No. 18-9645

IN THE

Supreme Court of the United States

VICTOR J. BLACK,
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

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QUESTIONS PRESENTED

Respondent objects to the Petitioners' Questions Presented because they assume certain procedural, legal, and factual premises that are demonstrably unfounded, as established more fully below. Respondent, therefore, suggests the following Questions Presented:

1. Should the Court grant certiorari to review the lower court's fact-bound determination that Petitioner failed to raise a claim pursuant to *United States v. Cronic*, 466 U.S. 648 (1984), in the district court?

2. Should the Court grant certiorari to determine whether the requirements of Habeas Rule 11(a)—that a district court first *deny* a certificate of appealability on a given claim before a habeas petitioner may obtain a certificate of appealability from a circuit court on the same claim—is jurisdictional when the circuit court lacked jurisdiction to consider the *Cronic* claim for an independent reason?

3. Should the Court grant certiorari to review the lower court's determination that Habeas Rule 11(a) is jurisdictional where the decision below is fully consistent with the Court's precedent?

RELATED CASES

Black v. Davis, 902 F.3d 541 (5th Cir. Sept. 5, 2018) (No. 16-10159).

Black v. Stephens, No. 3:14-CV-341-L, 2016 WL 302261 (N.D. Tex. Jan. 25, 2016).

Black v. State, No. 3:13-CV-0892-D, 2013 WL 1760951 (N.D. Tex. Apr. 24, 2013).

Black v. State, No. 05-10-01558-CR, 2012 WL 206501 (Tex. App.—Dallas Jan. 25, 2012).

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BRIEF IN OPPOSITION

Respondent, Lorie Davis, Director, TDCJ-CID (the "Director") respectfully files this brief in opposition to Victor J. Black's petition for writ of certiorari.

STATEMENT OF THE CASE

A Texas jury found Black guilty of aggravated assault with a deadly weapon, and the trial court sentenced him to sixty years' confinement. ROA.532–33.[1] After this conviction was affirmed on direct appeal, and after his state postconviction efforts failed, Black sought federal habeas relief pursuant to 28 U.S.C. §§ 2241 and 2254. ROA.13–22. As relevant to this appeal, Black raised an ineffective assistance of counsel claim based on trial counsel's purported racial animus toward him. ROA.250–290. First, he contended that trial counsel's alleged racial hatred constituted a Sixth Amendment violation under the familiar standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* Second, Black argued that *Strickland* prejudice should be presumed because trial counsel's animus constituted a conflict of interest that adversely affected

[1] "ROA" refers to the Fifth Circuit's record on appeal in the proceeding below. The citation format is "ROA" followed by a period, followed by the page number, or page range.

trial counsel's performance. *Id*. (citing *Cuyler v. Sullivan*, 446 U.S. 335, 349–49 (1980) (holding that *Strickland* prejudice is presumed if petitioner demonstrates that "an actual conflict of interest adversely affected his lawyer's performance.")). The district court denied federal habeas relief after concluding that Black's factual contentions in support of his *Strickland* and *Cuyler* arguments were conclusory, meritless, and procedurally barred. ROA.404−427, 451–53. The district court also denied a certificate of appealability (COA) on these claims. ROA.452.

Black then filed a notice of appeal and application for COA with the Fifth Circuit. ROA.454. In seeking COA, Black reasserted the arguments made pursuant to *Strickland* and *Cuyler*. *See* Appellant's Br. in Supp. of COA at 3–23. A circuit judge granted COA, not to consider application of *Strickland* or *Cuyler* to Black's petition, but to answer a question never presented to or passed on by the district court: whether trial counsel's alleged racial animus constituted a complete *absence* of counsel of counsel under this Court's holding in *United States v. Cronic*, 466 U.S. 648 (1984). *See* Order at 2, Apr. 5, 2017.

Following merits briefing, the Fifth Circuit issued a published opinion vacating the COA and dismissing the appeal, without prejudice,

for lack of appellate jurisdiction. *Black*, 902 F.3d at 541. In reaching its decision, the Fifth Circuit reasoned that the district court necessarily "denied a COA for each issue Black presented in his habeas application." *Id.* at 546. With this in mind, the court then examined Black's district court pleadings and determined that, even with the benefit of liberal-pleading construction, Black had never raised "to the district court, in any manner identifiable by that court, a claim that he was constructively denied counsel" under *Cronic*. *Id.* at 547. As a result, the district court could not be said to have denied a COA on a *Cronic* claim—or even to have *considered* the claim in the first instance.

