CAPITAL CASE NO. _____

IN THE

Supreme Court of the United States

JUAN RAMON MEZA SEGUNDO,

v. ***Petitioner,***

LORIE DAVIS,

_____ ***Respondent.***

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE: QUESTIONS PRESENTED FOR REVIEW

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court held that a motion for relief under Federal Rule of Civil Procedure 60(b) in a federal habeas corpus case does not violate the AEDPA rule against successive petitions if the 60(b) motion attacks a procedural ruling, or some other defect in the integrity of the habeas proceedings, and not the federal court's previous resolution of a habeas claim on the merits. The *Gonzalez* Court reasoned that permitting 60(b) motions in federal habeas cases would not expose federal courts to frivolous litigation because a movant for relief under Rule 60(b) must establish extraordinary circumstances to reopen the judgment.

This Supreme Court has never returned to clarify the requirements for Rule 60(b) in the AEDPA context. Since *Gonzalez*, circuits have split over how to differentiate true 60(b) motions from successive habeas petitions, including over whether the defect alleged in a 60(b) motion must have precluded the federal court from reaching the merits of the habeas claims, and whether the extraordinary circumstances alleged in the motion must be procedural in nature. The confusion following *Gonzalez* raises the following questions and requires guidance from this Court:

1. Does a district court's denial of Section 3599 representation services under the wrong legal standard constitute a defect in the integrity of the proceedings under Rule 60(b), even though the district court previously ruled on the merits of the habeas claims?

2. Did the Fifth Circuit err by holding that a court cannot consider merits-based extraordinary circumstances under Rule 60(b)(6) because such arguments render a Rule 60(b) motion a successive habeas petition?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion below.

OPINIONS BELOW

On December 13, 2018, the United States Court of Appeals for the Fifth Circuit issued an opinion affirming the district court's order construing Mr. Segundo's Rule 60(b) Motion as a successive petition. This opinion is unpublished and unofficially reported as *In re Segundo*, 2018 WL 6595159 (5th Cir. 2018). It is reproduced in **Appendix A.** The judgment issued by the United States District Court for the Northern District of Texas construing Mr. Segundo's Rule 60(b) Motion as a successive petition on September 26, 2018, is reproduced in **Appendix B**. The district court's memorandum opinion and order, issued the same day, is unofficially reported as *Segundo v. Davis*, 2018 WL 4623106 (N.D. Tex. Sept. 26, 2018) and is reproduced in **Appendix C**.

JURISDICTION

The district court entered its order on September 26, 2018. *Segundo v. Davis*, No. 4:10-CV-970-Y (N.D. Tex. Sept. 26, 2018) (ECF Doc. 99). Mr. Segundo timely filed the Notice of Appeal on October 4, 2018. ECF No. 105. The Fifth Circuit entered its judgment and opinion on December 13, 2018. *In re Segundo*, 757 F. App'x 333 (5th Cir. 2018). Mr. Segundo's petition for writ of certiorari was originally due on March 13, 2019, within 90 days of the Fifth Circuit's opinion. Sup. Ct. Rule 13.3. On February 28, 2019, this Court granted Mr. Segundo an extension of 58 days, making the new deadline May 10, 2019. *Segundo v. Davis*, No. 18A885.

The district court had jurisdiction over this capital habeas case pursuant to 28 U.S.C. §§ 2241, 2254. Under 28 U.S.C. § 1291, the United States Court of Appeals

for the Fifth Circuit had jurisdiction over the appeal of the district court's order construing Mr. Segundo's Rule 60(b) Motion as a successive petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND OTHER AUTHORITIES INVOLVED

This case involves Federal Rule of Civil Procedure 60, which states:

> . . .
>
> (b) On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > . . .
> >
> > (6) any other reason that justifies relief.

This case further involves the application of 28 U.S.C. § 2244, which states:

> . . .
>
> (3)
>
> > (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

This case further involves the application of 18 U.S.C. § 3599, which states:

> . . .
>
> (f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant . . . .

STATEMENT OF THE CASE

A. Introduction

Texas has a long history of attempting to execute the intellectually disabled, and Juan Segundo's case is no different. Before his 2006 capital murder trial, Mr. Segundo's IQ was measured at 75, a score within the margin of error for intellectual disability. This should have triggered defense counsel to investigate his adaptive deficits in pursuit of an intellectual disability diagnosis, but they did not. Blinded by racist stereotypes, the defense team assumed that because Mr. Segundo, or "Speedy Gonzalez" as they called him, grew up in a bi-lingual household, he must have a higher IQ than was shown by the test.

In state post-conviction proceedings three years later, Mr. Segundo again underwent IQ testing, this time scoring a 72. And again, defense counsel failed to investigate his adaptive deficits in pursuit of an intellectual disability diagnosis. State post-conviction counsel hired a psychologist who, after a single meeting with Mr. Segundo, determined that he was not intellectually disabled. This expert heavily relied on the debunked *Briseno* factors and other stereotypes, concluding that someone who had held down a job in the past could not have an intellectual disability.

Finally, in federal habeas proceedings, new counsel asked for funds under 18 U.S.C. § 3599 to investigate—for the first time—Mr. Segundo's adaptive deficits for his *Atkins* claim and also for his unexhausted ineffective assistance of counsel claim for the prior attorneys' failure to do so. But the federal court thrice denied the requests because Mr. Segundo failed to establish a "substantial need" for funds—a legal standard later struck down by this Court in *Ayestas v. Davis*, 138 S. Ct. 1080

(2018). The federal court ultimately denied Mr. Segundo's habeas petition and the Fifth Circuit Court of Appeals affirmed.

Following this Court's decision in *Ayestas*, Mr. Segundo filed a motion for relief under Rule 60(b)(6), wherein he asked the court to remedy a procedural defect in the integrity of his habeas proceedings: that the district court denied his § 3599 requests under an erroneous legal standard. To establish extraordinary circumstances, Mr. Segundo detailed several problems that had plagued his case from the beginning, including the trial team's racial epithets toward Mr. Segundo and the use of the *Briseno* factors in state post-conviction to undermine his *Atkins* claim. Mr. Segundo also highlighted that all prior counsel—from trial to his initial federal habeas proceedings—had operated under some form of a conflict of interest. In response, the federal district court construed Mr. Segundo's extraordinary circumstances as successive habeas claims and transferred the motion to the Fifth Circuit.

