No. 19-5755

IN THE
Supreme Court of the United States

BILLY JACK CRUTSINGER,
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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Fifth Circuit and district court erred here in considering a change in decisional law as one of several factors when it denied Crutsinger's motion for relief under Rule 60(b).

2. Whether this Court should expend its limited judicial resources on further examination of a case which has already received appellate review of his Rule 60(b) motion, extensive federal review of the multiple funding requests—in spite of the $32,000 already received in federal habeas funding, and, most importantly, exhaustive review from courts at all levels of his underlying ineffective assistance-of-counsel claim.

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BRIEF IN OPPOSITION

Petitioner Billy Jack Crutsinger is scheduled to be executed on September 4, 2019, for the 2003 murders of eighty-nine-year-old Pearl Magouirk and her seventy-one-year-old daughter Patricia Syren. He unsuccessfully challenged his conviction and sentence through nearly sixteen years of state and federal proceedings. Through this extensive litigation, he received full merits review of his ineffective-assistance-of-trial-counsel (IATC) claim for failure to investigate in both state and federal courts.

Prior to filing his federal habeas petition, he sought funding to hire a mitigation investigator to further develop this IATC claim which had already been adjudicated in state habeas court. The district court denied his request. The district court subsequently denied Crutsinger's IATC claim on de novo review, and the Fifth Circuit denied him a Certificate of Appealability (COA) as to that claim.

Years later, Crutsinger filed in the district court a motion under Federal Rule of Civil Procedure 60(b)(6) seeking to reopen the case in light of the Supreme Court's decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). He primarily sought to reopen the district court's denial of

funding to pursue his IATC claim, alleging that the denial prevented him from fully presenting the claim in federal court. The district court construed his motion for relief from judgment as a successive habeas petition over which it lacked jurisdiction and transferred it to the Fifth Circuit. However, the appellate court concluded that Crutsinger's motion was not a second-or-successive petition and remanded the case back to the district court for consideration in the first instance of the issue raised therein.

After supplemental briefing by both parties, the district court denied Crutsinger's Rule 60(b) motion. Alternatively, it again denied the underlying request for funding. The Fifth Circuit denied his request for a COA. Crutsinger now petitions this Court for a writ of certiorari from the Fifth Circuit's decision. However, he fails to identify any compelling reasons for this Court to expend its limited judicial resources on further review. Thus, his petition should be denied.

STATEMENT OF THE CASE

I. Initial State Court Proceedings

In September 2003, Crutsinger was convicted of capital murder and sentenced to death for the stabbing-deaths of two elderly women. ROA.2624–26.[1] The Court of Criminal Appeals (CCA) affirmed on direct review. *Crutsinger v. State*, 206 S.W.3d 607, 613 (Tex. Crim. App. 2006). This Court denied his petition for writ of certiorari. *Crutsinger v. Texas*, 549 U.S. 1098 (2006).

Crutsinger filed a state application for writ of habeas corpus, in which he raised an IATC claim for failure to conduct any pretrial investigation. ROA.1076–219. The state convicting court entered findings of fact and conclusions of law recommending the denial of relief. ROA.1071, 4018–4080. Based on these findings and its own review of the record, the CCA denied habeas relief more than a decade ago. *Ex parte Crutsinger*, No. WR-63,481-01, 2007 WL 3277524, at *1 (Tex. Crim. App. Nov. 7, 2007). Crutsinger did not seek certiorari review.

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[1] "ROA" refers to the record on appeal utilized by the Fifth Circuit in *Crutsinger v. Davis*, No. 19-70012, --- F.3d ----, 2019 WL 4010718 (5th Cir. Aug. 26, 2019).

II. Initial Federal Habeas Proceedings

Crutsinger then initiated habeas proceedings in federal district court. Prior to filing his federal petition, he sought funding under 18 U.S.C. § 3599. ROA.61–65. The district court denied this request, holding that: 1) Crutsinger failed to demonstrate that the IATC claim he sought to develop was not unexhausted and procedurally barred from review, and 2) that he had failed to develop the factual basis for the claim in state-court proceedings. ROA.74–75.

