CAPITAL CASE No. 19-6934

IN THE

Supreme Court of the United States

DEXTER DARNELL JOHNSON,

Petitioner,

v.

LORIE DAVIS,

DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Rule 60(b) litigation in 28 U.S.C. § 2254 cases has grown increasingly convoluted in the Fifth Circuit. Following this Court's ruling in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the distinction between Rule 60(b) motions and successive habeas petitions appeared to be clear—a Rule 60(b) motion cannot raise habeas "claims" for relief. But in recent years, the Fifth Circuit's interpretation of this rule has strayed far afield of this Court's intent. Now, the Fifth Circuit will affirm the denial of a Rule 60(b) motion because the petitioner did *not* include a meritorious claim for relief. In doing so, it has further muddied the waters of Rule 60(b) jurisprudence. This Court's intervention is required.

Mr. Johnson's case presents this Court with the optimal vehicle to resolve the important question of whether a petitioner must establish an entitlement to habeas relief from his underlying conviction or sentence in a Rule 60(b) motion to justify reopening the judgment. Here, Mr. Johnson sought to reopen the judgment of his habeas proceedings due to his counsel's conflict of interest, and enumerated significant extraordinary circumstances warranting the requested relief. The Fifth Circuit faulted Mr. Johnson for not briefing underlying claims for relief in his Rule 60(b) motion. App'x. A at 7–8. But, had Mr. Johnson done so, this Court's precedent would have dictated his 60(b) motion then be treated as a successive application. *See Gonzalez*, 545 U.S. at 531 (explaining that using a Rule 60(b) motion "to present new claims for relief" renders that filing a successive application); *see also In re Edwards*, 865 F.3d 197, 204 (5th Cir. 2017) (same). The specific facts of Mr. Johnson's case are

unique and render it extraordinary, and the lower court's opinion presents an important legal question justifying this Court's review.

Rather than engaging with the puzzling split between this Court's jurisprudence and that of the Fifth Circuit, the Respondent incorrectly asserts that Mr. Johnson's "primary argument" is that "conflicted counsel constitutes extraordinary circumstances in and of itself" to justify relief under Rule 60(b). BIO at 11. Not surprisingly, the Respondent provides no citation for this assertion, as it misstates Mr. Johnson's argument. Mr. Johnson does not argue that a conflict automatically justifies reopening a judgment under Rule 60(b). Instead, he argued below that representation by conflicted counsel was a "defect in the integrity of his initial federal habeas proceedings." Pet. at 13; *see also Clark v. Davis*, 850 F.3d 770 (5th Cir. 2017) (holding that an allegation of a conflict of interest properly alleged a defect in the integrity of federal habeas proceedings). Then, he argued that the specific facts present in Mr. Johnson's case—which go beyond the mere existence of conflicted counsel—constitute extraordinary circumstances justifying reopening the judgment. Pet. at 13.

Prior counsel's actions here went far beyond a garden-variety conflict created by *Martinez*[1] and *Trevino*[2] when he continued to represent Mr. Johnson in federal habeas proceedings after having represented Mr. Johnson in state habeas proceedings. These extraordinary circumstances include prior counsels repeatedly taking steps directly adverse to Mr. Johnson by (1) failing to notify Mr. Johnson of

[1] *Martinez v. Ryan*, 563 U.S. 1 (2012).
[2] *Trevino v. Thaler*, 569 U.S. 413 (2013).

the conflict of interest; (2) attempting to amend claims into the federal petition by invoking *Martinez* and *Trevino* to excuse the default of those claims while arguing he had not provided ineffective assistance; (3) treating Mr. Johnson's case in a different manner from other clients he represented in similar postures to Mr. Johnson, in which he had sought different counsel to be appointed because it was "his ethical duty" to do so; (4) opposing Mr. Johnson's request for conflict-free counsel; and (5) filing a state successor application without informing Mr. Johnson or obtaining his consent, even after he was on notice that doing so would create additional procedural impediments for Mr. Johnson's claims to be heard on the merits. Pet. at 5, 10–14. These case-specific facts establish that extraordinary circumstances exist that justify reopening the judgment against Mr. Johnson.

But the question for this Court to consider is whether the Fifth Circuit has created an untenable rule by requiring Rule 60(b) litigants to establish a meritorious claim for relief. 18 U.S.C. § 3599 exists to ensure that death-sentenced individuals have adequate representation during their federal habeas proceedings. Under the Fifth Circuit's logic, if an attorney conceals a conflict of interest from his death-sentenced client and actively argues *against* the client's ability to receive relief, that individual's only recourse is to meet the onerous and difficult requirements of a successive application to vindicate his constitutional and statutory rights. According to *Gonzalez*, a pleading styled a Rule 60(b) motion that contains claims for relief *must* be treated as a successive application. 545 U.S. at 532; *see also* BIO at 18–19 (recognizing that such a filing would be treated as successive). Contrary to the

Respondent's belief, BIO at 6, this is a compelling question that justifies this Court's intervention.

The Respondent denies that the Fifth Circuit's internal jurisprudence is contradictory, ignoring the obvious conflict between cases like *In re Edwards*, 865 F.3d 197 (5th Cir. 2017), in which Fifth Circuit construed a Rule 60(b) motion as a successive petition when the petitioner argued that former federal habeas counsel's fraud on the court constituted a defect in the integrity of the proceedings because the petitioner discussed a defaulted trial counsel ineffectiveness claim, and cases such as Mr. Johnson's. Instead, the Respondent argues that the rule is clear—"Rule 60(b)(6) relief is available only in 'extraordinary circumstances' *and with the showing of a meritorious claim*." BIO at 13 (emphasis added). The Respondent simultaneously argues that a 60(b) motion including a previously unraised claim for relief is a successive petition, but Mr. Johnson failed to establish extraordinary circumstances because he did not raise new ineffective assistance of counsel claims. *See* BIO at 18–19. This is further evidence of the quagmire litigants must combat under the Fifth Circuit's inconsistent positions.

The Fifth Circuit has created a rule not only inconsistent with its own precedent, but in direct conflict with the precedent of this Court. Mr. Johnson's case presents the optimical vehicle for this Court to clear the confusion lingering in Rule 60(b) cases—it is one in which the Fifth Circuit plainly denied relief for the simple fact that Mr. Johnson did not raise meritorious claims in his 60(b) motion. This Court should grant a writ of certiorari.

Respectfully submitted this 25th day of February, 2020,

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by

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