Since the district court never denied a COA as to *Cronic*, the Fifth Circuit panel reasoned that the motions judge had no authority to grant a COA on a claim and in a circumstance that the district court had never denied a COA. *Id.* at 544–45 (citing 28 U.S.C.A. § 2253(c)(1); Rule 11(a), 28 U.S.C. foll. § 2254). Specifically, the court analyzed Rule 11(a) of the Rules Governing Section 2254 Cases, which "states that a 'district court *must* issue or deny a certificate of appealability when it enters a final order adverse to the applicant.'" *Black*, 902 F.3d at 544–45 (emphasis added) (quoting Rule 11(a), 28 U.S.C. foll. § 2254) ("Habeas Rule 11(a)").

"In addition, a grant of a COA 'must state the specific issue or issues' that were found to justify the COA, but no comparable requirement exists to identify the issues considered in denying a COA." *Id.* at 545 (quoting Habeas Rule 11(a)). Finally, the court focused on the following sentence from Habeas Rule 11(a):

> "If the [district] court *denies* a certificate, the parties *may not appeal* the denial *but may seek* a certificate [of appealability] from the court of appeals under Federal Rule of Appellate Procedure 22."

Id. at 545 (alterations in original) (emphasis added) (quoting Habeas Rule 11(a)). Based on its construction of Habeas Rule 11(a),[2] the court determined the following: In circumstances in which a district court's failure to issue a COA ruling on a given claim occurs because the petitioner failed to raise the claim *at all*, the circuit court is without jurisdiction to grant COA on that claim. *Id.* (the "district-court-first" rule).

Black filed a timely motion for rehearing en banc, which the court denied after no panel member or active service member of the court requested a poll. *See* Order at 2, Apr. 9, 2019.

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[2] The Director will provide more detailed analysis below.

SUMMARY OF THE ARGUMENT

Certiorari review is unwarranted because this is fundamentally a fact-bound question regarding forfeiture of a claim. If cast in terms of jurisdiction, no matter how the Court might resolve the lower court's certificate of appealability jurisdictional determination, the court below lacked jurisdiction to consider *Cronic* for reasons that are wholly *independent* of the jurisdictional status of Habeas Rule 11(a). In any event, certiorari review is unnecessary because the lower court's decision is fully consistent with this Court's precedent.

ARGUMENT

I. The Court Should Not Grant Certiorari to Review the Fifth Circuit's Determination that Black Failed to Raise a *Cronic* Claim in the District Court.

Much of the Fifth Circuit's legal reasoning is premised on its antecedent determination that Black had not raised a *Cronic* claim in the district court. *See Black*, 902 F.3d at 546–47. In his petition for rehearing, Black challenged this conclusion, suggesting that the manner in which the panel constructed his claims violated "precedent from both this Circuit and the Supreme Court." Pet. Reh'g at ii, Oct. 18, 2018. However, in his petition for certiorari, Black now acknowledges that he made no

reference to *Cronic* in the district court.[3] Pet. Cert. at 4 (conceding that he did not cite *Cronic* in the district court). Black's concession that he forfeited any *Cronic* claim dooms any effort to secure review of this question in this Court.

But even if Black continued to dispute the existence of a *Cronic* claim in his district court pleadings, the Court should not review the determination because it is not a question of exceptional importance—nor was the decision that he did not raise the claim incorrect. *See Black*, 902 F.3d at 546–47. And even if the lower court erred on this question, the error does not support certiorari review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). There is no good reason to review the lower court's determination that Black failed to raise a *Cronic* claim in the district court. *See id.*

[3] Black also acknowledges that he failed to raise a *Cronic* claim in his COA application. *See* Pet. Cert. at 4 ("In seeking COA from the 5th Circuit . . . Petitioner did not request one [about] . . . whether his claim was governed by *Cronic*.").

