 545 U.S. at 531 (emphasis added). Thus,

> [a] federal court examining a Rule 60(b) motion should determine whether it either: (1) presents a new habeas *claim* (an "asserted federal basis for relief from a state court's judgment of conviction"), or (2) "attacks the federal court's previous resolution of a claim *on the merits* . . ." If the Rule 60(b) motion does either, then it should be treated as a second-or-successive habeas petition and subjected to AEDPA's limitation on such petitions.

In re Edwards, 865 F.3d 197, 203–04 (5th Cir. 2017) (emphases in original) (quoting *Gonzalez*, 545 U.S. at 530, 532).

> Here, the Fifth Circuit rejected Segundo's motion as successive:
>
> > The district court examined Segundo's claims and concluded that "[a]lthough Segundo's motion is couched in terms of Rule 60(b), it is actually a successive habeas petition" because it raises and extensively briefs various substantive claims related to ineffective assistance of counsel. On appeal, Segundo contends that the district court misconstrued his motion. He maintains that he has properly identified one non-merits-based defect in the integrity of the federal *habeas* proceedings—the use of an erroneous legal standard to deny him services guaranteed by 18 U.S.C. § 3599. All of the additional issues raised in his motion are, according to Segundo, "extraordinary circumstances" justifying the reopening of the proceedings.
> >
> > This is a clever argument because if we accept it, it would allow *habeas* petitioners to shoehorn all of their merits-based arguments into a Rule 60(b) motion. And courts would be forced to delve into those arguments to evaluate whether they constitute "extraordinary circumstances." But neither our caselaw nor prudence support such an approach.
> >
> > For example, *Gonzalez* approvingly notes that where a petitioner conceals merits-based claims behind straightforward, valid claims, "[v]irtually every Court of Appeals ... has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." 545 U.S. at 530–32 [ ]. And we have repeatedly applied this principle to identify all of the claims raised in a particular petition and classify that petition accordingly—as a Rule 60(b) motion or successive habeas petition. *See e.g.*, *In re Coleman*, 768 F.3d 367, 371–72 (5th Cir. 2014) (*per curiam*); *Runnels v. Davis*, [ ] 746 F. App'x 308, 315–17 [ ] (5th Cir. Aug. 14, 2018); *In re Jasper*, 559 F. App'x 366, 371 (5th Cir. 2014).
> >
> > The district court carefully demonstrated that several of the so-called "extraordinary circumstances" identified by Segundo were

> actually successive *habeas* claims. In particular, Segundo's motion briefly discusses the supposed non-merits-based defect remediable under Rule 60(b) and then extensively raises and relitigates ineffective assistance of counsel claims of various sorts. As the district court rightly observed, "[t]he motion ... seeks to present new evidence and new theories of ineffective assistance of counsel that constitute new claims." Labeling these claims "extraordinary circumstances" does not conceal their true identity.

In re Segundo, 757 F. App'x at 335.

In his petition, Segundo states the following:

> Before a U.S. district court and the Fifth Circuit, Mr. Segundo sought relief under Rule 60(b)(6) to correct a non-merits defect in his federal habeas proceedings—that his request for services under 18 U.S.C. § 3599 was denied under an erroneous legal standard. Once Mr. Segundo established that defect, he listed nine extraordinary circumstances that warranted relief, ranging from racist statements directed at him by his own trial team to a bevy of conflicts that tainted every phase of his case. Notably, Mr. Segundo specifically stated that he did *not* seek habeas relief on any of the extraordinary circumstances listed. He only asked that the district court consider his § 3599 motions under the correct legal standard.

Petition at 27–28 (emphasis in original). Segundo's argument is refuted by the numerous statements made in his Rule 60(b) motion, which may have alleged a procedural defect but mixed this issue with claims for relief. Examples of these claims are as follows:

- "This defect, and the numerous other extraordinary circumstances present in this case—including the animosity and racially-charged language used by his trial team to describe him, and the various conflicts of interest under which Mr. Segundo's counsel labored—tainted Mr. Segundo's case." ECF 86 at 8–9.

- "That [funding] defect, along with the numerous extraordinary circumstances present in this case, creates an unconscionable risk that Texas will execute an intellectually disabled defendant in violation of the Eighth Amendment as set out in *Atkins* and its progeny. Accordingly, Mr. Segundo requests this Court reopen the case as of the date Mr. Segundo filed his second request for funding, following this Court's denial of the first motion using the overly burdensome 'substantial need' standard." *Id.* at 12–13.

- "Through every stage of his proceedings, Mr. Segundo has been denied adequate, professional, and conflict-free representation, resulting in extraordinary circumstances that compel relief under Rule 60(b)(6)." *Id.* at 20 (heading "C").

