No: 19-5353

In the

Supreme Court of the United States

FRANK E. VENNES, Jr.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

FRANK E. VENNES, JR.
Pro se
Reg. No. 05123-059
FPC Butner
P.O. Box 1000
Butner, NC 27509

No Phone

Petitioner

QUESTION PRESENTED

Does a motion filed under Federal Rule of Civil Procedure 60(d)(3) that does not attack the merits of a prior *habeas* decision, but alleges "some defect in the integrity of the federal habeas proceeding" that, if proven, also implicates the substantive issues raised by the 28 U.S.C. § 2255 petition, render the F.R.Civ.P. 60(d)(3) motion a second-and-successive motion within the meaning of *Gonzalez v. Crosby*, 545 U.S. 524 (2005)?

PARTIES TO THE PROCEEDING

Petitioner Frank E. Vennes, Jr., and the United States of America are parties to the proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frank E. Vennes, Jr., respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit, so that this Court may review the judgment below.

OPINIONS BELOW

This matter seeks discretionary review of a memorandum and order of a United States District Court for the District of Minnesota to deny a motion filed pursuant to *F.R.Civ.P.* 60(d)(3), seeking to set aside a judgment denying a petition brought pursuant to 28 U.S.C. § 2255. The District Court ruled that the motion was procedurally barred pursuant to 28 U.S.C. § 2244(b)(3)(A). That decision, which was unpublished, appears at **Appendix A**. The United States Court of Appeals for the Eighth Circuit issued a *Judgment* denying a certificate of appealability. That decision, which was unpublished, appears at **Appendix B**. Subsequently, the Court of Appeals denied rehearing in an *Order,* which was unpublished, which is attached as **Appendix C.** These opinions are all unreported.

JURISDICTION

This Court has jurisdiction to hear this *Petition* pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

F.R.Civ.P. 60(b) and (d), and 28 U.S.C. § 2244(b)(2) are the principal statutory and rules provisions involved in this *Petition*, which are set out in **Appendix D**.

STATEMENT OF THE CASE

In 2013, Vennes was convicted of aiding and abetting securities fraud and money laundering pursuant to a plea agreement. After his direct appeal was completed, he filed a timely *Motion to Vacate, Set Aside or Correct Sentence by a Person in Custody* pursuant to 28 U.S.C. § 2255. That *Motion* alleged, *inter alia,* that his attorney rendered ineffective assistance in counseling Vennes to enter into a plea agreement.

The Government's response to the § 2255 *Motion* included a declaration from Vennes' defense attorney contradicting Vennes' position. The District Court relied on that declaration in denying the § 2255 *Motion.*

Slightly more than three years later, Vennes filed a motion pursuant to *F.R.Civ.P.* 60(d)(3) *Motion*[1] that alleged his defense attorney had committed a fraud on the District Court during the § 2255 proceeding. The *F.R.Civ.P.* 60(d)(3) motion contained evidence that Vennes argued show his defense attorney, at the same time

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[1] Throughout this *Petition,* Vennes will use the reference to a *Rule* 60(b) and a *Rule* 60(d) motion interchangeably, because motions pursuant to either subsection are treated identically for determining whether they are second-or-successive § 2255 motions.

he was filing his declaration in the § 2255 proceeding, was committing fraud on the District Court by hiding hundreds of thousands of dollars in assets that Vennes had once provided as part of his retainer to the firm, assets that had since been ordered surrendered to the court-appointed receiver by the District Court in a related proceeding brought under the *Anti-Fraud Injunction Act* in a case styled *United States v. Petters*, Case No. 0:08-cv-05348. Vennes linked defense counsel's § 2255 declaration to the fraudulent conduct in that other proceeding, arguing that defense counsel's § 2255 declaration was intended to bring that proceeding to a quick end, in order to divert further attention on the unreported assets.

The District Court denied Vennes' 60(d)(3) *Motion,* holding that the motion was procedurally barred by 28 U.S.C. § 2244(b)(3)(A), a ruling that the District Court lacked jurisdiction. " *Order,* Dkt. 543, entered June 18, 2018. Vennes timely filed a notice of appeal, and filed an application for a certificate of appealability on August 23, 2018.

A panel of the U.S. Court of Appeals for the Eighth Circuit denied the application for a certificate of appealability on December 3, 2018. Vennes sought panel rehearing, which was denied on February 14, 2019.