Crutsinger then filed a federal habeas petition alleging IATC for failure to conduct a timely, i.e., pretrial, social history investigation. ROA.228–52. The district court found the substance of his claim was unexhausted, ROA.432 n.5, and that he was prohibited from factual development in federal court under 28 U.S.C. § 2254(e)(2). ROA.432. The court did not, however, apply a procedural bar to the claim. ROA.432 n.5. The court instead reviewed the claim de novo, found it without merit, denied habeas relief, and denied a COA. ROA.432–54, 460–61.

Crutsinger filed a motion under Federal Rule of Civil Procedure 59(e), challenging both the district court's denial of his claim and the denial of funding. ROA.462–78. While the motion was pending,

this Court issued its decision in *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). The district court denied Crutsinger's motion, finding in part that the IATC claim was not substantial, and thus, *Martinez* did not benefit him. ROA.543.

Moreover, the court found that because the IATC claim was "unexhausted *as well as meritless*," evidentiary development would be inappropriate; thus, the court declined to reconsider its funding denial. ROA.543–44 (emphasis added). The Fifth Circuit in turn denied COA on the IATC claim. It held that, even considering this Court's holdings in *Martinez* and *Trevino v. Thaler*, 569 U.S. 413 (2013), the district court did not abuse its discretion in denying funding. *Crutsinger v. Stephens*, 576 F. App'x 422, 428–31 (5th Cir. 2014) (*Crutsinger II*).[2] And this Court denied Crutsinger's certiorari petition. *Crutsinger v. Stephens*, 135 S. Ct. 1401, 1401 (2015).

[2] The Director adopts the citation conventions of the Fifth Circuit used in its most recent opinion (also employed by Crutsinger in his petition).

III. Recent Federal Habeas Proceedings

Over two years ago, Crutsinger moved the district court for funding to employ a DNA expert. ROA.593–606. The request was denied. ROA.678–91. Crutsinger moved for reconsideration and that was also denied. ROA.692–706, 735–43. The denial of funding was affirmed on appeal. *Crutsinger v. Davis*, 898 F.3d 584 (5th Cir. 2018). This Court denied Crutsinger's petition for writ of certiorari. *Crutsinger v. Davis*, 139 S. Ct. 801 (2019).

A little more than a year ago, Crutsinger moved for relief from judgment under Federal Rule of Civil Procedure 60(b) in light of this Court's decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). ROA.751–848. The district court found that Crutsinger's motion for relief was, in fact, a second or successive petition, so it transferred the case to the court of appeals for authorization proceedings. ROA.1254–64. The Fifth Circuit, however, disagreed with the district court's characterization of Crutsinger's motion and remanded the case to consider it under the traditional Rule 60(b) rubric. *Crutsinger v. Davis*, 929 F.3d 259 (5th Cir. 2019) (*Crutsinger III*). The Fifth Circuit also

denied Crutsinger's attendant motion for stay of execution. *Crutsinger v. Davis*, 930 F.3d 705 (5th Cir. 2019) (*Crutsinger IV*).

On remand, the district court entertained supplemental briefing on Crutsinger's motion for relief. ROA.1300–09, 1349–61. The court ultimately denied the request to reopen the proceeding, alternatively denied the funding request, and denied a stay of execution. ROA.1388–413. Last week, the Fifth Circuit denied Crutsinger's request for a COA and his motion to stay the execution. *Crutsinger v. Davis*, No. 19-70012, --- F.3d ----, 2019 WL 4010718 (5th Cir. Aug. 26, 2019) (*Crutsinger VI*); Pet.App.1. Crutsinger now petitions the Court for a writ of certiorari from this decision and asks the Court to stay his execution. Pet. for Writ of Certiorari 1–29 (Pet.).[3]

[3] Crutsinger has another petition for certiorari pending with this Court from the CCA's denial of his suggestion to reconsider on the court's own motion its denial of his initial state habeas proceedings. *See Crutsinger v. Texas*, No. 19-5715.

