RECORD NO. _____

IN THE
Supreme Court of the United States

TIMOTHY RICHARDSON,

Petitioner,

v.

EDWARD THOMAS, Warden, Central Prison,
Raleigh, North Carolina,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Stanley F. Hammer
WYATT, EARLY, HARRIS
& WHEELER, LLP
1912 Eastchester Drive
High Point, NC 27261
336-819-6013
shammer@wehwlaw.com

Kenneth J. Rose
Counsel of Record
809 Carolina Avenue
Durham, NC 27705
919-886-0350
Kenroseatty@gmail.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

CAPITAL CASE

QUESTIONS PRESENTED

Timothy Richardson's death penalty case raises a significant issue of national importance: whether our criminal justice system tolerates the execution of an intellectually disabled defendant whose death sentence stands undisturbed because federal review of his case rests on a misinterpretation of state law governing intellectual disability claims. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the Eighth Amendment bars the execution of the intellectually disabled).

During Richardson's initial federal habeas proceedings, both the federal district court, *Richardson v. Branker,* 769 F.Supp. 2d 896 (E.D.N.C 2011) and the United States Court of Appeals for the Fourth Circuit , *Richardson v. Branker,* 668 F.3d 128 (4th Cir. 2012) erroneously interpreted North Carolina's statute prohibiting execution of intellectually disabled defendants; both courts interpreted the statute as a bright line rule by which a defendants seeking to qualify as intellectually disabled must register an IQ score of "70 or below" without consideration of the clinically accepted standard error of measurement. Because Richardson registered scores of 73 and 74, the district and circuit courts refrained from addressing his §2254[28 U.S.C. §2254] habeas claim that the state post-conviction court's assessment of Richardson's adaptive functioning was an unreasonable determination of fact.

Importantly, after Richardson's initial federal habeas review was final, in 2015 a North Carolina state court clarified North Carolina's intellectual disability statute, holding:

> 19. The North Carolina Supreme Court has not interpreted North Carolina's statute to preclude consideration of the standard error of measurement or to limit the introduction of evidence if the threshold showing of an IQ score below 70 has not been met. Therefore, North Carolina's statute, like the Florida statute, can be - and has been in this case specifically - interpreted consistently with Atkins.

Order of the Hon. Quentin T. Sumner, Senior Resident Superior Court Judge, June 16, 2015. Pet. Appx. 42, 46

This clarification of state law clearly demonstrates a fundamental flaw in the federal district and circuit courts initial review of Richardson's habeas petition, for both the district court and the Fourth Circuit proceeded under the erroneous premise that North Carolina's intellectual disability statute imposed a strict IQ cutoff, and thus neither court reviewed an earlier state post-conviction court's findings regarding Richardson's adaptive deficits.

Notwithstanding the foregoing, in 2019 the Fourth Circuit held that Rule 60(b)(6) of the Federal Rules of Civil Procedure does not provide a remedy for this defect, which clearly undermined the integrity of the earlier in the federal habeas proceedings. *Richardson v Thomas,* 930 F3d 587 (4th Cir. 2019) Pet. Appx A 1, rehearing den.. August 9, 2019, Pet. Appx. A51.

The Fourth Circuit's erroneous ruling creates an unacceptable risk of the federal court permitting the execution of a person with an intellectual disability, in

defiance of the Eight Amendment prohibition set forth in *Atkins*. The present case raises significant issues that this Court should resolve, including whether:

> 1) The Fourth Circuit Court of Appeals contravened this Court's decision in *Gonzalez v. Crosby* in ruling that a "defect in the habeas proceedings," as a matter of law, can only be a procedural error, and that Rule 60(b) relief is unavailable for any claim in which the district court previously reached the merits of a defendant's federal habeas application?
>
> 2) The Fourth Circuit erred in failing to recognize that its previous misinterpretation of state law amounted to a defect undermining the integrity of earlier habeas rulings, and thus justified relief under Rule 60(b)(6)?

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

No.

TIMOTHY RICHARDSON,
Petitioner,
v.