In a distorted interpretation of this Court's decision in *Gonzalez v. Crosby*, the court of appeals ignored the *Ayestas* defect and determined that because Mr. Segundo's pled extraordinary circumstances were not procedural in nature, he had filed a successive habeas petition. The result of the court's holding has rendered 60(b) litigation untenable in the Fifth Circuit—unless the procedural defect itself is extraordinary, no relief may be obtained. The Fifth Circuit's rule is out of line with at least five other circuits and requires intervention from this Court.

B. The Capital Trial Proceedings

In 2005, Mr. Segundo was charged with the 1986 capital murder of Vanessa Villa in Fort Worth, Texas. Mr. Segundo was represented at trial by appointed

counsel, Mark Daniel and Wes Ball. Early into the representation, counsel recognized that Mr. Segundo had trouble communicating and understanding what was happening in the trial proceedings. As a result, counsel hired psychologist Dr. Kelly Goodness to analyze Mr. Segundo for potential intellectual disability. But rather than a professional evaluation, Mr. Segundo was subjected to racist and derogatory insults from his defense team. The result of their prejudices was that Mr. Segundo—a man with an IQ score within the range for intellectual disability—was never given a full *Atkins* evaluation.

"Tard," "Dumb Bastard," "Speedy Gonzalez"

These words were used to describe Mr. Segundo by the trial team sworn to advocate for his best interest. Although defense counsel and Dr. Goodness recognized that Mr. Segundo is impaired, they discounted the significance of that issue based on racist and other derogatory stereotypes. Following a meeting with Mr. Segundo at which he failed to grasp the evidence against him, Daniel emailed Dr. Goodness, "IF THERE IS SOME MEDICATION ON THE MARKET THAT CAN MAKE THAT DUMB BASTARD JUST A SLIGHT BIT SMARTER, GET HIM STARTED ON IT IMMEDIATELY." App. 59 (capitalization in original). Despite all of the signs of intellectual issues, the team decided that Mr. Segundo "is not a *tard* and *does not belong in the tard yard*." App. 65 (emphasis added). Worst of all, Mr. Segundo's IQ score of 75—a score that qualifies for an intellectual disability diagnosis—was disregarded because Dr. Goodness determined that his true intelligence must be higher. Dr. Goodness decided that Mr. Segundo's score was artificially deflated

because he grew up in a bi-lingual household. App. 64.[1] As a result, the team did nothing to investigate Mr. Segundo's adaptive deficits or pursue an intellectual disability claim.

Beyond the myriad insults at Mr. Segundo's expense, Mr. Segundo's lead trial attorney operated under a conflict of interest that was never disclosed to Mr. Segundo. Daniel had represented an alternate suspect in a murder Mr. Segundo was accused of committing during the punishment phase of his trial. Daniel had even advised his other client not to take a polygraph. Nonetheless, he never revealed the conflict to Mr. Segundo. App. 69–70.

Ultimately, Mr. Segundo was convicted of capital murder and sentenced to death. *Segundo v. State*, 270 S.W.3d 79, 83 (Tex. Crim. App. 2008).

C. Mr. Segundo's State Habeas Proceedings

Mr. Segundo received new counsel for his state post-conviction proceedings but fared no better. In 2009, Jack Strickland filed an initial state habeas application on Mr. Segundo's behalf wherein he argued that Mr. Segundo is intellectually disabled and therefore ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). Shortly before the state habeas court held a hearing, Strickland retained a psychologist, Dr. Stephen Thorne, to evaluate Mr. Segundo. This time, Mr. Segundo measured a 72 IQ score. App. 89. Nevertheless, Dr. Thorne testified before the state habeas court that Mr. Segundo did not meet any of the prongs for an intellectual

[1] This type of IQ score manipulation was expressly rejected by this Court. *See Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017) ("But the presence of other sources of imprecision in administering the test to a particular individual cannot *narrow* the test-specific standard-error range.") (internal citations omitted).

disability diagnosis. Dr. Thorne based this testimony on a single interview with Mr. Segundo and on the since-debunked *Briseno* factors, relying on information such as Mr. Segundo's self-report that he had previously been employed and that Mr. Segundo could engage in polite conversation. App. 91; *see also Moore v. Texas*, 137 S. Ct. 1039 (2017) (holding that Texas's approach to assessing adaptive deficits was unscientific and created an unacceptable risk of executing the intellectually disabled); *Moore v. Texas*, 139 S. Ct. 666 (2019) (same).

Moreover, while waiting on the state habeas court's recommendation on Mr. Segundo's application, state habeas counsel Strickland committed to join the Tarrant County District Attorney's Office, the office that prosecuted Mr. Segundo and with which Strickland had long-standing connections.[2] Strickland was due to return there in January 2011, to coincide with the retirement of criminal division chief Alan Levy—the prosecutor who pursued the death penalty in Mr. Segundo's trial. *See id.*

Several months after announcing his move to the D.A.'s Office, Strickland filed a motion with the federal district court noting that he would be unable to represent Mr. Segundo through his federal habeas proceedings because he was set to begin his new employment as a prosecutor on January 14, 2011. *Segundo v. Davis*, 4:10-CV-970-Y (N.D. Tex. Dec. 22, 2010) (ECF Doc. 1, PageID 2). During the time between accepting employment with the District Attorney's Office and withdrawing from Mr. Segundo's case, Strickland did not alert Mr. Segundo or the state courts to this

[2] *See* Martha Deller, *Area Defense Attorney will Join DA's Office*, Ft. Worth Star Telegram, May 22, 2010, at B1.

conflict and did not give Mr. Segundo the opportunity to obtain conflict-free counsel. Moreover, while Strickland was busy negotiating his new employment as a prosecutor, he failed to object to the district court's findings of fact and conclusions of law, which recommended denying Mr. Segundo relief.[3] In 2010, the Texas Court of Criminal Appeals denied habeas relief. *Ex parte Segundo*, WR-70,963-01, 2010 WL 4978402 (Tex. Crim. App. 2010).