REASONS FOR GRANTING THE WRIT

Jurisdiction is not given for the sake of the judge, but for that of the litigant.
~ Blaise Pascal

In 2005 – with the *Antiterrorism and Effective Death Penalty Act of 1996* ("AEDPA"), Pub.L. 104-132, 110 Stat 1214, not quite 10 years old – this Court grappled with application of the "second-or-successive" limitations of 28 U.S.C. § 2244 as it applied to relief from a judgment or order pursuant to motions brought under *F.R.Civ.P.* 60(b) or 60(d)(3). In *Gonzalez v. Crosby,* 545 U.S. 524 (2005), the Court explained the circumstances under which a motion seeking to reopen a habeas proceeding should be treated as a second or successive habeas petition under the AEDPA, and not a *Rule* 60(b) motion, holding that regardless of the label applied to a pleading by a petitioner, "a motion is treated as a successive habeas petition when it seeks to add a new ground for relief... [or] attacks the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Gonzalez, supra* at 545 U.S. 532 (footnote omitted). By "on the merits," the *Gonzalez* Court meant "a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief 28 U.S.C. §§ 2254(a) and (d)." *Id.* at 545 U.S. 532, n.4.

Thus, the Court ruled, when a petitioner "asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) [in a Rule 60(b) motion] he is making a habeas corpus claim." *Id.* at 545 U.S. 533.

However, the Supreme Court explained, a petitioner is not making a habeas claim if he or she "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." *Id.* Thus, a motion is appropriately considered to be a Rule 60(b) motion when "neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state [or federal] conviction." *Id.*; *see also id.* at 545 U.S. 538 (holding that the *Gonzalez* petitioner's Rule 60(b) motion should not have been construed as a successive habeas petition because it challenged only the district court's failure to reach the merits due to a misapplication of AEDPA's statute of limitations).

Since that time, *Gonzalez* has been applied not only to second 2255 petitions and motions under *F.R.Civ.P.* 60(b), but as well motions to recall the mandate *Davis v. Kelley*, 854 F.3d 967, 969-70 (8th Cir. 2017) ("motion to recall a mandate is analyzed as a successive petition under the... AEDPA"); writs of *audita querela*, *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005); motions to alter or amend the judgment pursuant to *F.R.Civ.P.* 59(e), *United States v. Pedraza*, 466 F.3d 932, 934 (10th Cir. 2006) (portion of *Rule* 59(e) motion that raised substantive arguments in support of a second § 2255 claim is itself a second § 2255 motion");

and writs of error *coram nobis, Baranski v. United States*, 880 F.3d 951, 956 (8th Cir. 2018).

This Court recently granted a writ of *certiorari* in *Banister v. Davis,* Case No. 18-6943 (granted June 24, 2019), to consider whether and under what circumstances a timely *Rule* 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzalez.* Vennes' case would provide an excellent companion case to *Banister* to enable the Court to provide wider guidance on the limits of the term "claim" as used in 28 U.S.C. § 2244(b)(2) and *Gonzalez.*

Vennes has alleged that his defense attorney did not reveal to the 2255 court that he had a conflict of interest that should be taken into account when judging the credibility of his statements in his declaration. Vennes did not, however, allege that this conflict of interest had any cognizable effect other than on defense counsel's veracity in the § 2255 proceeding. Had the District Court granted Vennes the relief he sought in the *F.R.Civ.P.* 60(d)(3) motion, it would have explored the conflict under which Vennes' defense attorney labored at the time he provided the declaration to the Court about the facts and circumstances of his representation of Vennes in the underlying proceeding.

After due consideration of the facts and circumstances of the alleged conflict of interest, the District Court may have concluded that the conflict did not alter its determination the defense attorney's statement was credible. It may have discounted defense counsel's statement in its entirety or in part, but found an

independent basis for denying Vennes' § 2255 motion. It may have concluded that an evidentiary hearing was called for.