- Alleged conflicts of interests by trial, state habeas, and federal habeas counsel "create an unacceptable risk that an intellectually disabled person will be executed." *Id.* at 21–22.

- "[Trial counsel and defense expert] displayed extraordinary contempt for Mr. Segundo, describing him with offensive and derogatory terms—ones that showed extreme insensitivity to their client's potential disability and referenced offensive racial stereotypes. This ultimately left a potentially intellectually disabled person facing the very real possibility of execution." *Id.* at 22.

- "But the signs of Mr. Segundo's intellectual disability were lost on the trial team. As their unfounded plans for a plea deal slipped away, the team's frustration with their client escalated . . . . The team's frustration then turned to sarcasm, with multiple jokes at the expense of Mr. Segundo and the intellectually disabled." *Id.* at 23.

- "The trial team ignored multiple requests from the defense experts for a social history report for Mr. Segundo, which was important to an adaptive deficits analysis." *Id.* at 25 (heading "b").

- "Dr. Goodness's standard for determining whether 'speedy Gonzalez,' as she called Mr. Segundo, belonged in the 'tard yard'

was inconsistent with the diagnostic framework used in the medical community. *Id.* at 27 (heading "c").

- "Inexplicably, trial counsel not only joined [their expert's] disparaging remarks but kept her on the case as both the psychological expert and later as the mitigation specialist. This repulsive behavior constitutes an extraordinary circumstance warranting relief." *Id.* at 29.

- "Mr. Segundo's counsel at all phases of the proceedings have suffered from significant, distinct conflicts of interest that prevented Mr. Segundo from developing his case." *Id.* at 30.

- "At the trial and state habeas levels, Mr. Segundo's counsel failed to conduct even a basic investigation into Mr. Segundo's adaptive deficits—something they should have done under prevailing professional norms. Moreover, federal habeas counsel was unable to secure funding for such an investigation and, after creating a conflict, failed to raise the issue on appeal. But, the facts of this case show that it is very possible that Mr. Segundo is intellectually disabled and thus ineligible for execution. Under recent and intervening Supreme Court standards, Mr. Segundo is entitled to a full intellectual disability investigation pursuant to the standard medical norms." *Id.* at 49.

- "Mr. Segundo's state habeas proceedings were pervasively tainted by the *Briseno*[11] factors." *Id.* at 53 (heading "b").

- "The defense team failed to conduct an appropriate adaptive-deficits investigation, instead focusing on Mr. Segundo's perceived adaptive strengths based on a single interview." *Id.* (heading "i").

- The State's expert likewise focused on Mr. Segundo's adaptive strengths and conducted his evaluation according to the *Briseno* factors. *Id.* at 55 (heading "ii").

- Mr. Segundo has established multiple qualifying IQ scores for his *Atkins* claim. But because of errors by prior counsel and a

---

11 *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), *abrogated by Moore*, 137 S. Ct. at 1048–53.

> lack of funding, he has never been able to properly investigate prong two—adaptive deficits. Once Mr. Segundo made his strong showing that his multiple qualifying IQ scores satisfied prong one of *Atkins*, the Court was *required* to move on to an analysis of prong two. If Mr. Segundo is to be given a "fair opportunity" to show that he is intellectually disabled . . . he must also be granted the funding 'reasonably necessary' under *Ayestas* to investigate prong two adaptive deficits. The Court's deprivation of such funding, while applying the wrong legal standard, denied Mr. Segundo that "fair opportunity" and created an unacceptable risk that an intellectually disabled person will be executed. *Id.* at 59 (emphasis in original).

Segundo's Rule 60(b) motion included approximately fifteen pages of briefing covering alleged conflicts of interest pertaining to trial counsel, state habeas counsel, federal habeas counsel, and even the trial judge. *Id.* at 33–48. The last ten pages of Segundo's motion argued that the evidence indicates he is intellectually disabled. *Id.* at 49–59. Therefore, although Segundo argued that he was merely requesting that the district court reopen its proceedings to reconsider his funding request to investigate these matters, that is subterfuge. Beneath it all were ineffective-assistance and intellectual-disability claims. Segundo has attempted to use the alleged procedural defect to vindicate these claims, but "[a] habeas petitioner's filing that seeks vindication of [ ] a claim is, if not in substance a 'habeas corpus application,' at least similar enough that

failing to subject it to the same requirements would be 'inconsistent with' the statute." *Gonzalez*, 545 U.S. at 531 (citing 28 U.S.C. § 2254 Rule 11).[12]

Because Segundo's Rule 60(b) motion was meant to relitigate or raise new claims under the guise of challenging a denial of a funding request, his motion constituted a successive petition per *Gonzalez* and was properly characterized as such by the district court and Fifth Circuit.