D. Mr. Segundo's Federal Habeas Proceedings

Mr. Segundo received new counsel for his federal habeas corpus proceedings, Alexander Calhoun and Paul Mansur. On December 8, 2011, federal counsel filed Mr. Segundo's initial federal habeas petition raising his exhausted *Atkins* claim and an unexhausted ineffective assistance of trial counsel claim, arguing that trial counsel had failed to conduct an adequate investigation into intellectual disability, particularly adaptive functioning (IAC *Atkins* claim). *Segundo v. Davis*, 4:10-CV-970-Y (ECF Doc. 11, PageID 44, 66–101). Among other things, Mr. Segundo argued that none of the prior experts had appropriately assessed his deficits in adaptive functioning as all had wrongly focused on his adaptive strengths. *Id.* at 66–101. Because Mr. Segundo's IQ scores are consistent with intellectual disability, prior federal habeas counsel asserted that a "full assessment of adaptive behavior deficits [is] crucial to the diagnosis." *Id.* at 84–85.

[3] Notably, the state habeas judge who presided over Mr. Segundo's state post-conviction proceedings had retained Mr. Segundo's trial counsel to defend her against DWI charges while Mr. Segundo's state writ was pending before her. App. 74–75. This information was never disclosed to Mr. Segundo.

i. Funding Requests under 18 U.S.C. § 3599

Mr. Segundo requested funding three times to conduct an investigation into the facts related to his *Atkins* and IAC *Atkins* claims, particularly with respect to adaptive deficits. The district court thrice denied the requests on the basis that Mr. Segundo had not shown a "substantial need" for the funding.[4] The first motion was denied because the Fifth Circuit had held that the *Martinez* procedural bar exception was not applicable to Texas cases, thus Mr. Segundo could not establish a "substantial need." App. 162–67. Following this Court's decision in *Trevino v. Thaler*, 569 U.S. 413 (2013), Mr. Segundo filed a second motion for funds. The district again denied the request because Mr. Segundo failed to show a "substantial need" and would only be able to produce a disagreement between experts. App. 187–88. Mr. Segundo submitted a third request for funds following this Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), which emphasized the critical importance of evidence of adaptive functioning for an intellectual disability diagnosis, especially when the defendant's IQ score is within the range for intellectual disability. App. 202–03. The district court once again denied the request because Mr. Segundo had failed to show a "substantial need" as *Hall* was not applicable to a Texas case. App. 241, 243, 245. The court also noted that Mr. Segundo had not shown that the previous experts would change their opinions based on a new investigation into adaptive deficits. App. 245.

[4] For years, the Fifth Circuit held that funds are "reasonably necessary" under 18 U.S.C. § 3599 only when the petitioner shows a "substantial need" for funds to investigate "a viable constitutional claim that is not procedurally barred." *Ayestas*, 138 S. Ct. at 1088, 1092.

ii. Federal Counsel's Conflict

The same day that the district court denied the third request for funds, it also denied relief on all of Mr. Segundo's claims and denied a certificate of appealability. (ECF Doc. 48, PageID 815). Shortly after, Paul Mansur was replaced as co-counsel by Burke Butler. After she was appointed, Butler discovered additional IQ scores and documents that supported Mr. Segundo's *Atkins* and IAC *Atkins* claims, including information indicating that prior experts may have changed their opinions had they been given more information about adaptive deficits.[5] This evidence was presented to the district court through two post-judgment motions filed by Calhoun and Butler. (ECF Docs. 56 & 62). But, when asked by the court to explain why the evidence was not discovered pre-judgment, Calhoun created a conflict by misrepresenting his and Mansur's conduct and claiming that he and Mansur did not have access to the evidence discovered by Butler, placing the blame on Butler for the oversight. App. 78–81. Statements from Mansur and Butler directly contradict Calhoun's account to the district court. *Id.* However, after Calhoun made these misrepresentations to the court, Butler was terminated from the case and Calhoun proceeded on appeal as solo counsel for Mr. Segundo. He did not raise the funding issue before the Fifth Circuit, avoiding references to the post-judgment motions regarding his failure to present additional evidence. App. 84.

[5] Two mental health experts at trial had requested a social history of Mr. Segundo, which would have been critical for an adaptive deficits evaluation. App. 61–62. Defense counsel never provided one.

iii. Fifth Circuit Proceedings

The Fifth Circuit likewise denied a certificate of appealability on the issue of whether it is reasonably debatable that the district court erred by denying Mr. Segundo's unexhausted IAC *Atkins* claim without granting a hearing to allow Mr. Segundo to establish cause and prejudice under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *Segundo v. Davis*, 831 F.3d 345, 350-51 (5th Cir. 2016). This Court denied certiorari on that issue. *Segundo v. Davis*, No. 16-6622, 137 S. Ct. 1068 (Feb. 21, 2017).

E. Current Rule 60(b) Litigation

In March 2018, this Court issued *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), wherein it struck down the Fifth Circuit's "substantial need" test as overly burdensome—the same standard the district court applied three separate times to deny funding to Mr. Segundo. This Court held that to be eligible for funding under § 3599, a petitioner need only establish that he has a "plausible" claim for relief and that funding stands a "credible chance" of enabling him to overcome procedural default. *Id.* at 1095.

On May 18, 2018, Mr. Segundo filed the motion currently at issue under Rule 60(b)(6), attacking "the denial of funding for investigative, expert, and other services guaranteed by 18 U.S.C. § 3599 under the overly burdensome 'substantial need' standard" as a non-merits based defect in the integrity of the federal proceedings.[6]

[6] On May 15, 2018, the state trial court set Mr. Segundo's execution date for October 10, 2018.

App. 49. The Motion also outlined nine factors that made his case extraordinary, which collectively justified reopening the judgment:

1. The trial team used racist and derogatory terms to refer to Mr. Segundo, including calling him "Speedy Gonzalez," a "tard," and a "DUMB BASTARD";

2. Trial counsel ignored multiple requests from their experts for important information to support Mr. Segundo's potential intellectual disability;

3. Trial counsel operated under a conflict of interest when he represented an alternative suspect in an extraneous murder that was presented at the punishment phase of Mr. Segundo's trial and informed law enforcement that counsel would advise the alternative suspect whether to submit to a polygraph examination;

4. Mr. Segundo's state habeas counsel operated under a conflict of interest when he announced his intention to join the Tarrant County District Attorney's Office—the very office prosecuting Mr. Segundo's death sentence—while Mr. Segundo's state writ was still pending;

5. Mr. Segundo's trial counsel represented the state habeas judge in her DWI proceedings while the state habeas proceedings were ongoing;

6. Mr. Segundo's initial federal habeas counsel created a conflict of interest when he made misrepresentations to the district court regarding his failure to present evidence that supported an intellectual disability diagnosis;

7. Mr. Segundo's counsel and the courts repeatedly made the incorrect assumption that Mr. Segundo's IQ scores of 75 and below did not qualify him for an intellectual disability diagnosis—an assumption that was rejected by this Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014);

8. Mr. Segundo's counsel and the courts repeatedly used the outdated and unscientific *Briseno* factors to assess Mr. Segundo's adaptive deficits—an approach that was rejected by this Court in *Moore v. Texas*, 137 S. Ct. 1039 (2017); and

9. Mr. Segundo was denied his right to a "fair opportunity" to litigate his potential intellectual disability claim under *Hall* when the district court applied an overly burdensome standard, depriving him of necessary funding to investigate adaptive deficits despite Mr. Segundo's showing that he satisfied the initial threshold of an *Atkins* diagnosis with multiple qualifying IQ scores.