EDWARD THOMAS, Warden
Central Prison, Raleigh, North Carolina,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Timothy Richardson respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

PARTIES TO THE PROCEEDINGS

1. Petitioner Timothy Richardson is currently a prisoner on North Carolina's death row. In 1995, he was convicted of capital murder in Nash County, North Carolina.
2. Edward Thomas is the Warden of Central Prison, Raleigh, North Carolina.

OPINIONS AND DECISIONS BELOW

In an interlocutory and permissive appeal by the State of North Carolina pursuant to 28 U.S.C. § 1292, the United States Court of Appeals for the Fourth Circuit ruled that Richardson's Rule 60(b) motion was an unauthorized successive habeas petition, and thus vacated the district court's order re-opening his §2254 petition for habeas corpus based upon *Atkins v. Virginia*, 536 U.S. 304 (2002). *See Richardson v. Thomas*, 930 F.3d 587 (4th Cir. 2019). Pet. Appx. A1. The Fourth Circuit denied Mr. Richardson's request for rehearing *en banc* on August 9, 2019. *See Richardson v. Thomas*, No. 18-3 (4th Cir. Aug. 9, 2019) Pet. Appx.A51.

In 2017, the United States District Court for the Eastern District of North Carolina vacated its original 2011 denial of habeas relief. *See Richardson v. Joyner*, NO. 5:08-HC-2163-BO, 2017 WL 11473862 (N.C.E.D. Mar. 28, 2017) (Slip) (unpub.) Pet. Appx. A25.

In 2015, Nash County Superior Court clarified how North Carolina's intellectual disability statute should be interpreted. *See State v. Richardson,* Nash County Superior Court, No. 93 CRS 14711, 14709 (N.C. Sup. Ct. June 16, 2015), cert denied, *State v. Richardson*, 782 S.E.2d 736 (Mem) (N.C. 2016), cert denied *Richardson v. North Carolina*, 137 S.Ct. 337 (Mem) (2016). Pet. Appx. A 42,46

In 2012, the Fourth Circuit affirmed the district court's denial of Richardson's petition for habeas corpus relief. *See Richardson v. Branker*, 668 F.3d 128 (4th Cir. 2012), cert denied, *Richardson v. Branker*, 568 U.S. 948 (2012)

In 2011 the United States District Court for the Eastern District of North Carolina denied Richardson's original request for habeas relief from his death penalty sentence based upon his claim of being intellectually disabled. *See Richardson v. Branker,* 769 F. Supp. 2d 896 (E.D.N.C. 2011).

The Nash County Superior Court denied Richardson's request for post-conviction relief under *Atkins* in 2005. *See State v. Richardson*, Nash County Superior Court, 93 CRS 14711, 147094 (N.C. Superior Ct. July 29, 2005) (unpub.) [see *Richardson v. Thomas* (4th cir. 2017) Dkt.17-2*,* ECF Doc. 14-1 pp 381-382;, JA vol.1:377-378, hereinafter, "Doc. 14-1"] cert denied, *State v. Richardson*, 667 S.E.2d 272 (N.C. 2008).

STATEMENT OF JURISIDICTION

The Fourth Circuit entered its judgment on July 12, 2019 and denied a timely filed petition for rehearing on August 9, 2019. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves several federal statutory provisions and Rules of Civil Procedure. Specifically, 28 U.S.C. §§ 2244, 2254 and Rule 60(b) of the Federal Rules of Civil Procedure.

28 U.S.C. § 2254 provides, in relevant sections, that:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

i) there is an absence of available State corrective process; or

ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2244 provides, in relevant sections, that:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) he facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(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.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

Rule 60(b) of the Federal Rules of Civil Procedure provides, in relevant sections, that:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. 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:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality*. The motion does not affect the judgment's finality or suspend its operation.

Finally, this case involves the interpretation of North Carolina's intellectual disability statute, N.C. Gen. Stat. § 15A-2005 (2001), which, at the time of Richardson's original habeas petition provided in pertinent part::[1]

(a)

(1) The following definitions apply in this section:

a. Mentally retarded. – Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.

b. Significant limitations in adaptive functioning. – Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health

[1] The statute was re-written in 2015 to conform to the holdings in *Hall v Florida*, 572 U.S. 701 (2014) and *Brumfield v. Cain*, 135 S. Ct. 2269 (2015). 2015 N.C Sess. Laws. 247

and safety, functional academics, leisure skills and work skills.

c. Significantly subaverage general intellectual functioning. – An intelligence quotient of 70 or below.