II. This is a Poor Vehicle to Analyze the Jurisdictional Substance of the District-Court-First Rule Because the *Cronic* Claim is Ripe for Jurisdictional Dismissal as "Successive."

There is an *independent* jurisdictional impediment to this Court's review of the district-court-first rule. As the Director argued in the court below,[4] the order granting COA improperly asserted jurisdiction to consider a *new* claim—raised for the first time on appeal—even though that claim was plainly "second" or "successive" to the habeas application on which the district court entered final judgment. This secondary jurisdictional issue creates at least two impediments to the Court's review of the questions presented. First, if the Fifth Circuit was without jurisdiction to consider the successive *Cronic* claim, then this Court cannot resolve the lower court's understanding of the district-court-first rule.[5] Second, no matter how the Court might finally resolve the jurisdictional implications of the district-court-first rule, it would also

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[4] Resp. Opp'n Pet. Reh'g at 14–17, Dec. 21, 2018.

[5] *E.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) ("'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.'" (alterations in original) (quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936))).

have to determine the jurisdictional question presented by 28 U.S.C. § 2244(b)(2) in a circumstance in which the lower court had not addressed it.[6]

A. The Fifth Circuit was without jurisdiction to consider the *Cronic* claim under 28 U.S.C. § 2244(b)(2) because it was presented in a "successive" application.

Any claim "presented in a second or successive" application "that was not presented in a prior application *shall be dismissed*" unless the petitioner first seeks and obtains authorization from the appropriate court of appeals to press the new claim in a successive petition. 28 U.S.C. § 2244(b)(2) (emphasis added), (b)(3)(A). A circuit court may grant such authorization only if the movant makes a prima facie demonstration of reliance (1) on a new and retroactive rule of constitutional law; *or* (2) that the factual basis of the new claim could not have been discovered earlier with due diligence *and* that the new facts underlying the claim show a high probability of actual innocence. § 2244(b)(2)(A), (B); *see Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). Moreover, the mandatory gatekeeping requirements in § 2244(b) are "jurisdictional in nature." *Blackman v.*

[6] In lieu of resolving this secondary jurisdictional question, the en banc court denied Black's rehearing petition without opinion. *See* Order at 2, Apr. 9, 2019.

Davis, 909 F.3d 772, 777 (5th Cir. 2018) (citing *Panetti v. Quarterman*, 551 U.S. 930, 942 (2007)), *cert. denied*, 139 S. Ct. 1215 (2019); *see Case v. Hatch*, 731 F.3d 1015, 1027 (10th Cir. 2013) ("Section 2244's gate-keeping requirements are jurisdictional in nature, and must be considered prior to the merits of a § 2254 petition."). If a petitioner fails to meet any of the mandatory requirements, the successive claims *must* be dismissed.

Here, Black's *Cronic* claim was never raised in district court. Therefore, the district court's judgment denying Black's habeas petition was final well before the motions-judge recognized the new *Cronic* claim in the order granting a COA. Permitting Black to raise a new claim after the district court had entered final judgment enabled him to make a second collateral attack on his conviction after his initial petition had been rejected. In this circumstance, the new *Cronic* claim that Black eventually pressed for the first time on appeal was a successive application because the district court's "[f]inal judgment marks [the] terminal point" for purposes of § 2244(b)(2). *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012);[7] *but see United States v. Santarelli*, 929

[7] The Seventh Circuit's holding in *Phillips* is the majority rule in the circuits, with support from Ninth, Tenth, and Eleventh. *See Beaty v. Schriro*, 554 F.3d 780, 783 n.1 (9th Cir. 2009) (holding that petitioner may not amend

F.3d 95, 105 (3d Cir. 2019) (holding that subsequent habeas petition is not a "second or successive" petition when it is filed during the pendency of an appeal of the district court's denial of the petitioner's initial habeas petition). And necessarily so. "Treating motions filed during appeal as part of the original application . . . would drain most force from the time-and-number limits in § 2244 and § 2255." *Phillips*, 668 F.3d at 435. "Nothing in the language of § 2244 . . . suggests that the time-and-number limits are irrelevant as long as a prisoner keeps his initial request alive through motions, appeals, and petitions." *Id.*