App. 38.

The district court determined that Mr. Segundo's 60(b) Motion is a successive petition and transferred the motion to the Fifth Circuit pursuant to 28 U.S.C. § 2244.[7] App. 9. The district court found that, although couched in Rule 60(b) language, Mr. Segundo's motion was an attempt to litigate ineffective assistance of counsel claims—specifically, a claim that trial counsel were racially prejudiced against Mr. Segundo and a non-cognizable claim that federal counsel was ineffective by operating under a conflict of interest.[8] App. 18–19. The district court found that these supposed "claims" are substantive in nature and reopening the judgment would lead to the introduction of new evidence, meaning that the 60(b) motion was in fact a successive petition. App. 20. In determining that it lacked jurisdiction, the district court did not analyze *Ayestas* or the funding standard used to deny Mr. Segundo's prior § 3599 motions—the only facts alleged to support the determination that the Motion attacked a procedural defect. *See* App. 15–20.

F. Fifth Circuit Opinion

Mr. Segundo appealed the district court's order construing his Rule 60(b) Motion as a successive petition.[9] Mr. Segundo argued that to prevail on a Rule 60(b)(6)

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[7] One day before, on September 25, Mr. Segundo's state counsel filed a subsequent writ of habeas corpus and motion for stay of execution, arguing that Mr. Segundo is intellectually disabled under the standard adopted in *Moore v. Texas*, 137 S. Ct. 1039 (2017).

[8] Mr. Segundo never asserted claims on either of those bases. In fact, the same district court stated in a prior written order "no ineffective-assistance-of-counsel claim has been made against prior federal counsel" in the Rule 60(b) Motion. (ECF Doc. 88).

[9] Later that day, the Texas Court of Criminal Appeals (CCA) stayed Mr. Segundo's execution to allow more time to consider his subsequent state habeas application. On October 31, the CCA remanded Mr. Segundo's state habeas case to the trial court for a determination of whether Mr. Segundo meets the requirements for intellectual disability in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017). On November 9, undersigned counsel filed a Motion to Stay Appellate Proceedings in the Fifth Circuit pending the

Motion, a movant must meet two prongs: (1) the movant must attack a procedural or non-merits-based defect that undermined the integrity of the federal proceedings, and (2) the movant must establish "extraordinary circumstances" that warrant reopening the judgment. Mr. Segundo argued that prong one is a threshold jurisdictional determination for the district court, and the inquiry is limited to whether the movant has attacked a procedural or non-merits-based defect in the federal proceedings. If the movant has attacked such a defect, then the pleading is a proper Rule 60(b) motion, the district court has jurisdiction, and the court may proceed to prong two. Mr. Segundo further argued that the prong two inquiry into "extraordinary circumstances" is conceptually distinct from prong one, and allows the court to consider a far wider range of factors—whether procedural in nature or not—that may render the case extraordinary. Mr. Segundo drew a bright line between the evidence he offered to meet prong one (an erroneous procedural ruling denying funding under the incorrect legal standard) and prong two (the nine factors ranging from conflicts of interest to racist trial team members). He also clarified in his briefing that, if the court were to reopen the proceedings, he would not seek to litigate any of the listed extraordinary circumstances as "habeas claims." Rather, he simply offered them as evidence of the extraordinary nature of the case for Rule 60(b) purposes.

On December 13, 2018, the Fifth Circuit affirmed the trial court's order construing the Rule 60(b) Motion as a successive petition. App. A. In the opinion, the

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outcome of the concurrent state court litigation. On November 20, 2018, the Fifth Circuit denied the stay motion.

court agreed that a Rule 60(b) movant must establish the two prongs discussed above. App. 2–3. However, it concluded that the extraordinary circumstances Mr. Segundo pled were actually habeas claims in disguise. App. 3–5.

The court relied on *Gonzalez* for the rule that a petitioner may not bring "merits-based *claims*" in a Rule 60(b) motion, and extended that rule to prohibit movants from raising any "merits-based *arguments*" as well. App. 3–4. It acknowledged Mr. Segundo's argument that the two prongs are conceptually distinct and the evidence offered to support prong two extraordinary circumstances should not be used to defeat the prong one jurisdictional inquiry, but expressed concern that such an approach would allow Rule 60(b) movants to "shoehorn all of their merits-based arguments into a Rule 60(b) motion." *Id.* Under the Fifth Circuit's reasoning, this would improperly "force" courts to "delve into those [merits-based] arguments to evaluate whether they constitute extraordinary circumstances"—a practice it believes is prohibited by *Gonzalez*. *Id.* (emphasis added).

The court found that because Mr. Segundo "extensively brief[ed] various substantive claims" and "[sought] to present new evidence and new theories of ineffective assistance of counsel that constitute new claims," his motion should be construed as a successive petition. App. 4. The court made no mention that Mr. Segundo did not seek relief on any of those so-called "claims" or that he clearly stated that he did not seek to pursue any of the listed extraordinary circumstances as habeas claims.

This petition for writ of certiorari follows.

REASONS FOR GRANTING WRIT

I. This Supreme Court should grant certiorari to answer whether the denial of Section 3599 representation services under the wrong legal standard constitutes a defect in the integrity of the federal habeas proceedings.