(2) The defendant has the burden of proving significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that mental retardation was manifested before the age of 18. An intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of 18, to establish that the defendant is mentally retarded.

(b) Notwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 1995, Timothy Richardson was tried and convicted of first degree murder by a Nash County, North Carolina Superior Court jury, which thereafter sentenced him to death. The Supreme Court of North Carolina affirmed his conviction, *State v. Richardson*, 346 N.C. 520, 480 S.E.2d 148 (1997), cert. denied, *Richardson v. North Carolina*, 522 U.S. 1056 (1998).

RICHARDSON'S INITIAL MOTION FOR STATE POST-CONVICTION RELIEF BASED UPON ATKINS V. VIRGINIA (2002), IN WHICH HE OFFERED EVIDENCE OF INTELLIGENCE TESTS SCORES OF 73 AND 74, AND DEFICITS IN TEN AREAS OF ADAPTIVE FUNCTIONING.

On January 31, 2002 Richardson filed in Nash County Superior court a state post-conviction motion for appropriate relief, which was amended in light of this Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002). [*See,* Doc. 14-1, Pp.15-107; JA vol. 1: p 11-103;] Richardson alleged that he is intellectually disabled and thus ineligible for the death penalty based upon his significant subaverage intellectual functioning and significant limitations and deficits in ten areas of adaptive functioning.

In 2005, the Nash County Superior Court conducted an evidentiary hearing, during which Richardson presented ample evidence of his intellectual disability, including scores of 73 and 74 on intelligence tests, placing him within the clinically recognized range of subaverage intellectual functioning. He also presented evidence of significant limitations in adaptive functioning. [*See,* Doc. 14-1, pp 108-380 pp.; JA vol. 1: 104-377]

The undisputed evidence demonstrated that Richardson has the mental functioning of an 11-12 year old. [Doc. 14-1,; pp, 71 to 74; JA vol.1: pp 67,70] His mother drank *cases* of beer daily while she was pregnant, resulting in Richardson being born with fetal alcohol syndrome. [Doc. 14-1, pp. 375, 381; JA vol. 1:371, 377] At age three-and-half years, Richardson was hospitalized for severe lead poisoning. His blood contained lead-levels eight times higher than acceptable limits. [Doc. 14-1, p. 210; JA vol.1: 206]

In addition, the evidence presented at the state post-conviction hearing highlighted Richardson's significant adaptive deficiencies. While in tenth grade, he failed to read at a fourth-to-sixth grade level and had a "language comprehension age equivalent of just twelve years, eight months." [Doc. 14-1, p 73; JA vol.1:69);] He wet the bed until he was 14. [Doc. 14-1,p. 169; JA vol.1:165]. He wore his clothing inside out and could not tie his shoes unless he was helped. [Doc. 14-1, p.172; JA vol.1:168] He could not prepare his own meals. With respect to self-care, he had the skills of a child between 7-12 years of age. [Doc. 14-1, pp. 22-25; JA vol.1:18-21] Richardson never independently went to a doctor, did not know how to treat a basic cut, and did not know or understand basic rules of safety. [Id. at 12]. In terms of work skills, Richardson rated in the 0.1 percentile. *[Id.]*

The State of North Carolina offered only one expert witness to challenge Richardson's claim of that he was intellectually disabled. Dr. Mark Hazelrigg assessed Richardson's adaptive functioning based on the Street Survival Skills Questionnaire: a clinically unsound, and subsequently debunked, instrument.[2] In a 2015 affidavit, Hazelrigg actually retracted his reliance on the test to evaluate adaptive deficiencies. [*Richardson v. Thomas* (4th Cir. 2017) Dkt.17-2*,* ECF Doc. 14-4, p. 59; JA vol.4:1161]

[2] *See*, G.C. Denkowski and K.M. Denkowski, *Misuse of the Street Survival Skills Questionnaire for Evaluating the Adult Adaptive Behavior of Criminal Defendants with Intellectual Disability Claims*, 46 Intellectual and Developmental Disabilities 144-149 (2008).