REASONS FOR DENYING THE WRIT

I. Crutsinger identifies no compelling reason to expend limited judicial resources on this case.

Crutsinger has not furnished any compelling reason to grant certiorari review in this case. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). He has not identified a conflict. And he does not identify a *similar* pending case to justify this Court's review.[4]

He attempts to present his question in such a manner to cast a great constitutional shadow over his proceedings; but in truth, he seeks simple error correction by attacking the district court's discretionary weighing of his several factors when it denied his Rule 60(b) motion. *See infra*

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[4] In a footnote he cites two cases, presumably to draw this similarity: *Robertson v. Davis*, No. 19-70006, and *Jones v. Davis*, 927 F.3d 365 (5th Cir. 2019) (it's worth noting Crutsinger's counsel has represented both petitioners at some point during their federal habeas proceedings). Pet.11 n.1. He states that *Robertson* involves the "same denial of § 3599 statutory representation rights" and that it is "to be conferenced 10-1-2019." *Id.* However, the docket of this Court shows that the conference is on Robertson's motion for leave to file his certiorari petition under seal. *See Robertson v. Davis*, No. 19M9. Indeed, although Robertson has filed his petition with the Court, the petition has not actually been docketed.

As for the *Jones* case, the petition there is not due until twelve days after Crutsinger's scheduled execution. *See* Pet.11. n.1. The Director acknowledges that Crutsinger's counsel also represents Jones, and thus, has some contemplation of the issues to be raised in that certiorari petition. However, the promise of future litigation cannot be reason enough to grant certiorari now.

Reasons.II, III. "A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." See Sup. Ct. R. 10; *see also Citibank, N.A. v. Well Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring) (questioning why certiorari was granted when the opinion decided "no novel or undecided question of federal law" and merely "recanvasse[d] the same material already canvassed by the Court of Appeals"). Crutsinger truly asks this Court only to recanvas the same facts and legal arguments addressed by multiple courts in numerous proceedings. On this basis alone, the Court should deny the petition.

II. This Court Should Deny Certiorari on Crutsinger's First Question Because the Lower Courts All Considered, as One of Many Factors, the Change in Decisional Law on Which Crutsinger Relies—*Ayestas*—and Found It Did Not Weigh in Favor of Relief Under Rule 60(b).

Crutsinger presents as his first question for certiorari: "Whether in ruling on a 60(b) motion for relief from judgment, a court can consider "a change in the law" as one of many wide-range of factors, in determining whether extraordinary circumstances are present, warranting relief from the judgment." Pet.ii, 17, *see also* Pet.10–17. Clearly, the answer is "yes." That is why the lower courts here considered this Court's decision in

Ayestas—the crux of Crutsinger's Rule 60(b) motion[5]—in full as one of several factors when denying the relief he sought. The district court wrote extensively about the application of *Ayestas* to this case. *See* ROA.1389–92 (considering the effect of *Ayestas* as a factor in denying the Rule 60(b) motion), 1402 (considering as a separate factor *Ayestas*'s specific mention of the prior Fifth Circuit opinion in this case), 1406–12 (applying *Ayestas* to the underlying request for funds and denying the request in the alternative). In denying a COA, the Fifth Circuit approved the lower court's analysis. *Crutsinger VI*, 2019 WL 4010718, at *4–5.

But in addressing this question, Crutsinger moves the target. He challenges Fifth Circuit case law holding that a change in decisional law *alone* is not grounds for relief from judgment. Pet.10–13. He claims this "per se rule" created by the Fifth Circuit is a misapplication of this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). *Id.* He himself misapprehends *Gonzalez* and misconstrues the lower courts' application of it to his case.

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[5] Although Crutsinger seems to put more focus on *Martinez*/*Trevino* here, Pet.13–15, this Court's decision in *Ayestas* was the thrust of his argument originally to the district court. ROA.776–80 (Rule 60(b) motion), ROA.1300–09 (supplemental briefing). Indeed, this is reflected in the lower courts' opinions. ROA.1388–413; *Crutsinger VI*, 2019 WL 4010718, at *4–5.