There is no dispute that the district court applied an overly burdensome legal standard when it denied Mr. Segundo's request for funding to conduct an investigation in support of his intellectual disability claim. The question is whether this wrongful deprivation of services can be the basis for a motion to reopen the judgment under Rule 60(b). The answer to that question turns, in large part, on whether the court interprets *Gonzalez* to limit Rule 60(b) motions exclusively to scenarios where a procedural ruling precluded the court from reaching the merits of the underlying claims. The Fifth Circuit narrowly construes Rule 60(b) as such. The Sixth, Tenth, and Eleventh Circuits, on the other hand, have a more expansive view of what qualifies as a Rule 60(b) defect, which includes other non-merits-based "defect[s] in the integrity of the federal habeas proceedings" regardless of whether they precluded the court from reaching the merits of the claims in the initial petition. This Court should grant certiorari to resolve this circuit split by adopting the latter approach, which is most consistent with the language and intent of *Gonzalez*.

A. A true Rule 60(b) motion attacks a non-merits-based defect in the integrity of the federal proceedings.

Rule 60(b) allows a party to seek relief from a final judgment and request reopening of his case under a limited set of circumstances, including fraud, mistake, and newly discovered evidence. FED. R. CIV. PROC. 60(b)(1)–(5). It also permits

reopening when the movant shows "any other reason that justifies relief" from the operation of the judgment. *Id.* at (b)(6).

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) complicates Rule 60(b) practice in federal habeas corpus proceedings because it restricts a petitioner's ability to file successive habeas petitions. *See* 28 U.S.C. § 2244. For some time, it was an open question whether courts should treat all Rule 60(b) motions in the AEDPA context as successive petitions. In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court rejected such a categorical approach, explained that Rule 60(b) has an unquestionably valid role to play in federal habeas proceedings, and provided guidance to the lower courts to distinguish between a true Rule 60(b) motion and a successive petition.

The Court reasoned that the heightened requirements of AEDPA's § 2244 apply only where a court acts pursuant to a prisoner's "application" for writ of habeas corpus. *Gonzalez*, 545 U.S. at 530 (citing *Calderon v. Thompson*, 523 U.S. 538, 554 (1998)). An "application" is a filing that contains one or more "claims," which the Court defined as "an asserted federal basis for relief from a state court's judgment of conviction." *Id.* A filing styled as a Rule 60(b) motion must be treated as a successive petition if it seeks to add a new claim or "attacks the federal court's previous resolution of a claim *on the merits*." *Id.* at 532 (emphasis in original). "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." *Id.*; *see also id.* at 533 ("If neither the motion itself nor

the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules."). In a footnote, this Court gave "fraud on the court" as *one* such example. *Id.* at 532 n.5 ("Fraud on the federal habeas court is one example of such a defect."). The Court further explained that a movant does not raise a claim "when he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Gonzalez*, 545 U.S. at 532 n.4.

B. There is a circuit split regarding whether the non-merits-based defect *must* have precluded a merits determination on the underlying claim.

Gonzalez decided that a "true" Rule 60(b) motion must (1) attack a defect in the integrity of the federal habeas proceedings, or (2) attack an erroneous procedural ruling that precluded a merits determination on the original petition. Further, it gave "fraud on the court" as one example of the first category and failure to exhaust, procedural default, and statute-of-limitations bars as examples of the second category.

The Fifth Circuit has read *Gonzalez* narrowly such that the lists of examples in the footnotes are exhaustive. In other words, under Fifth Circuit precedent, a proper Rule 60(b) motion must allege either fraud on the court or that an erroneous procedural ruling precluded a merits determination. Because "fraud on the court" can only be raised under Rule 60(b)(3), for all practical purposes, under Fifth Circuit precedent, a Rule 60(b)(6) motion may attack *only* a procedural ruling that precluded

a merits analysis. *See Gonzalez*, 545 U.S. at 528–29 (explaining that a Rule 60(b)(6) motion may not complain of any of the more specific circumstances set out in subsections (1)–(5)). Therefore, in the Fifth Circuit, Rule 60(b)(6) relief is foreclosed if the district court reached the merits of the petition, regardless of the procedural irregularities that may have occurred along the way.

Other circuits have interpreted the examples from *Gonzalez* as merely illustrative and therefore non-exhaustive. As a result, these circuits allow movants to attack defects in the integrity of the federal proceedings *other than* fraud on the court. Practically speaking, that allows movants to seek relief under Rule 60(b)(6) even if the district court reached the merits of the original petition.

Moreover, while the aforementioned circuits have general rules regarding their interpretation of *Gonzalez*, it is noteworthy that even within those circuits, panels have at times reached conflicting conclusions on this issue. As a result, 60(b) procedure has become highly unpredictable, regardless of the jurisdiction. The lower courts have wide discretion to decide whether a particular Rule 60(b) motion presents "extraordinary circumstances" and therefore warrants relief. However, at the very least, a movant should be on notice of whether Rule 60(b)(6) relief is foreclosed when the district court reaches the merits of the underlying claims. This Supreme Court should grant certiorari to clarify the Rule 60(b) requirements under *Gonzalez* and resolve the confusion that plagues the lower courts on this issue.

i. The Fifth Circuit generally requires the movant to attack a defect that precluded a merits determination.

Under Fifth Circuit precedent, "procedural defects are narrowly construed" in the Rule 60(b) context. "They include fraud on the habeas court, as well as erroneous previous rulings which precluded a merits determination—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *In re Edwards*, 856 F.3d 197, 205 (5th Cir. 2017) (quoting *In re Coleman*, 768 F.3d 367, 371-72 (5th Cir. 2014)). Notably, the court's narrow construction limits Rule 60(b) defects to the precise examples listed in Footnotes 4 and 5 of the *Gonzalez* opinion. "Fraud on the court" is captured in Rule 60(b)(3), and therefore is irrelevant to motions filed under subsection (6), leaving "erroneous previous rulings which precluded a merits determination" as the only avenue for relief under Rule 60(b)(6) in the Fifth Circuit. *See Gonzalez*, 545 U.S. at 528–29 (explaining that a Rule 60(b)(6) motion may not complain of any of the more specific circumstances set out in subsections (1)–(5)); *see also Preyor v. Davis*, 704 F. App'x 331, 339–40 (5th Cir. 2017) (requiring the Rule 60(b)(6) motion to "confine itself to a nonmerits aspect of the first federal habeas proceeding that precluded a merits determination").