THE STATE POST-CONVICTION COURT'S DENIAL OF RELIEF

At the conclusion of the 20005 evidentiary hearing, the state superior ruled:

> The Court also finds that there is some evidence that the defendant suffers some reduced mental capacity, but that he is not mentally retarded as set out in GS 15A-2005. The Court further finds that the defendant has failed to meet the burden of proof requiring the defendant to show that he has significantly sub average adaptive skills in at least two areas as set out in the General Statutes of North Carolina.
> The defendant has also failed to show that he suffers from Mental Retardation as required by GS lSA-2005.[Doc. 14-1, pp.381-82, JA vol. 1:377-78]

The trial court therefore denied his motion for appropriate relief. The Supreme Court of North Carolina denied Richardson's petition for writ of certiorari. *State v. Richardson*, 362 N.C. 478, 667 S.E.2d 272 (2008).

RICHARDSON'S INITIAL FEDERAL HABEAS PETITION

Pursuant to 28 U.S C. § 2254 Richardson timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, alleging that the state post-conviction court's failure to find that Richardson is intellectually disabled was the product of an unreasonable application of the Eighth Amendment prohibition against executing intellectually disabled defendants, as this Court ruled in *Atkins*, and also involved an unreasonable determinations of fact. *Richardson v. Branker,* 769 F. Supp. 2d 896, 919 (E.D.N.C. 2011).

NORTH CAROLINA'S STATUTE ON INTELLECTUAL DISABILITY INTERPRETED AS STRICTLY REQUIRING A DEFENDANT CLAIMING INTELLECTUAL DISABILITY TO HAVE SCORED "70 OR BELOW" ON AN IQ TEST, WITHOUT ADJUSTMENT FOR STANDARD ERROR OF MEASUREMENT

When Richardson sought federal habeas relief in 2008, North Carolina's legislature had adopted a statute barring execution of intellectually disabled defendants,[3] N.C. Gen. Stat.§ 15A-2005, but North Carolina courts had not squarely addressed the question of the whether the statutory requirement that a defendant register an IQ score of "70 or below" was a bright line rule (or "strict cutoff"), or whether a court could consider the clinically accepted standard error of measurement, which effectively recognizes that significant subaverage intellectual functioning may be present where a defendant's IQ score is as high as 75.

In reviewing Richardson's intellectual disability claim in 2011, the federal district court held that the first prong of North Carolina's statute, which required a movant to establish "significantly subaverage general intellectual functioning, evidenced as an I.Q. of 70 or below," was a bright-line rule. And because Richardson's unadjusted IQ scores were above 70[4], the federal district court held that "petitioner cannot succeed in showing significantly subaverage general intellectual functioning, *[so] the court need not address petitioner's arguments with respect to adaptive functioning*." *Richardson*, 769 F. Supp. 2d at 927. (emphasis supplied)

---

[3] *Atkins* explicitly left to the states the task of developing appropriate procedures to implement its mandate. *See Atkins*, 536 U.S. at 317.

[4] At the post-conviction hearing Richardson also offered an IQ test score of 67 which was not considered by the Court in that it was administered by a psychometrist rather than a licensed psychologist, as required by statute.

Richardson appealed the district court's denial, arguing that the correct interpretation of state law did not include a bright-line cut-off, but rather permitted consideration of clinically accepted IQ score adjustments such as the standard error of measurement. *Richardson v. Branker*, 668 F.3d 128 (4th Cir. 2012). When Richardson filed his 2011 appeal, the North Carolina courts had not provided any guidance on whether its intellectual disability statute had a bright-line cut-off.