II. Segundo's Counter-Arguments Are Unavailing.

A. Segundo's claim of a circuit split is illusory.

In his petition, Segundo states the following: "In the majority of circuits that have addressed the issue, Mr. Segundo's attack on the district court's denial of § 3599 representation services under an erroneous legal standard would qualify as a "true" [Rule] 60(b) motion. This reasoning is most consistent with the language and purpose of *Gonzalez*." Petition at 25. He then argues that the Second, Third, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits analyze this issue differently and would have reached a different conclusion than the Fifth Circuit because, in general, they do not require a movant to attack a procedural defect that precludes a merits determination. Thus, due

---

[12] In *Gonzalez*, this Court further stated: "[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment. Such circumstances will rarely occur in the habeas context." *Id.* at 535. Neither the denial of a funding motion nor alleged ineffective assistance in a habeas corpus case can be considered "extraordinary" considering the frequency with which they occur.

to an alleged circuit split, he claims certiorari review should be granted. *Id.* at 25–26, 30–33. This argument is meritless because, as the Fifth Circuit pointed out in its decision, the *Gonzalez* Court held that nearly all circuits have determined that such a pleading "'although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly.'" *In re Segundo*, 757 F. App'x at 335 (quoting *Gonzalez*, 545 U.S. at 531).

This Court's analysis of the circuit precedent is correct, and the many circuit cases Segundo discusses fail to aid his argument.

1. Most of Segundo's supporting cases do not pertain to instances where a petitioner raised claims under the pretense of a Rule 60(b) defect.

Segundo refers to *Rodriguez v. Mitchell*[13] because the *Gonzalez* Court cited it as an example where Rule 60(b) relief can be granted if a petitioner demonstrates fraud on the court. Petition at 25–26; *Gonzalez*, 545 U.S. at 532 n.5; *see also* Fed. R. Civ. Proc. 60(b)(3). Segundo has raised many complaints about his prior federal habeas counsel, but fraud is not among them. And in this same footnote, the Court stated: "We note 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." *Gonzalez*, 545 U.S. at 532 n.5. Because

[13] 252 F.3d 191 (2d Cir. 2001).

Segundo has likewise complained about his federal habeas counsel's errors and omissions, this portion of *Gonzalez* undermines his argument.

Segundo also cites *Mitchell v. Rees*[14] where the Sixth Circuit held that a Rule 60(b) motion was not successive because it challenged only the district court's denial of an evidentiary hearing and did not assert a claim. 261 F. App'x at 829; Petition at 23–24. This case is not on point because Segundo's Rule 60(b) motion was presented under the semblance of challenging the district court's denial of his funding motion when in fact the motion was pretext for litigating substantive claims.

Segundo then cites two Tenth Circuit cases, *Spitznas v. Boone*[15] and *United States v. Marizcales-Delgadillo*.[16] Segundo refers to *Spitznas* because the Tenth Circuit stated that a Rule 60(b) motion alleging a defect in the federal habeas proceeding "requires a more nuanced analysis." 464 F.3d at 1216; Petition at 24. But in *Spitznas*, the issue concerned—as in *Rodriguez*—fraud on the court, and the Tenth Circuit determined that fraud on the federal habeas court could be brought under Rule 60(b), whereas a motion alleging fraud on a state court would be construed as a successive habeas petition.

---

14 261 F. App'x 825 (6th Cir. 2008), *abrogated on other grounds by Penney v. United States*, 870 F.3d 459 (6th Cir. 2017).

15 464 F.3d 1213 (10th Cir. 2006).

16 243 F. App'x 435 (10th Cir. 2007).

464 F.3d at 1216. Again, Segundo does not allege fraud as a basis for Rule 60(b) relief, and the "nuance" addressed in *Spitznas* does not apply here. Likewise, in *United States v. Marizcales-Delgadillo*, the Tenth Circuit found that the petitioner "primarily argued that the court had erred by denying his § 2255 motion without giving him an adequate opportunity to access record documents and amend the motion to present his claims properly . . ." 243 F. App'x at 438. The petitioner made evident "that his Rule 60(b) motion challenged the process *the court* used in deciding to deny the § 2255 motion, not the substance of that decision." *Id* (emphasis added). Thus, the alleged defect was attributed to the district court, not counsel, and had nothing to do with the actual merits. These cases are not on point. Indeed, the Tenth Circuit has also held that a Rule 60(b) motion alleging the district court's denial of a motion for evidentiary hearing is successive. *In re Lindsey*, 582 F.3d 1173, 1176 (10th Cir. 2009) (the denial of an evidentiary hearing "generally has to be attacking the district court's analysis of the merits").