Recently, in *Haynes v. Davis*, the Fifth Circuit categorically stated that Rule 60(b)(6) motions "may challenge *only* erroneous rulings 'which precluded a merits determination[.]'" 733 F. App'x 766, 769 (5th Cir. 2018) (quoting *Gonzalez*, 545 U.S. at 532 n.4) (emphasis added). The court has applied that rule in multiple cases since. *See, e.g., In re Robinson*, 917 F.3d 856, 863–65 (5th Cir. 2019) (rejecting the movant's attack on the court denying discovery and applying the wrong certificate of

appealability standard because neither precluded a ruling on the merits of the underlying claim); *United States v. Patton*, 750 F. App'x 259, 263–64 (5th Cir. 2018) (holding that the district court's ruling that precluded a determination on the merits of the movant's § 2255 petition is "the only proper subject of a motion seeking a change in the judgment").

While the Fifth Circuit generally follows this rule, there is still some confusion, depending on which panel hears the case. As Judge Duncan recently noted, "The Supreme Court has not exhaustively defined what it meant by a 'defect in the integrity of the federal habeas proceedings'—it only identified 'fraud on the federal habeas court as *one example* of such a defect.'" *Gilkers v. Vannoy*, 904 F.3d 336, 349 (5th Cir. 2018) (Duncan, J., concurring) (emphasis in original).[10] This concern is not confined to minority opinions. Just last year, in *United States v. Vialva*, 904 F.3d 356, 361 (5th Cir. 2018), the Fifth Circuit inexplicably departed from its general rule and stated that "Rule 60(b) motions can legitimately ask a court to reevaluate already-decided claims . . . as long as the motion credibly alleges a non-merits defect in the prior habeas proceedings."

This conflicting caselaw has left Rule 60(b) movants, like Mr. Segundo, in an untenable position. Under the vast majority of Fifth Circuit cases addressing the subject, Mr. Segundo's claim that the district court's denial of § 3599 representation services under the wrong legal standard is categorically precluded from being the

[10] The Eighth Circuit has also produced conflicting caselaw on the matter. Judge Melloy provided an articulate account of the competing interpretations of *Gonzalez* in his concurrence in part and dissent in part to *Ward v. Norris*, 577 F.3d 925 (8th Cir. 2009).

basis of a true Rule 60(b) motion. Yet, under *Vialva* and potentially under Judge Duncan's concurrence in *Gilkers*, defects under § 3599 are fair game for a Rule 60(b) motion.

ii. The Sixth, Tenth, and Eleventh Circuits do not require the defect to have precluded a merits determination.

Several circuits have held that, even if the district court reached the merits of the initial petition, the petitioner may nevertheless file a "true" Rule 60(b) motion by attacking a defect in the integrity of the federal habeas proceedings—whether that defect be in the form of fraud on the court or something else altogether. *See, e.g., Mitchell v. Rees*, 261 F. App'x 825 (6th Cir. 2008), abrogated on other grounds by *Penney v. United States*, 870 F.3d 459 (6th Cir. 2017); *United States v. Marizcales-Delgadillo*, 243 F. App'x 435 (10th Cir. 2007); *Franqui v. Florida*, 638 F.3d 1368 (11th Cir. 2011). This reading of *Gonzalez* is in large part dependent upon the understanding that the examples this Supreme Court listed in the footnotes of the opinion are not exhaustive. *See, e.g., Pease v. United States*, 2019 WL 1568407, at * 2 (11th Cir. Apr. 11, 2019) ("the Supreme Court [in *Gonzalez*] specifically noted the types of denials it provided were examples, and there is nothing indicating the Supreme Court was providing an exhaustive list."); *Hall v. Haws*, 861 F.3d 977, 986 n.4 (finding that Footnote 4 of *Gonzalez* "simply provided an example of when a claim exists; it was not intended as the definition of a claim.").

The Sixth Circuit explicitly rejects the argument that a "true" Rule 60(b) motion must attack a procedural ruling that precluded a merits determination. In *Mitchell*, the movant argued that the district court erroneously denied him an

evidentiary hearing, causing a defect in the integrity of the federal habeas proceeding. 261 F. App'x at 829. The respondent argued that the motion was, in fact, a successive habeas petition because the lower court had reached the merits of the underlying claims. The Sixth Circuit explained, "[T]he focus of the inquiry is not whether the court reached the merits of the original petition but on whether the Rule 60(b) motion contains a claim." *Id.* It concluded, "Because Mitchell's Rule 60(b) motion challenges only the judgment on the evidentiary hearing, it does not make a claim but rather asserts an error in the federal habeas proceeding." *Id.*

The Tenth Circuit likewise allows for a "true" Rule 60(b) motion when the court reached the merits of the petition, so long as the motion attacks a defect in the federal habeas proceedings. It acknowledges, though, that this requires a "more nuanced analysis." *See Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006). Similar to the Sixth Circuit, it explains that the focus of the inquiry must be whether the defect alleged relates only to the federal proceedings, or includes or necessarily implies a defect in the state proceedings. If the latter, then it is a successive petition. *Id.* In *Marizcales-Delgadillo*, the movant argued that the district court's denial of habeas relief without allowing him an adequate opportunity to access certain record documents and amend his habeas petition accordingly constituted a defect in the proceedings. 243 F. App'x at 437–38. In assessing the motion, the Tenth Circuit explained:

> [W]e need not determine whether the district court's denial of Mr. Marizcales-Delgadillo's § 2255 motion was procedural or on the merits. Regardless of how that denial may be characterized, his Rule 60(b)(6) motion is a "true" 60(b) motion because it challenged a defect in the

> integrity of the district court proceedings without necessarily attacking the reason the district court denied the underlying § 2255 motion.

Id.

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 60(b) relief after his previous habeas petition has been denied on the merits." *Franqui*, 638 F.3d at 1371, 1374 n.10.

C. This Supreme Court should clarify that the defect need not have precluded the district court from reaching the merits of the underlying claim.

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" 60(b) motion. This reasoning is most consistent with the language and purpose of *Gonzalez*. While 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 the opinion, to limit 60(b) practice to only those examples is overly restrictive.