The United States Court of Appeals for the Fourth Circuit affirmed, holding in pertinent part:

> Richardson does not cite to any North Carolina law, nor do we find any such law, requiring courts to consider the "Flynn effect" and the "practice effect". . . . **If the North Carolina legislature had intended that the state courts take these and other theories [standard error of measurement] into account when adjudicating mental retardation claims, the legislature could have so provided in the statute.** Thus, under the AEDPA standard we apply in this case, we agree with the district court's observation that **"there is no requirement under N.C. Gen. Stat. § 15A-2005 for a court to adjust a defendant's I.Q. scores downward for such factors."** 769 F.Supp.2d at 927; *see also Green v. Johnson*, 515 F.3d 290, 300 n. 2 (4th Cir. 2008) (applying Virginia law in reviewing habeas petition and observing that "neither *Atkins* nor Virginia law appear to require expressly that [the Flynn effect or the standard error of measurement] be accounted for in determining mental retardation status).
>
> Because we hold that the MAR court did not unreasonably conclude that Richardson failed to establish "significantly subaverage general intellectual functioning," **we need not address the MAR court's conclusion concerning Richardson's failure to establish the other requirement of the statute, "significant limitations in adaptive functioning."** N.C.G.S. § 15A-2005(a)(1)(b).

668 F.3d at 152-53 (emphasis supplied) It bears emphasis that because the district and circuit courts concluded that North Carolina employed a strict IQ cutoff, or bright line rule, which Richardson failed to satisfy with his IQ scores of 73 and 74, neither court addressed whether the state court's ruling related to adaptive functioning was an unreasonable determination of fact.

THE STATE COURT CLARIFIES NORTH CAROLINA'S INTELLECTUAL DISABILITY STATUTE, N.C. GEN. STAT. 15A-2005

In 2015 Richardson returned to state court and sought reconsideration of his *Atkins* claim in light of *Hall v. Florida*, 572 U.S. 701 (2014), in which this Court held that when a defendant offers IQ scores between 71 and 75, a court must examine adaptive functioning in determining whether a defendant is of sub-average intelligence.

Superior Court Judge Quentin Sumner, who presided at Richardson's trial and his 2005 post-conviction hearing, ruled on Richardson's amended state post-conviction motion, and held that North Carolina had always applied the principles set forth in *Hall*, which rejected the use of a strict IQ cut-off.[5] *State v. Richardson,* Nash County Superior Court, No. 93 CRS 14711, 14709 (N.C. Sup. Ct. June 16, 2015) Pet. Appx. A45-46; cert denied, *State v. Richardson*, 782 S.E.2d 736 (Mem) (N.C. 2016) (denying certiorari). The superior court stated that during his prior

[5] Consistent with the superior court's decision, in 2015, the North Carolina Legislature clarified its law on the use of strict IQ cut-offs to make clear that the IQ of 70 is an approximation of intellectual disability, and higher scores do not preclude the consideration of adaptive deficiencies when determining whether an individual is intellectually disabled. The statutory amendments also made clear that North Carolina courts are allowed to consider any clinically accepted evidence. N.C. Sess. Law. 2015-247 (2015).

state proceeding, "Richardson was granted a full evidentiary hearing during which this Court considered all of Richardson's IQ test scores, *without limitation*, as well as evidence of his alleged limitations in adaptive function . . . . In effect, this Court has already interpreted North Carolina's law consistently with *Hall*." Pet. Appx. A 45-46(emphasis added).[6]

Richardson's Rule 60(b)(6) Motion Based Upon Hall v. Florida (2014)

After the state court denied Richardson's amended *Atkins* claim, and relying on this Court's decision in *Hall v. Florida,* 572 U.S. 501 (2014), he filed a Rule 60(b)(6) motion in the federal district court [*Richardson v. Thomas* (4th Cir. 2017) Dkt.17-2*,* ECF Doc 14-4, .p.5; JA vol.4:1107], seeking to vacate the "judgment entered on October 18, 2005, dismissing the petition for writ of habeas corpus on the intellectual disability issue." Order of the United States District Court for the Eastern District of North Carolina Richardson v. Joyner, NO. 5:08-HC-2163-BO, 2017 WL 11473862 (N.C.E.D. Mar. 28, 2017) (Slip) Pet. Appx. A23-41. After conducting an analysis of whether Richardson's 60(b) motion was in fact a successive habeas petition, and relying on *Gonzalez v. Crosby*, 545 U.S. 524 (2005),