The terminal import of the district court's final judgment as it relates to § 2244(b)(2) also finds support in *Gonzalez v. Crosby*. There, the Court held that a motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure seeking to reopen final judgment to consider a

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petition after the district court had ruled and proceedings had begun in the circuit court); *Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007) (per curiam) (holding petitioner who sought to raise new *Atkins* claim in federal court while federal appeal on his prior petition was still pending required to satisfy second and successive petition requirements); *United States v. Terrell*, 141 F. App'x 849, 852 (11th Cir. 2005) (per curiam) (finding petition to be successive rather than an amendment because "there was no pending § 2255 motion in the district court). Only the Second and Third Circuits conclude otherwise. *Santarelli*, 929 F.3d at 105; *Whab v. United States*, 408 F.3d 116, 118–19 (2d Cir. 2005).

new claim "on the merits" was a new "application" for collateral review and thus as barred as successive by § 2244(b). *Gonzalez*, 545 U.S. at 530–32. The situation here is no different. The claim under *Cronic* came into existence months after the district court entered final judgment; thus, Black is in the same position as any petitioner wanting to launch a second post-judgment attack with a new constitutional claim: he must seek permission from the court of appeals to file a second or successive application.

B. This is a poor vehicle to resolve the district-court-first rule.

If the Court granted certiorari to review the lower court's application of the district-court-first rule, it would also be tasked with resolving the jurisdictional defect related to § 2244(b)(2)—in a circumstance where the lower court had not first addressed it. *See Steel Co.*, 523 U.S. at 94 ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900))).

This justiciability concern is exacerbated by both the complexity of the § 2244(b)(2) jurisdictional question and the lack analysis in the lower courts, which robs the Court of any meaningful basis to evaluate the petition. Where such complex issues are involved, "there are strong reasons to adhere scrupulously to the customary limitations on [the Court's] discretion." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). Doing so "discourages the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Id.* The Court should adhere to those limitations here.

C. The Court need not resolve the question presented because Black has a readily available remedy to pursue relief on the *Cronic* claim.

The Court need not analyze the jurisdictional implications of the district-court-first rule because Congress created an available remedy for Black to obtain review of the *Cronic* claim after it was first recognized by the judge granting COA. *See* § 2244(b)(2)(A), (B). In other words, Black, like all similarly situated habeas petitioners, can move the Fifth Circuit to permit consideration *Cronic* to these facts. *Id.* To be sure, such authorization requires a movant to first show (1) a new and retroactive rule of constitutional law; *or* (2) that the factual basis of the new claim

could not have been discovered earlier with due diligence *and* that the new facts underlying the new claim show a high probability of actual innocence. § 2244(b)(2)(A), (B). While this additional hurdle may be difficult to achieve, it reflects the policy-imperatives that Congress had in mind when it enacted § 2244(b)(2) as part of the Antiterrorism and Effective Death Penalty Act, *i.e.*, to "limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

* * *

In sum, lower court's determination that it was without jurisdiction to grant COA on the newly derived *Cronic* claim was independently correct without regard to the question sought to be raised in the petition. The Court should deny certiorari.

III. The Lower Court's Application of the District-Court-First Requirement is Fully Consistent With this Court's Precedent.

Plainly, Habeas Rule 11(a) mandates that a district court *must* grant or deny COA on a given claim when it enters final judgment. Important too, where the district court denies a COA pursuant to that

mandatory command, a petitioner "*may not appeal* the denial but may seek a certificate from the court of appeals" pursuant to Rule 22 of the Federal Rules of Appellate Procedure, which explicitly incorporates the mandatory requirements of 28 U.S.C. § 2253. *See* Habeas Rule 11(a) (citing Fed. R. App. P. 22(a)).