As an initial matter, *Gonzalez* is framed in terms of identifying whether the motion asserts a federal basis for relief from the state court conviction. *See Gonzalez*, 545 U.S. at 533 ("When no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application."). The opinion gives guidance on how to make such a determination, but the ultimate question for the courts must be whether the motion that was filed asserts a habeas

claim—that question is not answered by whether the district court reached the merits of the original petition. Rather, it is answered by asking whether the defect complained of in the motion necessarily implies a defect in the state proceedings. *See Spitznas*, 464 F.3d at 1216. As the Second Circuit framed it in *Rodriguez v. Mitchell*, a pre-*Gonzalez* case, the question is whether granting the Rule 60(b) motion would have the effect of invalidating the state conviction. 252 F.3d 191, 198 (2d Cir. 2001). If so, then the motion should be construed as a successive petition. *Id.* This Court cited favorably to the *Rodriguez* opinion in *Gonzalez*, signaling that the Second Circuit's approach to the matter captures the purpose of Rule 60(b). *See Gonzalez*, 545 U.S. at 532 n.5 (citing *Rodriguez*, 252 F.3d at 199). Granting Mr. Segundo's request to vacate the federal judgment to allow the district court to consider his request for § 3599 services under the correct legal standard would not have the effect of invalidating Mr. Segundo's death sentence. *See Rodriguez*, 252 F.3d at 198 ("[W]hile it is undoubtedly a step on the road to the ultimate objective of invalidating the judgment of conviction, it does not seek that relief."). It would merely remedy a defect in the integrity of the federal habeas proceeding.

Further, *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 Court even relegated the examples to footnotes. Given the facts of *Gonzalez*, it is reasonable to conclude that this Court's statement that an attack on an erroneous procedural ruling that precluded a merits

determination would qualify as a true 60(b) does not necessarily mean that it is the *only* type of defect that would qualify. It is simply the type that was at issue in that particular case.

This Supreme Court should grant certiorari to clarify the requirements of a "true" Rule 60(b) motion as originally set out in *Gonzalez*.

II. The Fifth Circuit improperly extended this Court's ruling in *Gonzalez v. Crosby* when it held that a Rule 60(b)(6) movant cannot make merits-based arguments to establish extraordinary circumstances to re-open the judgment because such arguments render a Rule 60(b) motion a successive habeas petition.

Once a movant establishes a non-merits-based defect in the integrity of the federal proceeding, the district court has jurisdiction and may consider the Rule 60(b) motion. Relief under Rule 60(b) should be granted if the motion establishes "extraordinary circumstances" that warrant relief from judgment. This Court has considered a wide range of factors when assessing extraordinary circumstances, and in fact, has never limited the types of circumstances a court may consider.

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.

Nevertheless, the Fifth Circuit held that because the extraordinary circumstances listed by Mr. Segundo were "merits-based arguments," rather than procedural in nature, the motion was a successive petition in disguise. The Fifth Circuit's reading extends *Gonzalez* to preclude any extraordinary circumstances that are not themselves procedural in nature. This unreasonable extension of this Court's precedent is at odds with five other circuit courts and renders 60(b) relief virtually unattainable in the Fifth Circuit.

A. This Court has held that the "extraordinary circumstances" requirement under Rule 60(b)(6) serves a gatekeeping function, permitting courts to consider a broad range of equitable circumstances while limiting relief to the rare, "extraordinary" case.

In *Gonzalez*, this Court answered the question of whether permitting relief under Rule 60(b) in federal habeas cases would "expose federal courts to an avalanche of frivolous postjudgment motions" by pointing to the requirement that the movant show "extraordinary circumstances" justifying reopening the final judgment. 545 U.S. at 534–35 (2005). While such circumstances will be rare in habeas cases, the "extraordinary circumstance" requirement allows courts to review the equitable considerations in a case and determine whether the court should take the significant step of re-opening the judgment to remedy the defect. *See id.* at 535. But this Court did not use the extraordinary circumstances requirement to aid in determining whether a Rule 60(b) motion was in fact a successive habeas petition. *Id.* Instead, this Court conducted a two-pronged analysis: (1) did the petitioner allege a non-merits

based defect? If so, (2) did the petitioner establish sufficient extraordinary circumstances to warrant reopening the judgment? *See id.* at 533–35. Prong one establishes jurisdiction, while prong two asks whether equitable relief is warranted.

On the second prong, this Court has explained that Rule 60(b)(6) grants federal courts "broad authority" to relieve a party from judgment when such action is appropriate to accomplish justice. *Liljeberg v. Health Servs. Acqu. Corp.*, 486 U.S. 847, 863 (1988). In determining what constitutes extraordinary circumstances, this Court has never limited the categories of consideration but has pointed to equitable concerns such as "the risk of injustice to the parties [], the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *See id.* at 864. 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.

The effect of these cases demonstrates that the extraordinary circumstances requirement is not meant to assist courts in distinguishing between true 60(b) motions and successive habeas petitions. *See Gonzalez*, 545 U.S. at 531. Rather, it

serves to permit courts to consider all of the equitable circumstances in a case and reopen the judgment of only those deemed "extraordinary."

B. The Fifth Circuit's holding limiting the extraordinary circumstances analysis to non-merits-based arguments puts it squarely at odds with the Third, Sixth, Seventh, Ninth, and Tenth Circuits.

While purportedly applying *Gonzalez*, the Fifth Circuit all but ignored the defect Mr. Segundo asked the court to remedy—that the federal district court denied his request for funding to investigate his *Atkins* and IAC-*Atkins* claims under an erroneous legal standard. *See* App. 3. Instead, the circuit court determined that because Mr. Segundo's Rule 60(b) Motion "extensively" discussed his pled extraordinary circumstances—ranging from the trial team referring to Mr. Segundo as "Speedy Gonzalez" and "tard" while ignoring his potential intellectual disability to the conflicts of interest Mr. Segundo's counsel operated under at every stage of litigation—that he was attempting to litigate "successive *habeas* claims." App. 4. Although the relief Mr. Segundo sought was an evaluation of his § 3599 motion under the correct legal standard, the Fifth Circuit looked only to his enumerated extraordinary circumstances and decided that because the circumstances were not procedural in nature, he had filed a successive habeas petition.

The Fifth Circuit's rule directly conflicts with the approach taken by the Third, Sixth, Seventh, Ninth, and Tenth Circuits, creating an entrenched and irreconcilable circuit split. A brief survey of these circuits draws a sharp contrast to the holding of the Fifth Circuit.