2. Segundo's citation to Eleventh Circuit case law undermines his argument.

In his petition, Segundo states:

> The Eleventh Circuit explains that it is "particularly skeptical" of a Rule 60(b) motion when the district court reached the merits, but has specifically declined to "create a categorical rule against permitting a habeas petitioner to seek [Rule] 60(b) relief after his previous habeas petition has been denied on the merits."

Petition at 25 (quoting *Franqui v. Florida*, 638 F.3d 1368, 1374 n.10 (11th Cir. 2011)). However, in *Franqui*, the petitioner did essentially the same as Segundo—attempted to raise a claim under the veil of challenging a defect in the federal habeas proceeding. There, the petitioner sought Rule 60(b) relief because he claimed his federal habeas counsel failed to challenge his co-defendant's confession under *Bruton v. United States*[17] and did not alert him to the omission. 638 F.3d at 1370. The Eleventh Circuit reiterated per *Gonzalez* that petitioners cannot use Rule 60(b) to circumvent AEDPA by couching claims in terms of the rule when the motion actually seeks a second chance to advance a new claim. *Id.* at 1371–72. The court held:

> Petitioner's 60(b) motion is careful to characterize its attack as targeting the omission in the habeas proceeding of his *Bruton* claim, rather than challenging Petitioner's state conviction on the merits. But in guarding the respective roles of both AEDPA and Rule 60(b), we cannot ignore the basic objective of this motion: it advances an additional claim for habeas relief. The real problem the motion aims at is Petitioner's continued confinement, and the objective it seeks is an additional shot at release by asserting a new claim to be considered on its merits.

Id. at 1372. The circuit court concluded: "Petitioner's motion for relief from the District Court's judgment, while couched in the terms of a 60(b) motion, was, in effect, an attempt at getting a second opportunity at habeas relief without complying with AEDPA's requirements." *Id.* at 1374. This is precisely what

---

17 391 U.S. 123 (1968).

Segundo has attempted via his Rule 60(b) motion and his complaints about state and federal habeas counsel. And although the Eleventh Circuit did state in a footnote that "[t]oday's decision does not create a 'categorical rule' against permitting a habeas petitioner to seek [Rule] 60(b) relief after his previous habeas petition has been denied on the merits," the court explained that the motion must attack a defect in the federal habeas proceeding to be proper. *Id.* at 1374 n.10. The court did not state that a hybrid Rule 60(b) motion—like Segundo's that purportedly attacks a defect in the habeas proceeding while advancing substantive claims and complaints about counsel—qualifies.

3. Segundo's Third, Seventh, and Ninth Circuit cases are not on point.

Like many of the above cases, Segundo refers to other circuit cases that have no similarity to the circumstances here. He argues that they stand for the proposition that a merits consideration, or consideration of other "equitable" factors, is appropriate under Rule 60(b), but he ignores the full context of these cases. For instance, he states:

> In *Cox v. Horn*, the Third Circuit expressly disagreed with the Fifth Circuit's inflexible approach, holding that evaluating a post-*Martinez* Rule 60(b) Motion required the court to "take[] into account all of the particulars of a movant's case." 757 F.3d 113, 122 (3d Cir. 2014). Recognizing that "the *Gonzalez* Court examined the individual circumstances of the petitioner's case to see whether relief was appropriate," the Third Circuit looked to the merits of the petitioner's underlying claim because the court "need not provide a remedy under 60(b)(6) for claims of dubious merit[.]" *Id.* at 123, 125.

Petition at 31. *Cox* has no significant bearing to the instant case. There, the Third Circuit simply held that it did not agree with the Fifth Circuit's ruling in *Adams v. Thaler*[18] that a change in decisional law *alone* is an insufficient basis for Rule 60(b) relief. 787 F.3d at 121–25. The court did state:

> We also hasten to point out that the merits of a petitioner's underlying ineffective assistance of counsel claim can affect whether relief based on *Martinez* is warranted. It is appropriate for a district court, when ruling on a Rule 60(b)(6) motion where the merits of the ineffective assistance claim were never considered prior to judgment, to assess the merits of that claim.

Id. at 124. But, again, the context was the circuit court concluding that it would, under certain circumstances, consider a Rule 60(b) motion based on a change in decisional law. *Cox* did not pertain to a Rule 60(b) motion that raised a host of new claims and complaints about habeas counsel, as Segundo's motion did. Moreover, in *Cox*, the merits of a majority of the petitioner's claims were never considered since they were deemed defaulted. *Id.* at 117–18. Segundo's were considered on the merits, which renders *Cox* inapplicable.