Rule 60(b)(6) is a catchall provision that allows a court to grant relief "from a final judgment, order, or proceeding" for "any other reason that justifies relief." To succeed on such a motion, the movant must demonstrate: "(1) that the motion be made within a reasonable time;[6] and (2) extraordinary circumstances exist that justify the reopening of a final judgment." *In re Edwards*, 865 F.3d 197, 203 (5th Cir. 2017) (citing *Gonzalez*, 545 U.S. at 530, 535 (2005)). Extraordinary circumstances "will rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535.

When considering a Rule 60(b) motion, the district court is permitted to consider a "wide range of factors" in determining whether extraordinary circumstances are present. *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). "These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64 (1988)). "Moreover, a Rule 60(b)(6) movant must show that he can assert 'a good claim or defense' if

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[6] The Director concedes that Crutsinger filed this particular motion within a reasonable time of the Supreme Court's decision in *Ayestas*, the crux of Crutsinger's claim for extraordinary circumstances. But as the lower courts noted, his due diligence does not tip the scales in favor of granting his Rule 60(b) motion. ROA.1402; *Crutsinger V*, 2019 WL 4010718, at *4.

his case is reopened." *Ramirez v. Davis*, No. 19-70004, --- F.3d ----, 2019 WL 2622147, at *6 (5th Cir. June 26, 2019) (quoting *Buck*, 137 S. Ct. at 780).

Throughout the various iterations of Crutsinger's briefing in support of his request under Rule 60(b), he, at bottom, relies on merely a change in law—through the Supreme Court's decisions in *Martinez*, *Trevino*, and *Ayestas*—to demonstrate he deserves relief. However, as the lower courts recognized in denying the Rule 60(b) motion—*see* ROA.1390; *Crutsinger VI*, 2019 WL 4010718, at *4—the Supreme Court's decision in *Gonzalez*, as applied in the Fifth Circuit's case law, was determinative of Crutsinger's argument. In *Gonzalez* this Court found that Rule 60(b)(6) relief was unwarranted when a change in law arguably rendered the district court's ruling on a time-bar—thus precluding a merits determination—incorrect. 545 U.S. at 537. "It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Id.*

Indeed, the Fifth Circuit recognized the impact of *Gonzalez* on Crutsinger's Rule 60(b) motion in its prior opinions, published one month prior, remanding the case for consideration in the first instance of the

issues raised in the Rule 60(b) motion but also denying his motion for a stay of execution. In its order remanding the case to the district court, this Court said:

> The *Gonzalez* decision appears to establish that Crutsinger is not entitled to relief under Rule 60(b) because a change in the law does not constitute an extraordinary circumstance, which Rule 60(b)(6) requires.
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> * * *
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> It would appear that the Supreme Court's holding in *Gonzalez* that "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final" is at least instructive, *if not dispositive*, of Crutsinger's Rule 60(b) motion.

Crutsinger III, 929 F.3d at 264, 266 (emphasis added) (quoting *Gonzalez*, 545 U.S. at 536). In its published opinion denying Crutsinger's request for a stay of execution, this Court reiterated:

> Though acknowledging that we were without jurisdiction to make a merits determination on his Rule 60(b)(6) motion, we underscored that Crutsinger was unlikely to establish that "extraordinary circumstances" exist to justify the reopening of the final judgment because "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final."

Crutsinger IV, 930 F.3d at 707 (quoting *Gonzalez*, 545 U.S. at 536).

And what the Fifth Circuit recognized in those opinions must necessarily be true. If a change in law that entirely precluded merits

review—as in *Gonzalez*—is not sufficient to warrant Rule 60(b)(6) relief, then the change in the law on a lesser matter—funding to possibly support a claim for relief—necessarily cannot warrant Rule 60(b)(6) relief. The Fifth Circuit has applied this same reasoning when deciding that reliance on *Martinez* and *Trevino* cannot, *by itself*, achieve relief under Rule 60(b). *See Adams v. Thaler*, 679 F.3d 312, 319–20 (5th Cir. 2012) (concluding that *Martinez* was merely a change in decisional law and did not constitute extraordinary circumstances under Rule 60(b)); *see also Haynes v. Davis*, 733 F. App'x 766, 769 (5th Cir. 2018) (noting the petitioner's "acknowledge[ment] that the change in decisional law effectuated by *Martinez* and *Trevino* [was] insufficient, on its own, to demonstrate 'extraordinary circumstances'"); *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013) (affirming that *Trevino* did not undermine *Adams*).