[6] The North Carolina Attorney General has, at different stages in Richardson's case, taken inconsistent positions regarding how courts should interpret North Carolina's intellectual disability statute. Prior to this Court's decision in *Hall*, the Attorney General sought dismissal of Richardson's *Atkins* claim by arguing that North Carolina's statute applied a strict IQ cut-off and that if a defendant did not present an IQ score of "70 or below," he could not satisfy the intelligence prong of an intellectual disability claim. [*Richardson v. Branker,* Eastern Dist. N.C. Dkt 5:08-hc-02163, ECF Doc 16, p. 47-48]. After *Hall*, however, and during subsequent proceedings, the Attorney General argued the exact opposite, and sought dismissal of Richardson's post-*Hall Atkins* claim in state court by arguing that North Carolina courts had never imposed a statutory cut-off. [*Richardson v. Branker,* Eastern Dist. NC Dkt 5:08-hc-02163, ECF Doc 61-1 p.256]

the district court ruled that "[a] defect exists in the integrity of the federal habeas [proceeding], and petitioner may proceed via a Rule 60 motion." Pet. Appx, A 40 .

THE STATE'S INITIAL INTERLOCUTORY APPEAL IS DISMISSED

The district court permitted the State to appeal his preliminary ruling, and on January 23, 2018 the case was heard by a Fourth Circuit panel, which dismissed the State's appeal on February 23, 2018 for failure to comply with 28 U.S.C.§1292 and Appellate Rule 5, while permitting the district court to properly certify an appeal.[*Richardson v. Thomas*, 4th Cir. Dkt 17-2, ECF Doc.41]. On March 26, 2018 the district court allowed the State of North Carolina's motion to amend its earlier order to include language that would permit an interlocutory appeal.[*Richardson*, United States District Court for the Eastern District of North Carolina, Dkt 5:08-HC-02163, ECF Doc. 79], which was denied on May 1, 2018 [Id., ECF , Doc. 86], after the Fourth Circuit granted the North Carolina Attorney General's Motion to allow a permissive appeal[Id., ECF. Doc. 84]

RICHARDSON RAISES THE STATE LAW CLARIFICATION AS BASIS FOR RELIEF IN MAY 2018

On May 11, 2018 Richardson unsuccessfully moved for remand to the district court in order to permit that Court to amend his prior order so that the district court could consider or incorporate Judge Sumner's ruling clarifying North Carolina law. [*Richardson v. Thomas*, 4th. Cir. Dkt 18-3, ECF Doc. 14] The motion was denied on June 1, 2018. [[*Richardson v. Thomas*, 4th. Cir. Dkt 18-3, ECF Doc. 21]

In response to the State of North Carolina's second permissive interlocutory appeal to the Fourth Circuit, Richardson raised as a basis for affirmance the North

Carolina state court's 2015 clarification of state law, and the federal court's corresponding misinterpretation of state law regarding the IQ cut-off, as a defect in the federal proceedings that warranted Rule 60(b) relief. *Richardson v. Thomas*, 930 F.3d 587, 599 (4th Cir. 2019), Pet. Appx. A19-24.

The Fourth Circuit rejected Richardson's argument, holding:

> Richardson's new ground for Rule 60(b)(6) relief also does not fall within *Gonzalez's* narrow exception to § 2244's limitations. In *Gonzalez*, the Supreme Court provided quite clear guidance for distinguishing between a true Rule 60(b) motion and a disguised § 2254 petition. The Court repeatedly focuses the threshold inquiry on whether the district court denied the habeas petitioner's constitutional claim *on the merits* under § 2254(d), or whether the district court's prior dismissal of the habeas claim was based upon a *procedural* ruling that *precluded* the court from reaching the merits of the constitutional claim under § 2254(d). This quite basic, and understandable, merits/nonmerits distinction permeates the *Gonzalez* opinion, and it does not support Richardson's argument that he can reopen the final judgment denying his federal habeas claim on the merits under § 2254(d), based upon a clarification of substantive law or a subsequently-discovered error. We need not go any further than the language of *Gonzalez* to be sure of that.
>
> 930 F.3d 587, 598 (4th Cir. 2019) , Pet. Appx. A 20.