Next, Segundo cites *Ramirez v. United States*[19] and states that the Seventh Circuit has declined to construe Rule 60(b) motions that make merits-based "extraordinary circumstances" arguments as successive petitions. Petition at 32. But in *Ramirez*, the Seventh Circuit was convinced "Ramirez

---

18 679 F.3d 312 (5th Cir. 2012).

19 799 F.3d 845 (7th Cir. 2015).

is not trying to present a new reason why he should be relieved of either his conviction or his sentence. . . . He is instead trying to reopen his existing section 2255 proceeding and overcome a procedural barrier to its adjudication." 799 F.3d at 850. The court explained the unusual circumstances:

> Recall that on direct appeal this court found enough merit in Ramirez's claims that we rejected counsel's *Anders*[20] submission and required the case to go forward. Appellate counsel never obtained the relevant records from the Texas courts, however, and so the appeal failed for lack of proof. When Ramirez sought to remedy these failures in a motion under section 2255, postconviction counsel failed to remedy that critical omission, despite the central role that it had played in our disposition of the direct appeal. We do not know if that omission was intentional or not, although if the records had been unfavorable to Ramirez, it is hard to see why the prosecutor did not obtain them. Most importantly, postconviction counsel abandoned Ramirez on appeal, thus depriving him of the opportunity to pursue his Sixth Amendment claims.

Id. (footnote added). What Segundo ignores is that the Seventh Circuit was "satisfied that Ramirez's motion was not a disguised second or successive motion under section 2255, and thus may be evaluated on its own merit." *Id.* at 850. Had the Seventh Circuit faced a motion like Segundo's, the merits would have been irrelevant because the court would have construed the motion as successive.

---

20 *Anders v. California*, 386 U.S. 738 (1967).

Segundo also cites *Hall v. Haws*[21] for the same proposition. Petition at 32. But in *Hall*, the Ninth Circuit found Hall's Rule 60(b) motion to conform to *Gonzalez's* description of a true Rule 60(b) motion because (1) the federal district court dismissed Hall's petition for failing to comply with its exhaustion order and, thus, was a non-merits-based ruling, and (2) Hall's motion only explained why his Rule 60(b) motion was dismissed and did not "present any substantive ground for setting his conviction aside." *Id.* at 985. "Therefore, because neither the district court's dismissal nor Hall's motion to reopen address the merits for setting Hall's conviction aside, allowing the motion to proceed is not inconsistent with AEDPA." *Id.* The Ninth Circuit further noted the unique circumstances of the case that Hall would have been subject to "manifest injustice" without Rule 60(b)(6) because Hall's co-defendant "was granted habeas relief on the same claim based on the same error from the same trial." *Id.* at 987–88. However, the court was careful to point out Hall never argued the substance of any claim in his motion. Moreover, the Ninth Circuit's Rule 60(b) jurisprudence comports with the lower court's ruling here. *See United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011) (an allegation that the district court erred in denying an evidentiary hearing

[21] 861 F.3d 977 (9th Cir. 2017).

"expressly seeks a fresh opportunity to air the arguments that failed at his trial").

A fatal flaw with Segundo's argument about a circuit split, particularly with regard to *Cox* and *Ramirez*, is that these cases misstate the Fifth Circuit's ruling in *Adams*. For instance, in *Cox*, the Third Circuit interpreted *Adams* as holding that a change in decisional law can *never* be a basis for Rule 60(b) relief. 757 F.3d at 120–21. *Ramirez* likewise characterized the Fifth Circuit's approach as "absolute." 799 F.3d at 850. This is not correct. The Fifth Circuit has held that a change in decisional law *alone* cannot be a basis for Rule 60(b) relief, not that such a change can *never* be grounds for Rule 60(b) relief. *See Diaz v. Stephens*, 731 F.3d 370, 375 (5th Cir. 2013). Importantly, although Segundo contends the Fifth Circuit will not consider "equitable" factors where a change in decisional law is the basis for Rule 60(b) relief, the Fifth Circuit stated precisely the opposite in *Diaz*. The appellate court assumed *arguendo* that eight equitable factors enunciated in *Seven Elves, Inc. v. Eskenazi*[22] "may have some application in the Rule 60(b)(6) context" and then addressed those factors. *Diaz*, 731 F.3d at 377. Thus, the "categorical" rule Segundo claims the Fifth Circuit employs—the refusal to consider "equitable" factors—does not exist. Absent that rule, there cannot be a circuit split.

---

[22] 635 F.2d 396 (5th Cir. 1981).

The bottom line is that Segundo is cherry-picking assertions from these cases about the merits while skirting the central issue in his—that his Rule 60(b) motion was an attempt to relitigate substantive claims and advance new ones. Not a single case Segundo cites holds that this tactic is proper simply because the claims are bundled within a purported procedural defect. In fact, they implicitly state the opposite. Thus, there is no circuit split that warrants certiorari review.