Crutsinger attempts to contrast this Court's decisions in *Ayestas*, *Martinez*, and *Trevino* as something different than what was at issue in *Gonzalez*, which he asserts was a "mere decisional change." Pet.11–15, 27. But this is reliant on nothing other than his own semantical distinctions. The Fifth Circuit recently addressed why a Rule 60(b)

motion based only on a claim of deficient representation, which is at the heart of Crutsinger's motion, is not enough to demonstrate extraordinary circumstances. *See In re: Dexter Johnson*, No. 19-70013, --- F.3d ----, 2019 WL 3814384, at *3 (5th Cir. Aug. 14, 2019). There, the lower court held that "in a deficient representation case such as this, there needed to be some factor besides the representation." *Id.* (citing this Court's decision in *Buck* and its reliance on other significant factors—specifically race—when granting relief under Rule 60(b)). The Fifth Circuit in *Johnson* said that pointing to deficient representation without also identifying a "good" claim that was omitted or defaulted without merits review because of the deficiency cannot amount to extraordinary circumstances. 2019 WL 3814384, at *4 (citing *Gonzalez*, 545 U.S. at 532 n.5).[7]

Crutsinger's first question presented—whether a change in law should be considered "as one of many wide-range of factors[] in determining whether extraordinary circumstances are present," *see* Pet.10— is not a novel, or even difficult, one. The district court "engag[ed] in an exhaustive review of the seven factors presented by Crutsinger,"

[7] The Fifth Circuit also recognized that Johnson, like Crutsinger, failed to provide the courts "with any authority that Section 3599 has ever provided relief pursuant to Rule 60(b)." *Johnson*, 2019 WL 3814384, at *4. That court again recognized this fact in the case below. *See Crutsinger VI*, 2019 WL 4010718, at *4 n.9.

including his arguments regarding the change brought about by *Martinez*, *Trevino*, and of greatest importance to Crutsinger's arguments, *Ayestas*. *Crutsinger VI*, 2019 WL 4010718, at *4. "Ultimately, the changes in decisional law, even when viewed in conjunction with these additional factors, fail to establish extraordinary circumstances warranting relief from judgment." *Id.* at *5. The lower courts gave Crutsinger exactly that for which he petitions this Court: full consideration of his case including the changes in decisional law. And the courts did not misapply *Gonzalez* or any other case law from this Court when deciding the Rule 60(b) motion. Thus, the Court should deny certiorari as to his first question.

III. This Court Should Deny Certiorari on Crutsinger's Second Question Because Crutsinger Has Received Competent Representation in his Federal Habeas Proceeding as Well as Full Reviews of His Rule 60(b) Motion, His Funding Request, and His Underlying IATC Claim.

As the lower courts found, none of Crutsinger's other "factors" weigh in favor of granting the Rule 60(b) motion. ROA.1392–402; *Crutsinger VI*, 2019 WL 4010718, at *4. The district court noted, and the Fifth Circuit agreed, that two of the factors—i.e., the capital nature of the case and *Ayestas*'s impact on the prior funding decision—implicate many cases and thus, by their nature are not extraordinary. *See*

ROA.1392–93, 1402; *Crutsinger VI*, 2019 WL 4010718, at *4. Chiefly though, the district court addressed the prior, and plural, reviews Crutsinger has received on the merits of both his funding request and the underlying IATC claim. ROA.1394–02 (discussing the propriety of the prior reviews), 1403–12 (alternatively denying the funding request based on a fresh review under *Ayestas*).