The Third Circuit has uniformly interpreted *Gonzalez* as permitting a comprehensive review of all of the equitable circumstances in a case to determine whether it is "extraordinary" and worthy of re-opening. 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; *see also United States v. Doe*, 810 F.3d 132, 152 (3d Cir. 2015) ("Doe's underlying claim's merit is relevant, too."). Similarly, in *Satterfield v. District Attorney Philadelphia*, the circuit court held that a district court reviewing a Rule 60(b) motion premised on a change in the law "must examine the full panoply of equitable circumstances" in the case, including whether the underlying habeas claims have merit. 872 F.3d 152, 162–63 (3d Cir. 2017) ("The Supreme Court's recent decision in *Buck v. Davis* established that the severity of the underlying constitutional violation is an equitable factor that may support a finding of extraordinary circumstances under Rule 60(b)(6)"); *but see* App. 4 ("*Buck* . . . appears to stand only for the proposition that the 'infusion of race as a factor for the jury' can be itself 'extraordinary' in nature.") (internal citation omitted).

At least four other circuits have followed suit. Because Rule 60(b)(6) is "fundamentally equitable in nature" and requires the party invoking the rule to demonstrate why extraordinary circumstances justify relief, the Seventh Circuit has declined to construe Rule 60(b) motions that make merits-based extraordinary circumstances arguments as successive petitions. *See Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015) ("Pertinent considerations include . . . whether the underlying claim is one on which relief could be granted."). The Ninth Circuit likewise determined a petitioner had established extraordinary circumstances when "his co-defendant was granted habeas relief on the same claim based on the same error from the same trial." *Hall v. Haws*, 861 F.3d 977, 988 (9th Cir. 2017).

In *United States v. Marizcales-Delgadillo*, the Tenth Circuit determined that a petitioner for relief under Rule 60(b) had not brought a disguised successive habeas petition when he discussed the merits of his § 2255 motion because the relief sought demonstrated that his motion "challenged the process the court used in deciding to deny the § 2255 motion, not the substance of that decision." 243 F. App'x 435, 438 (10th Cir. 2007). And while the Sixth Circuit has not held that a court is required to consider merits-based arguments to determine whether equitable relief is warranted, the court has not construed Rule 60(b) motions as successive habeas petitions for making such arguments. *See Zagorski v. Mays*, 907 F.3d 901, 907 (6th Cir. 2018) (noting that some Sixth Circuit cases "assumed it appropriate to consider the merits to decide 'whether it changes the balance of equities with respect to the Rule 60(b)(6)

motion"). As with the Third, Seventh, Ninth, and Tenth Circuits, this holding by the Sixth Circuit is irreconcilable with the Fifth Circuit's holding in this case.

C. The Fifth Circuit's interpretation of *Gonzalez* renders Rule 60(b)(6) relief in federal habeas cases unattainable.

"Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzalez*, 545 U.S. at 534. But since this Court held in *Gonzalez* that Rule 60(b) motions are viable in federal habeas cases, the circuits have come to opposing conclusions about how to distinguish a true Rule 60(b) motion from a successive habeas petition. Under the Fifth Circuit's rule, a petitioner for relief under Rule 60(b) may not invoke any non-procedural considerations under the extraordinary circumstances prong because the court will construe such arguments as successive habeas claims. The Fifth Circuit's approach ignores this Court's holdings that Rule 60(b) relief is reserved for cases in which the equitable circumstances render the case "extraordinary" and makes Rule 60(b) litigation in federal habeas cases futile.

The Fifth Circuit has determined that in order to "carefully police purported Rule 60(b) motions for signs that they are successive *habeas* petitions in disguise[,]" courts should look past the pled procedural defect and relief sought in Rule 60(b) motions and dismiss as successors any motions that argue the case is extraordinary by making "merits-based arguments." *See* App. 5. Likewise, in *Preyor v. Davis*, the Fifth Circuit construed a Rule 60(b) motion predicated on fraud on the court as a successive petition because the pled extraordinary circumstances related to the merits of an underlying ineffective-assistance-of-counsel claim. 704 F. App'x 331, 340 (5th Cir. 2017). The circuit court determined that the underlying IAC claim was the

true "focus of the motion," ignoring the fraud-defect allegation. *Id.*; *see also In re Jasper*, 559 F. App'x 366, 374–75 (5th Cir. 2014) (disagreeing with the majority's holding that a Rule 60(b) motion predicated on part of the state court record being lost due to technical error constituted a successive petition but concurring because the underlying claim lacked merit and thus the extraordinary circumstances prong was not met) (Dennis, J., concurring); *Ward v. Norris*, 577 F.3d 925, 940 (8th Cir. 2009) ("[I]t is reasonable to look at the immediate relief a movant seeks rather than focusing only on the question of whether the movant eventually will seek to challenge a state court judgment.") (Melloy, J., dissenting).

But this 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. *Compare Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) (holding that the change brought about by *Martinez* was not itself extraordinary and denying 60(b) relief) *with Haynes v. Davis*, 733 F. App'x 766, 769 n.1 (5th Cir. 2018) (affirming denial of Rule 60(b) relief on *Martinez* grounds for failing to establish extraordinary circumstances and noting the court was "precluded from conducting a comprehensive merits review"); *see also Haynes*, 733 F. App'x at 773 n.1 ("The majority opinion contends that 'we are precluded from conducting a comprehensive merits review.' Neither *Gonzalez v.*

Crosby nor *Adams v. Thaler* supports this assertion.") (Dennis, J., dissenting) (internal citations omitted).

To state differently, according to the Fifth Circuit below, non-procedural extraordinary circumstances have no place in Rule 60(b) litigation. That rule cannot be squared with this Court's precedent that the extraordinary circumstances prong of Rule 60(b) is meant to permit an equitable evaluation of the case. *See Liljeberg*, 486 U.S. at 863; *Buck*, 137 S. Ct. at 778; *see also Teamsters, Chauffers, Warehousement & Helpers Union v. Superline Transp. Co.*, 953 F.2d 17, 20 (1st Cir. 1992) ("[A]s a precondition to relief under Rule 60(b), [litigants] must give the trial court reason to believe that vacating the judgment will not be an empty exercise."). The Fifth Circuit has placed 60(b) litigants in an untenable position that this Court did not envision in *Gonzalez*. Accordingly, this Court should grant certiorari to resolve the circuit split and clarify whether the extraordinary circumstances pled in a Rule 60(b)(6) motion must be procedural in nature.

CONCLUSION

The Fifth Circuit's interpretation of *Gonzalez v. Crosby* render 60(b) relief in federal habeas cases unworkable. 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. This Court has not provided guidance on Rule 60(b) motions in federal habeas cases in over a decade. It should do so now and resolve the circuit splits on these issues.

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Respectfully submitted,

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