B. The Fifth Circuit's rule comports with *Gonzalez*.

Segundo argues that the Fifth Circuit's standard for assessing Rule 60(b) motions is too strict. For instance, in his conclusion, Segundo states:

> By permitting 60(b) motions only in cases where the federal court failed to reach the merits of the underlying habeas claims, the Fifth Circuit has extended *Gonzalez* past this Court's intention. And by limiting the extraordinary circumstances inquiry to procedural arguments, the Fifth Circuit has improperly restricted a federal court's ability to consider all of the equitable circumstances in a case and only reopen the judgment in those cases where justice requires.

Petition at 35–36. Both arguments are incorrect. As discussed above, the first relies on circuit precedent where courts considered the merits only after they were convinced the Rule 60(b) motion raised procedural matters and did not attempt to advance claims. The second surely runs afoul of *Gonzalez's* admonition that a true Rule 60(b) motion attacks "some defect in the integrity of the federal habeas proceedings," such as a "previous ruling which precluded

a merits determination." 545 U.S. at 532 & n.4. Again, Segundo is sidestepping the fact that his motion sought relitigation of prior claims and to advance additional ones. Had he merely complained about the district court's denial of his funding motion and nothing more, the motion may have been non-successive. He did not, which is why the Fifth Circuit correctly held his motion is successive under *Gonzalez*.[23]

Segundo's actual complaint is that if he is not permitted to address the merits of his claims, he will not be able to demonstrate "extraordinary circumstances" to warrant Rule 60(b) relief. For example, he states:

> [T]his Fifth Circuit rule places petitioners for relief under Rule 60(b) in a catch-22. Litigants can either only discuss the procedural defect in the case—which is unlikely to be viewed as extraordinary—or plead extraordinary circumstances that are non-procedural in nature and have the motion tossed as a successive petition. In either scenario, Rule 60(b) relief is essentially unattainable.

---

[23] In his petition, Segundo states:

> *Gonzalez* listed fraud on the court, failure to exhaust, procedural default, and statute-of-limitations bars as *examples* of proper bases for 60(b) motions. This Court did not include language to restrict 60(b) practice *solely* to those examples or otherwise treat the list as exhaustive. . . . This Supreme Court should grant certiorari to clarify the requirements of a "true" Rule 60(b) motion as originally set out in *Gonzalez*.

Petition at 26–27 (emphasis in original). Certiorari review is not merited because even if Segundo's alleged procedural defect qualifies as a "true" Rule 60(b) issue, this does not change the fact that the motion sought to raise substantive claims, in contravention of *Gonzalez*.

Petition at 34. As shown previously, the rule in all the circuits is consistent with *Gonzalez*. In no circuit is a petitioner allowed to relitigate old claims or raise new ones under the pretext of claiming a procedural defect. Segundo is, in fact, conceding that his alleged procedural defect does not rise to the level of "extraordinary circumstances" that warrants Rule 60(b) relief. Thus, he is claiming—at least implicitly—that the rule should be altered to incorporate other factors. *See* Petition at 25 (stating "it is true that the wrongful denial of § 3599 services does not fall under any of the examples cited in Footnotes 4 and 5" of *Gonzalez* but "to limit 60(b) practice to only those examples is overly restrictive"). Segundo is not entitled to a more beneficial rule simply because his argument fails under existing precedent.

Segundo also contends that, per this Court's precedent, federal courts have "broad authority" to consider "equitable concerns" such as the "risk of injustice to the parties." Petition at 29 (citing *Liljeberg v. Health Servs. Acqu. Corp.*, 486 U.S. 847, 863 (1988)). He then states:

> In *Buck v. Davis*, this Court reiterated the comprehensive nature of the extraordinary circumstance analysis, noting that the petitioner identified eleven factors, ranging from merits-based arguments related to ineffective assistance of counsel to the state's confession of error in other cases, that warranted reopening the judgment. 137 S. Ct. 759, 772 (2017). Observing that a "wide range of factors" may establish extraordinary circumstances, this Court ultimately held that the prejudice Buck suffered as a result of his attorney's deficient performance meant that his case could not be considered "run-of-the-mill." *Id.* at 778.

Id. Thus, he claims *Buck* suggests that factors usually considered successive under *Gonzalez* are nonetheless proper equitable considerations per Rule 60(b). *Id.* at 29, 31, 35. The Fifth Circuit correctly held:

> *Buck* does no such thing. Instead it appears to stand only for the proposition that the "infusion of race as a factor for the jury" can be itself "extraordinary" in "nature." Indeed, Justice Thomas was correct to note that the opinion in *Buck* does not announce "any new principles of law[,] ... leav[ing] untouched ... established principles governing ... Rule 60(b)(6)motions."