The Fourth Circuit reversed the district court's decision and ordered dismissal of Richardson's Rule 60(b) motion, holding that Richardson's Rule 60(b) motion was actually a successive habeas petition which required pre-clearance by the circuit court[7]. *Richardson*, Pet. Appx A24. The court held that when a district court reaches the merits of a habeas petition, which occurred with Richardson's *Atkins* claim, any subsequent Rule 60(b) motion must be treated as a successive

[7] During the pendency of Richardson's appeal he filed a pre-filing authorization motion to file a successive habeas corpus application pursuant to 28 U.S.C. § 224. *In re Richardson*, 4th cir. Dkt. No. 17-7, argued on 11 December 2019. As of the date of this petition, the Court has not acted on Richardson's §2244 motion.

habeas petition. Furthermore, the court declined to recognize that subsequent clarifications of state law may serve as grounds for Rule 60(b) review. *Richardson,* 930 F3d at 598-600. Pet. Appx A20-24.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Fourth Circuit's ruling runs afoul of this Court's precedent governing Rule 60(b) motions, and frustrates comity and federalism interests by failing to give effect to a state court's important clarification of state law. Moreover, the Fourth Circuit's erroneous procedural rulings create an unacceptable risk that an intellectually disabled defendant will be executed in contravention of the Eighth Amendment. Finally, the Fourth Circuit opinion directly conflicts with other federal circuits' treatment of a habeas petitioner's Rule 60(b) motion.

I. By Ruling That a "Defect in the Habeas Proceedings," As a Matter Of Law Can Only Be a Procedural Error, And That Rule 60(b) Relief Is Unavailable For Any Claim In Which The District Court Reached The Merits, The Fourth Circuit Contravenes This Court's Holding In *Gonzalez v. Crosby,* 525 U.S.424 (2005)

While our legal system values finality in judgments, exceptions must be -- and are -- made in the interest of justice. Courts must weigh an interest in finality against an equally strong interest in ensuring their decisions do not raise "the risk of injustice to the parties," and an interest in avoiding "the risk of undermining the public's confidence in the judicial process." *See Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017). This balancing is acknowledged in the Federal Rules of Civil Procedure.[8] *See* Fed. R. Civ. P. 59, 60; *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005).

[8] Rules 59 and 60 of the Federal Rules of Civil Procedure allow courts to amend or vacate their original judgments that run contrary to the federal laws, Constitution, or the interests of justice.

In particular, Rule 60(b) allows district courts to vacate judgments on grounds such as "mistake," "fraud," "newly discovered evidence," or "any other reason that justifies relief." *See* Fed. R. Civ. P. 60(b); *Gonzalez*, 545 U.S. at 528-29. Federal district courts have jurisdiction to correct judgments where an error in the process by which the court reached its original decision amounts to "a defect in the federal habeas proceedings' integrity." *Id*. at 532.

Nothing in Rule 60(b)'s text or history prevents its application to a case that originally sought habeas relief. But its potential conflict with 28 U.S.C. §2244, amended as part of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), dictates that federal courts must conduct a preliminary analysis of whether a Rule 60(b) motion is actually an improperly filed successive habeas petition.[9] *Gonzalez* addressed the interplay between Rule 60(b) and successive petitions under §2244, stating that "Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules," such as §2244 of the AEDPA. *Gonzalez*, 545 U.S. at 529.

Richardson is not attempting an end run around AEDPA! His Rule 60(b) motion merely seeks to correct a prior ruling that was erroneously based upon the district court's misinterpretation of a state law that was clarified only after the

---

[9] *See Gonzalez*, 545 U.S. at 535-36 (analyzing first whether the petitioner's motion was a proper Rule 60(b) motion rather than a successive habeas petition under Section 2244); *see also Richardson v. Thomas,* 930 F.3d 587, 596 (4th Cir. 2019)(addressing first whether the Rule 60(b) motion was in fact a successive petition before reaching the merits of the motion); *Jones v. Ryan*, 733 F.3d 825, 835, 838 (9th Cir. 2013) (same); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (same).

district court's ruling was final. And, in fact, the district court recognized that in light of *Hall v. Florida,* it erred when it ruled in 2008 that it need not consider the standard error of measurement, Pet. App. A37, and that there was a possible defect in the integrity of his original habeas proceeding. Although the district court was relying on *Hall,* he identified the precise defect that flows from interpreting the North Carolina law as imposing a bright line rule which precludes examination of state court findings regarding a defendant's adaptive functioning.