At the same time, there is little doubt that evidence of defense counsel's conflict (and his conduct in failing to disgorge over $300,000 in Vennes' assets) – if found to be credible – would have had a profound impact on the merits of the § 2255 ineffective assistance of counsel claims. This is hardly surprising: evidence often serves double duty. *See, e.g., United States v. Cowart,* 595 F.2d 1023, 1033-34 (5th Cir. 1979) (no double jeopardy violation occurred for conviction of both conspiracy,, and aiding and abetting even where the evidence adduced served "double duty" in establishing the elements of both offenses); *Boyde v. Brown,* 404 F.3d 1159, 1168 (9th Cir. 2005) (petitioner's "new mental health evidence does double duty. In addition to supporting his argument that he was incompetent, [petitioner] contends it proves he was incapable of forming the intent required for first-degree murder"); *Young v. Warner-Jenkinson Co.,* 990 F. Supp. 748, 760-61 and n.9 (E.D.Mo. 1997) (in employment law, the "double duty" evidence doctrine applies where "the facts are such that they serve to establish both the *prima facie* requirements and the inference of illegal discrimination").

The distinction is this: Vennes' *Rule 60(d)(3)* motion raised a claim, that a defect in the § 2255 proceeding resulted from a breach of defense attorney's obligations as an officer of the court. The evidence supporting that may, if the § 2255 proceeding were to be reopened, also be admissible to prove ineffective

assistance of counsel. But 28 U.S.C. § 2244(b)(2) and *Gonzalez* alike address *claims*, not *evidence.*

A "claim" in this context is "an asserted federal basis for relief from a... judgment of conviction." *Gonzalez, supra* at 545 U.S. 530. Unfortunately, some courts have been misunderstanding portions of *Gonzalez* in ruling that other post-judgment claims are "second or successive" because the evidence adduced to support the claims can serve "double duty." For example, *Gonzalez* holds that

> In some instances, a Rule 60(b) motion will contain one or more "claims." For example, it might straightforwardly assert that owing to "excusable neglect," Fed. Rule Civ. Proc. 60(b)(1), the movant's habeas petition had omitted a claim of constitutional error, and seek leave to present that claim. *Cf. Harris* v. *United States,* 367 F.3d 74, 80-81 (CA2 2004) (petitioner's Rule 60(b) motion sought relief from judgment because habeas counsel had failed to raise a Sixth Amendment claim). Similarly, a motion might seek leave to present "newly discovered evidence," Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied. *E.g., Rodwell* v. *Pepe,* 324 F.3d 66, 69 (CA1 2003). Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim. *E.g., Dunlap* v. *Litscher,* 301 F.3d 873, 876 (CA7 2002). Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly. *E.g., Rodwell, supra,* at 71-72; *Dunlap, supra,* at 876.
>
> We think those holdings are correct. A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a "habeas corpus application," at least similar enough that failing to subject it to the same requirements would be "inconsistent with" the statute. 28 U.S.C. § 2254 Rule 11. Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction--even claims couched in the language of a true Rule 60(b) motion--circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. § 2244(b)(2). The same is true of a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated: Even assuming that reliance on a

> new factual predicate causes that motion to escape § 2244(b)(1)'s prohibition of claims "presented in a prior application," § 2244(b)(2)(B) requires a more convincing factual showing than does Rule 60(b). Likewise, a Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent § 2244(b)(2)(A)'s dictate that the only new law on which a successive petition may rely is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In addition to the substantive conflict with AEDPA standards, in each of these three examples use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar. § 2244(b)(3).

Gonzalez, supra at 545 U.S. 531-32. All of this seems straightforward enough.

But consider how one appellate court sliced and diced this passage. After his 28 U.S.C. § 2255 proceeding had concluded, a defendant in the Third Circuit obtained evidence of prosecutorial misconduct during trial which the government had repeatedly denied existed, throughout an *F.R.Crim.P.* 33(b) motion, direct appeal and a 28 U.S.C. § 2255 proceeding. The defendant filed a motion pursuant to *F.R.Civ.P.* 60(b)(3) and (d)(3), alleging that the government had made misrepresentations to the court during the § 2255 proceeding that the evidence defendant now possessed did not exist.

The district court ruled the *F.R.Civ.P.* 60(b)(3) and (d)(3) motion was a "second-or-successive" § 2255 motion, and the Third Circuit affirmed. It said

> As the District Court recognized, it had jurisdiction to consider Donahue's Rule 60 motion only if it was a true Rule 60 motion, and not an attempt to circumvent the requirements for filing a new § 2255 motion. *See Robinson v. Johnson*, 313 F.3d 128, 139-40 (3rd Cir. 2002). This question is governed by *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005). In that case, the Supreme Court held that jurisdiction is proper over a Rule 60 motion that attacks

> "some defect in the integrity" of a prior habeas proceeding. *Id.* at 532; *see also Pridgen v. Shannon*, 380 F.3d 721, 727 (3d Cir. 2004) (holding that a Rule 60 motion may be adjudicated if its "factual predicate... attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction"). *By contrast, a "motion presenting new evidence in support of a claim already litigated" is "in substance a successive habeas petition and should be treated accordingly."* *Gonzalez*, 545 U.S. at 531.