In re Segundo, 757 F. App'x at 335–36 (quoting *Buck*, 137 S. Ct. at 778, and *id.* at 786 (Thomas, J., dissenting)).

In sum, while Segundo requests certiorari review claiming the Court should clarify *Gonzalez* on this point, no clarity is needed. *Gonzalez's* holding pertaining to when a Rule 60(b) motion should be classified as a successive petition has not changed, and the circuits are not split on the matter. Certiorari review should be denied.

III. In the Alternative, Segundo Failed to Demonstrate "Extraordinary Circumstances" Warranting Rule 60(b) Relief.

A. A change in decisional law pursuant to *Ayestas* does not warrant Rule 60(b) relief.

Segundo has argued that the district court erred in denying his motion for funding and that he demonstrated he was entitled to Rule 60(b) relief because the district court denied his motion for funding under the "substantial

need" standard abrogated by *Ayestas*. *See* Petition at 4–5, 12, 14. This is the purported procedural defect at issue.

Relief pursuant to Rule 60(b)(6) is available only if "extraordinary circumstances" are present. *Ackermann v. United States*, 340 U.S. 193, 199 (1950). But a mere change in decisional law is insufficient to garner Rule 60(b)(6) relief. *See*, *e.g.*, *In re Edwards*, 865 F.3d at 208; *Clark v. Davis*, 850 F.3d 770, 784 (5th Cir. 2017); *Moses v. Joyner*, 815 F.3d 163, 168–69 (4th Cir. 2016); *Arthur v. Thomas*, 739 F.3d 611, 631–33 (11th Cir. 2014) *McGuire v. Warden*, *Chillicothe Correctional Inst.*, 738 F.3d 741, 750 (6th Cir. 2013); *Adams*, 679 F.3d at 319. For example, in *Gonzalez*, the district court did not reach the merits of an inmate's claims because, under then-existing law, the habeas petition was untimely. 545 U.S. at 527. Months later, this Court issued an opinion that arguably rendered the time-bar ruling incorrect. *Id.* at 537. Assuming incorrectness, this Court found that Rule 60(b)(6) relief was unwarranted because "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Id.*

If a change in law that entirely precluded merits review is not sufficient to warrant Rule 60(b)(6) relief, then a change in law on a lesser matter—funding to investigate a claim under *Ayestas*—necessarily cannot. *See Guevara v. Davis*, 679 F. App'x 332, 336 (5th Cir. 2017) (refusing Rule 60(b) relief with

respect to the *Brumfield*[24] intellectual-disability case); *Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2014) (Supreme Court's decision in *McQuiggin v. Perkins*[25] that a properly supported claim of actual innocence of the crime charged could excuse the failure to comply with the statute of limitations constituted a change in decisional law that did not merit Rule 60(b) relief); *Hernandez v. Thaler*, 620 F.3d 420, 429–30 (5th Cir. 2011) (same with regard to procedural ruling in *Jimenez v. Quarterman*[26]); *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002) (same with regard to procedural statute-of-limitations change in *Flanagan v. Johnson*[27]).

B. Federal habeas counsel's omissions do not warrant Rule 60(b) relief, and additional funding would not have changed the outcome.

First, Segundo contended in the district court that he demonstrated "extraordinary circumstances" to warrant Rule 60(b)(6) relief because his previous federal habeas counsel suffered from a conflict of interest. Specifically, he accused federal habeas counsel, Alexander Calhoun, of negligently failing to discover and present certain evidence in Segundo's initial

---

24 *Brumfield v. Cain*, 135 S. Ct. 2269 (2015).

25 569 U.S. 383 (2013).

26 555 U.S. 113 (2009).

27 154 F.3d 196 (5th Cir. 1998).

federal habeas application. He also accused habeas counsel of making material misrepresentations to the lower court that affected his habeas proceedings.

The district court rejected this claim as follows:

> Segundo does not claim that his original federally appointed counsel Alexander Calhoun, or appointed co-counsel Paul Mansur, also represented him in state court. Segundo acknowledges, and the record plainly shows, that he was represented by a different attorney, Jack Strickland, in the state habeas proceedings. [ ] Segundo does not assert that Calhoun or Mansur had any connection with Strickland, had any involvement in Segundo's representation in the prior state-court proceedings, or were in any way ethically prohibited from complaining of the ineffective assistance of any of Segundo's prior attorneys. Therefore, Segundo has not shown anything like the conflict of interest presented in *Clark*.

ECF No. 98 at 11. This decision is correct; no conflict existed, and this matter has already been litigated before the district court. ECF No. 69; *see also* ECF No. 70 at 11–12.