The Fifth Circuit acknowledged that the "district court engaged in an extensive review of the record to demonstrate that Crutsinger's representation at trial was not egregious and that he was not precluded from receiving a merits-based review of his federal habeas claims, including his claim of [IATC]." *Crutsinger VI*, 2019 WL 4010718, at *4.[8] In further affirmance of the district court's analysis, the Fifth Circuit agreed that "Crutsinger's 'assertions that the denial of funding precluded a true merits review and that trial counsel's representation was egregious, border on frivolous.'" *Id.* (quoting ROA.1395). Crutsinger now,

[8] This echoes the Fifth Circuit's prior statements in their prior order denying his request for a stay: "[Crutsinger] wholly fails to establish extraordinary circumstances or that he is likely to succeed on the merits of his claims." *Crutsinger IV*, 930 F.3d at 707. The court also found that his "inability to establish a likelihood of success on the merits" was dispositive of his motion for a stay. *Id.; see also Id.* at 709 ("Even if Crutsinger could establish a likelihood of success on the merits—which he cannot . . . .").

at bottom, complains that he has not been able to present the IATC claim in its best form because he has not been provided with enough funding. Pet.18–28. Yet Crutsinger's Rule 60(b) motion, and his request for funding, ultimately fail because it lacks a "significant element": it has no merit. *Buck*, 137 S. Ct. at 780.

Indeed, this was a significant element of this Court's decision in *Ayestas*. The Court held that analysis under the proper standard of "reasonably necessary" was "guided by [three] considerations": "[1] the potential merit of the claims that the applicant wants to pursue, [2] the likelihood that the services will generate useful and admissible evidence, and [3] the prospect that the applicant will be able to clear any procedural hurdles standing in the way," that is, whether the "funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default." *Id.* at 1092–94. As the district court's exhaustive review demonstrated, both in denying Crutsinger's Rule 60(b) motion, ROA.1394–402, and in alternatively denying his funding request, ROA.1403–12, he wholly fails to demonstrate any potential merit or credible chance of overcoming the procedural bar via the equitable

exception of *Martinez* (which would also fail because of a lack of substantial merit).

As the district court stated in its order denying a stay, Crutsinger's stay motion "does not identify any allegedly meritorious claims but, like his Rule 60(b) motion, rests on the assumption that Crutsinger is entitled to investigative funds to search for unexhausted claims." ROA.1415–16. Indeed, Crutsinger cites no authority for the proposition that a district court's entirely discretionary denial of funding in any way deprived him of his statutory right to representation, nor can he. *See Ayestas*, 138 S. Ct. at 1094 (affirming that district courts have broad discretion in assessing request for funding). And although Crutsinger was not granted the additional funds he requested, the district court docket indicates counsel for Crutsinger was given at least *$32,000* to investigate and present a federal petition. *See* ECF Nos. 9, 22, 33, 47, 55, 61.[9] And counsel did just that, filing a well-briefed petition raising three points of error (including the IATC claim at issue here) supported by seven exhibits. *See generally*

[9] These were electronic docket entries only with no attendant document; thus, they have no ROA cites.

ROA.192–338. Thus, Crutsinger has certainly received his statutory right to representation.

The district court took this into great consideration when weighing both the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process. It noted that Crutsinger received a full review of the underlying IATC claim, in its many iterations, and it was found to be without any merit. ROA.1395–402. Crutsinger also received multiple reviews for his funding request, including in the latest order by the district court. ROA.1403–12.

So now, it cannot be said that the district court abused its "*broad* discretion in assessing" Crutsinger's request for funding. *Ayestas*, 138 S. Ct. at 1094 (emphasis added). Moreover, this Court stressed in *Ayestas* that § 3599 "cannot be read to guarantee that an applicant will have enough money to turn over every stone." *Id.* And yet, that seems to be precisely what Crutsinger seeks. Even if there were some potentially meritorious lead, the Court recognized there "may even be cases in which it would be within a court's discretion to 'deny funds after a finding of 'reasonable necessity.'" *Id.* (quoting Ayestas's brief).