United States v. Donahue, 733 Fed. Appx. 600, 603 (3rd Cir. 2018) (emphasis added).

That, of course, is *not* what this Court said in *Gonzalez*. Rather, it said that *if* the claim was a "Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated" it should be dismissed. But the *Donahue* court, as did Vennes' court, has read that passage from *Gonzalez* to mean that *any* Rule 60(b) or (d) motion that relies on evidence that not only is relevant to the post-judgment *F.R.Civ.P.* 60(b) attack but as well *may* be relevant to the § 2255 substantive claims must be labeled a "second-or-successive" claim subject to 28 U.S.C. § 2244(b)(2).

This misreading of *Gonzalez* engrafts a limitation on post-judgment motions in collateral-attack proceedings (28 U.S.C. §§ 2254 and 2255) that not only fails to advance any identifiable AEDPA goal, but ironically increases the chance that the more substantial and meritorious the *F.R.Civ.P.* 60(b) motion, the more likely that it will be foreclosed by a district court finding that it lacks subject-matter jurisdiction to hear the argument.

The only point that should matter, where a district court is determining whether it has subject-matter jurisdiction to hear a post-judgment motion filed in a § 2255 proceeding is that the issue raised – in Vennes' case, whether his defense

attorney committed a fraud on the § 2255 court – is not a claim that attacks the integrity of the underlying conviction or sentence. But whether Vennes is right or not is beside the point. Rather, the only point that matters is that the issues raised – whether defense attorney committed a fraud on the § 2255 court – is not an attempt to litigate § 2255 issue on its merits.

But is this an issue limited in scope? Since *Gonzalez,* the LEXIS legal database shows more than 17,400 case "hits" relating to 28 U.S.C. § 2254 or § 2255 and "second or successive" issues under 28 U.S.C. § 2244. In the period ending March 31, 2019, the combined courts of appeal terminated over 13,800 prisoner petitions.[2] By any measure, the proper application of *Gonzalez* is a matter affecting thousands of cases, and is a matter of national importance reaching far beyond Vennes' situation. Indeed, as noted *supra,* this case is an excellent fit with the pending *Banister v. Davis* case reviewing the application of 28 U.S.C. § 2244(b)(2) to post-judgment motions filed pursuant to *F.R.Civ.P.* 59(e).

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[2] This figure includes civil actions alleging defects in prison conditions, but even allowing for those actions, the number of cases is impressive. *See* Table B-1—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2019), downloadable at https://www.uscourts.gov/statistics/table/b-1/federal-judicial-case-load-statistics/2019/03/31(last visited June 30, 2019). To place this in some context, U.S. district courts during the same period acted on more than 6,900 post-conviction actions to vacate conviction or sentence. *See* Table, downloadable at https://www.uscourts.gov/statistics/table/b-1/federal-judicial-case-load-statistics/2019/03/31 (last visited June 30, 2019). To place this in some context, U.S. district courts during the same period acted on more than 6,900 post-conviction actions to vacate conviction or sentence. *See* Table C-3—U.S. District Courts–Civil Federal Judicial Caseload Statistics (March 31, 2019), at https://www.uscourts.gov/ statistics/table/c-3/federal-judicial-caseload-statistics/2019/03/31 (last visited June 30, 2019).

CONCLUSION

A determination of subject-matter jurisdiction should be a preliminary, focused inquiry examining the claim made, and not devolve into a rump determination on the merits. This Court should seize the opportunity that *Banister* represents to speak broadly about *Gonzalez,* and provide guidance to the courts to correct the misunderstandings and misapplications of its holding to thousands of post-conviction actions under 28 U.S.C. §§ 2254 and 2255.

WHEREFORE, this *Petition for a Writ of Certiorari* should be granted.

Dated: July 10, 2019

Frank E. Vennes, Jr.
Reg. No. 05123-059
FPC Butner
P.O. Box 1000
Butner, NC 27509