In any event, although Segundo has claimed that he is merely asserting a procedural defect or "extraordinary circumstance," his argument is that federal habeas counsel did a poor job researching Segundo's petition. This does not suffice for Rule 60(b)(6) relief, as this Court has held that a Rule 60(b) motion based on "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." *Gonzalez*, 545 U.S. at 532 n.5; *see*, *e.g.*, *Brooks v. Bobby*, 660 F.3d 959, 963 (6th Cir. 2011) (finding motion based on "general

ineffective assistance of habeas counsel" claim barred as "a plain-vanilla successive petition designed to do nothing more than attack his earlier counsel's omissions").

Second, as stated, additional funding would not have changed the outcome. A court evaluating a funding request should consider "the potential merit of the claims that the applicant wants to pursue." *Ayestas*, 138 S. Ct. at 1094. However, Segundo's claim that trial counsel was ineffective for failing to adequately investigate and present evidence of his alleged intellectual disability at punishment is meritless. Indeed, in denying COA, the district court necessarily found that reasonable jurists could not debate this conclusion. And while the court's previous denial of funding did cite the abrogated "substantial need" standard, the court would have also denied relief under the standard approved by *Ayestas*. ECF Nos. 21, 44, & 47; *see also* ECF No. 48 at 12–13; *Ayestas*, 138 S. Ct. at 1093 (noting that substantial-need standard is only "arguably more demanding" than one based on reasonable necessity).

Indeed, this is the conclusion the district court reached. ECF No. 98 at 16 ("Segundo has also not shown that the funding decision would be any different under *Ayestas*."). Specifically:

> In denying funding, this Court previously determined that Segundo had not shown how the sought funding would be capable of establishing ineffective assistance of counsel . . . and come

> within the exception to procedural bar under *Martinez* in light of the expert assistance obtained by trial and state habeas counsel. Specifically, this Court held that merely presenting a new expert opinion that disagreed with the opinion of an expert at trial was not enough to show trial counsel to be ineffective. "There is no indication that the experts felt incapable of basing their conclusions on the information they obtained through their own testing and examinations. . . . Finally, it is unclear that, even had these materials been provided to experts, their evaluations of [the prisoner] would have differed." (Order, doc. 47, at 5 (quoting *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990).)

Id. at 16–17. The district court then pointed out that the Fifth Circuit had also rejected Segundo's argument:

> "The record makes clear that Segundo's trial counsel obtained the services of a mitigation specialist, fact investigator, and two mental-health experts. These experts and specialists conducted multiple interviews with Segundo and his family, performed psychological evaluations, and reviewed medical records. Segundo claims that trial counsel failed to provide necessary social history, which would have changed the experts' conclusions that he is not intellectually disabled. But none of the experts retained by trial counsel indicated that they were missing information needed to form an accurate conclusion that Segundo is not intellectually disabled."

Id. at 17–18 (quoting *Segundo v. Davis*, 831 F.3d at 352).

Despite the fact that counsel retained these experts and investigators, and even though the experts did not believe that Segundo suffered from intellectual disability, counsel still introduced evidence of Segundo's difficult childhood, positive character traits, and religious awakening. *Segundo v. State*, 270 S.W.3d at 84–85. In addition, counsel offered testimony from Dr. Hopewell that Segundo suffered from fairly significant brain damage, that

his memory was impaired, that his judgment and insight were "non-existent," and that he had significant difficulty with executive function. 25 RR 176–83. Dr. Hopewell told the jury that individuals like Segundo tended to do well in structured environments, like prison. 25 RR 186–90.

In sum, given the meritless nature of Segundo's underlying IATC claim, the investigation that Segundo sought to fund was not reasonably necessary. Instead, at best, it would have only created a battle of experts, and counsel were entitled to their own experts. *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) ("To now impose a duty on attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any requests for information from an expert, would defeat the whole aim of having experts participate in the investigation."); *see also Turner v. Epps*, 412 F. App'x 696, 704 (5th Cir. 2011) (unpublished) ("While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an expert, counsel should be able to rely on that expert to alert counsel to additional needed information of other possible routes of investigation."). Segundo's proposed investigation would not have adduced evidence that would have undermined the district court's conclusions regarding counsel's performance or any potential prejudice. As such, the investigation was not reasonably necessary, even under *Ayestas*. Therefore, this is not an "extraordinary circumstance" meriting Rule 60(b) relief.

CONCLUSION

For these reasons, the Court should deny Segundo certiorari review.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

/s/ Erich Dryden
*ERICH DRYDEN
Assistant Attorney General
Criminal Appeals Division
Texas Bar No. 24008786
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936–1600
Fax: (512) 320–8132
e-mail address:
erich.dryden@oag.texas.gov

ATTORNEYS FOR RESPONDENT