So too, the district court did not abuse its discretion when denying Crutsinger's Rule 60(b) motion. Nor was the Fifth Circuit out of turn in denying a COA. To the degree Crutsinger invokes *McFarland v. Scott*, 512 U.S. 849 (1994), to his rescue, he again misapplies the case. In *McFarland*, this Court held that an indigent capital defendant, who had not yet filed an initial state habeas application, was entitled to the appointment of qualified legal counsel once a federal postconviction proceeding has commenced and that an attendant stay of execution was warranted to allow newly appointed counsel to investigate claims and file a federal habeas petition. 512 U.S. at 857–59. However, *McFarland* is limited to *initial* habeas petitions, *see id.* at 858 ("Under ordinary circumstances, a capital defendant presumably will have sufficient time to request the appointment of counsel and file a formal habeas petition prior to his scheduled execution.").[10]

"Crutsinger, however, has been well-represented by his counsel for approximately eleven years, and there is no indication that, as in

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[10] *McFarland's* holding relating to a stay of execution was superseded by statute, which is similarly limited to *newly* appointed counsel. *See* 28 U.S.C. § 2251(a)(3) (if a death-sentenced state prisoner seeks the appointment of new counsel in a court that would have jurisdiction to consider a habeas petition, that court may stay that prisoner's execution, but such stay shall terminate after ninety days of counsel's appointment).

McFarland . . ., 'he would be deprived of meaningful counsel absent a stay.'" *Crutsinger IV*, 930 F.3d at 708. Crutsinger certainly received his statutory right to representation—moreover, competent representation throughout his very lengthy federal habeas proceedings. And that counsel received at least $32,000 to peruse claims and nine months to file a petition.

Likewise, Crutsinger misapplies this Court's holding in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See* Pet.27. In arguing that the lack of funding in federal habeas court "goes to the very structural integrity of the proceeding," he cites to *Gideon* for the proposition that the "right to representation is 'fundamental and essential to a fair trial.'" *Id.* Of course though, *Gideon* was concerned with the Sixth Amendment right of representation *at trial*. 372 U.S. at 343–44.

This is fundamentally different than federal habeas representation, which obviously is not constitutionally guaranteed. As then-Justice Rehnquist said: "the state trial on the merits [is] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). The statutory right to representation in § 3599 is not

constitutionally fundamental and indispensable. And funding that flows from that statute is a bonus windfall provided to state court inmates sentenced to death by Congress for limited purposes, not a universal Due Process right enshrined in the Sixth Amendment.

Ultimately, the fatal flaw here is that the IATC claim at the heart of all of this is plainly meritless. "If there were no underlying meritorious waived claims, then it can hardly be argued that there is a 'risk of injustice' to Johnson." *Johnson*, 2019 WL 3814384, at *4. When discussing this, the Fifth Circuit also found that the lack of such claims negated the risk of "undermining the public's confidence in the judicial process . . . ." *Id.* Here, Crutsinger's request for relief under Rule 60(b) rests almost entirely in a change in decisional law. And like Gonzalez and Johnson, he cannot identify a "good" claim that was omitted or defaulted without merits review because of the alleged deficient representation.

The district court squarely addressed both any potential "injustice to Crutsinger" and "undermining the public's confidence in the judicial process" in its lengthy opinion, both in discussing the prior merits review of the claim, ROA.1394–402, and more importantly, in its fresh review and denial of Crutsinger's request for funding under *Ayestas*,

ROA.1403–12. And following *Gonzalez*'s direction it also considered the preservation of the finality of judgment. ROA.1389 (citing *Gonzalez*, 545 U.S. at 535). Here, Crutsinger was convicted nearly fifteen years ago, has been litigating his claims in federal court over a decade, and has received review of both his underlying IATC claim and the denial of funding through multiple cycles of review. He has not shown any factors that rise to the level of extraordinary circumstances (either alone or when combined) sufficient enough to warrant the grant of his Rule 60(b) motion. Even though his complaint to this Court amounts to nothing more than a request for error correction, it is also incorrect. Thus, the Court should deny his request for certiorari as to his second question presented.

CONCLUSION

Crutsinger fails to identify any compelling reasons for this Court to expend its limited judicial resources on further review. Consequently, his petition should be denied.

Respectfully submitted,

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