Despite the textual anchors in Habeas Rule 11(a), Black argues that the district-court-first rule violates the Court's holding in *Gonzalez v. Thaler*, 565 U.S. 134 (2012). Pet. Cert. at 5–12. To the contrary, the district court's preliminary COA denial—followed by a circuit judge's subsequent COA grant—are coincident steps to invoking appellate jurisdiction under § 2253(c)(1), which is jurisdictional. *See Gonzalez*, 565 U.S. at 142 (holding that only § 2253(c)(1) is jurisdictional). To be sure, § 2253(c)(2) and (3), which define the standard for granting a COA and the form of such a ruling, respectively, are *not* jurisdictional. *Id.* at 143. But the district court's preliminary COA denial—made pursuant to Habeas Rule 11(a)—is a better analog to § 2253(c)(1), the jurisdictional provision. In other words, requiring the *existence* of a district court's preliminary COA denial on a given claim—saying nothing of its form or

content—is a means of implementing the screening mechanism for triggering appellate jurisdiction to consider COA under § 2253(c)(1).[8]

Moreover, this interpretation of *Gonzalez* is consistent with the Court's prior decision in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). There, the Court identified a distinction "between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." *Id.* at 503. *Gonzalez* effectively applied this distinction to the COA requirement by holding that the existence of a COA grant is jurisdictional, while any defects in a COA grant, even if violative of a statute, are not. *Gonzalez*, 565 U.S. at 141–43. But here, as explained above, the district court failed to make the required COA ruling on the *Cronic* claim *at all*. And, consistent with *Gonzalez*, it is the non-existence of the district court's COA ruling that disrupts the transfer of adjudicatory authority to the circuit court to grant a COA under Habeas Rule 11(a) and § 2253(c)(1).

[8] It also serves an important prudential function. *E.g., Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997) (explaining that the district court has superior familiarity with the case, and "the circuit court will be informed by district court's determination in its own decision making").

By contrast, this Court recently determined that the limitation on the length of an extension for filing a notice of appeal, found in Federal Rule of Appellate Procedure 4(a)(5)(C), is a court-made claim-processing rule that is *not* jurisdictional. *Hamer v. Neighborhood Hous. Sers. of Chicago*, 138 S. Ct. 13, 17 (2017). But this does not mean that all federal rules, especially those Congress approved under the Rules Enabling Act,[9] have no bearing on appellate jurisdiction. The Court's earlier decision in *Torres v. Oakland Scavenger*, 487 U.S. 312 (1988), which *Gonzalez* distinguished, and which *Hamer* left intact, is illustrative. There, the Court concluded that the requirement that a notice of appeal designate a party, as required by Federal Rule of Appellate Procedure 3(c), although not statutory, is effectively "imposed by the legislature" because "the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal." *Torres*, 487 U.S. at 315. Hence, the complete failure to name a party in a notice of appeal, in violation of Rule 3(c), meant the circuit court "never had jurisdiction over petitioner's appeal." *Id.* at 317.

[9] 28 U.S.C § 2072.

In the same way that the specification of a party is essential to the timely notice of appeal requirement in 28 U.S.C. § 2107, the district court's preliminary COA denial on a specified claim is central to enforcement of the statutorily-imposed COA requirement under § 2253(c)(1). Further, the COA requirement, again like the notice of appeal requirement, "transfers adjudicatory authority from the district court to the appellate court." *Manrique v. United States*, 137 S. Ct. 1266, 1271 (2017). This function would be rendered hollow if the district court were not first required to determine whether a COA should issue. Stated another way, without the district court's review, the circuit court would be exceeding its appellate authority—the very core of the jurisdictional inquiry. *See Bowles v. Russell*, 551 U.S. 205, 212–13 (2007) (explaining that "the notion of 'subject-matter' jurisdiction obviously extends to 'classes of cases . . . falling within a court's adjudicatory authority'" (quoting *Eberhart v. United States*, 546 U.S. 12, 16 (2005))).

Relatedly, the Court has emphasized that "a rule should not be referred to as jurisdictional unless it governs a court's *adjudicatory capacity*, that is, its subject-matter or personal jurisdiction." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (emphasis added).

The Court has distinguished such plainly jurisdictional rules from "claims-processing rules," which "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* "Filing deadlines . . . are quintessential claim-processing rules." *Id.* Nevertheless, the Court has explained that, "unfortunately," the jurisdictional inquiry "is not quite that simple because Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule." *Id.* The Court has only found such rules to be jurisdictional when the outcome is "mandated by Congress." *Id.* As an example of these "unfortunate" circumstances, the Court cited its prior opinion in *Bowles*, which characterized § 2107's time limit for filing a notice of appeal as jurisdictional. *Id.* (citing *Bowles*, 551 U.S. 212–13).

The Court's recent opinion in *Hamer* must be read with this context in mind. As explained above, *Hamer* determined that Rule 4's time limit on extensions is non-jurisdictional—distinguishing it from the statutorily prescribed, jurisdictional time limit in *Bowles*. *Hamer*, 138 S. Ct. at 16, 21. But the Court's ruling in *Hamer* was narrow: "a *time limit* prescribed only in a court-made rule . . . is not jurisdictional." *Id.* at 16 (emphasis

added). Recall that the Court holds that time-limits are quintessentially claims-processing rules that are only jurisdictional if mandated by Congress. *Henderson*, 562 U.S. at 435. An overbroad reading of *Hamer* risks depriving rules that plainly govern a court's adjudicatory capacity of their jurisdictional import simply because they are not explicitly prescribed by statute—even if they are a substantive analog to a jurisdictional statute.[10] Such a proposition is irreconcilable with this Court's prior precedent. *See id.*; *see also Torres*, 487 U.S. at 315. Ultimately, there is a stark distinction between Habeas Rule 11(a), which, in conjunction with § 2253(c)(1), goes to the appellate court's authority to rule on a COA, and the rules governing the appropriate *form* of a COA grant as analyzed in *Gonzalez* or the limit on the length of an

[10] By passively approving Rule 11(a), Congress surely would be expected to appreciate the jurisdictional significance of the district-court-first rule and understand that it would be construed harmoniously with § 2253(c)(1) as a jurisdictional pre-requisite. *See, e.g., Cardenas v. Thaler*, 651 F.3d 442, 446 n.4 (5th Cir. 2011) ("When the Supreme Court promulgates the Federal Rules of Appellate Procedure pursuant to 28 U.S.C. § 2072, it must transmit them to Congress. *See* 28 U.S.C. § 2074. Congress, in turn, signals its approval of the Supreme Court's proposed rules by inaction." (citing David D. Siegel, *Submitting the Rules to Congress,* Commentary on 1988 Revision to 28 U.S.C. § 2074 ("The procedure for Congressional approval remains passive. Inertia means approval. If Congress does nothing within the seven-month period stipulated by the statute, the new rules go into effect."))).

extension addressed in *Hamer*—rules that are plainly procedural. Indeed, the district-court-first rule requires a determination from a lower court before an appellate court is permitted to act—it is facially jurisdictional in nature.

And finally, while a district court's general denial in this case may indeed be sufficient to fulfill its gatekeeping function at the COA stage, that denial must still encompass the issue on which a circuit judge subsequently grants COA. As the Fifth Circuit determined in this case, the district court's general COA denial was not just inadequate as it related to *Cronic*, it was necessarily *non-existent*.[11] Thus, in accordance with *Gonzalez*, the Fifth Circuit properly treated the lack of a district court COA ruling on the *Cronic* claim as a jurisdictional bar to its consideration on appeal.[12]

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[11] By analogy, although § 2253(c)(3), which requires that a COA grant specifically state the issues, is *not* jurisdictional, a COA ruling under § 2253(c)(1)—which, undoubtedly, *is* jurisdictional—does not confer unlimited jurisdiction over any claim, including one not before the court.

[12] Even if the district-court-first rule is only a mandatory claims-processing directive, the lower court still was without authority to grant COA because Black did not follow the rule. Specifically, Black failed to obtain a COA ruling from the district court for a *Cronic* claim, which—if not jurisdictional—is mandatory. Hence, the Fifth Circuit's decision to grant COA on the claim without first requiring the district court to deny COA, was improper. Indeed, given the procedural posture of this appeal, it is doubtful that Black could ever return to the district court to obtain a *Cronic* COA ruling in compliance with

CONCLUSION

Based on the foregoing arguments and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Habeas Rule 11(a). Doing so would necessarily require a Rule 60(b) post-judgment motion, which the district court would have no jurisdiction to grant under this Court's decision in *Gonzalez v. Crosby* because the motion would be successive under § 2244(b). *See Gonzalez*, 545 U.S. at 530–32.