Richardson's position is simple and straightforward: In 2011 the district court misinterpreted North Carolina's intellectual disability statute as imposing a bright line cutoff which required that a defendant register an IQ of "70 or below" without regard to clinically accepted adjustments such as the standard error of measurement. Because Richardson failed to satisfy the bright-line or "strict cutoff" rule advanced by the North Carolina Attorney General, in ruling on his initial petition the district court prematurely ended its analysis and failed to consider Richardson's arguments concerning adaptive deficits. Pursuant to Rule 60(b), the district court's initial failure to consider the standard error of measurement or evidence of Richardson's adaptive deficits amounted to a defect in the habeas proceedings' integrity that warrants Rule 60(b) relief. Therefore, even though the district court originally reached a decision on the merits of Richardson's *Atkins* claim, the process by which it did so was tainted to such a degree that allowing the decision to stand would raise "the risk[s] of injustice to the parties" and

"undermining the public's confidence in the judicial process." *Buck*, 137 S. Ct. at 777-78.

In evaluating whether Richardson's Rule 60(b) motion was proper, or was in fact a successive petition requiring pre-clearance by the circuit court, the Fourth Circuit reached a conclusion contrary to *Gonzalez,* and inconsistent with the analyses of other circuits.

According to the Fourth Circuit, the only question that guides whether an issue is properly a Rule 60(b) motion or a successive habeas petition, is "whether the district court's prior dismissal of the habeas claim was based upon a procedural ruling that *precluded the court from reaching the merits* of the constitutional claim under § 2254(d)." *Richardson*, 930 F.3d at 597, Pet. Appx. A 21. Under the Fourth Circuit's test for distinguishing a Rule 60(b) motions from §2244 successive petitions, the only habeas decisions that could ever be corrected under Rule 60(b) are those in which the underlying claim was procedurally defaulted or barred. *Id.*

In the Fourth Circuit's view, if the merits were reached in the initial habeas ruling, any subsequent Rule 60(b) motion addressing a defect in the proceeding, including a defect where the court applies the wrong state law, would be barred as a successive habeas petition. *Id.* (holding that the threshold inquiry under *Gonzalez* is "whether the Rule 60(b) motion attacked the district court's prior resolution of a habeas claim on the merits . . . or merely asserted a procedural defect in the integrity of the original proceeding *that had preclude an adjudication on the merits* of the claim" (emphasis added)). Pet. Appx A20

The Fourth Circuit's approach directly contradicts this Court's ruling in *Gonzalez* regarding the meaning of a "defect in the habeas proceeding," and regarding which claims are properly Rule 60(b) claims. *Gonzalez* presented examples of which scenarios constitute defects in a habeas proceeding and should be properly addressed under Rule 60(b). 545 U.S. at 532 n.4.

One scenario endorsed by this Court as properly raised under Rule 60(b) is fraud on the federal district court. *See id*. at 532 n.5 ("Fraud on the federal habeas court is one example of such a defect."). A claim of fraud under Rule 60(b) is an attack on "some defect in the integrity of the federal habeas proceeding," "not [one attacking] the substance of the federal court's resolution of a claim on the merits." *Id*. This remains true whether or not the original habeas decision was on the merits. This Court's explanation in *Gonzalez* that fraud is a proper Rule 60(b) basis demonstrates that the Fourth Circuit's limitation of Rule 60(b) to procedural rulings is incorrect.

To explain *why* fraud is an example of an error properly raised under Rule 60(b), and not a successive petition, this Court adopted the Second Circuit's rationale in *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001). *Gonzalez*, 545 U.S. at 532 n.5 (citing *Rodriguez* for the proposition that a conflict does not arise between Section 2244 and Rule 60(b) when a defect in the proceeding is challenged).

In *Rodriguez*, the federal district court reached the merits of the petitioner's claim and denied relief. 252 F.3d at 196. But, because of a subsequent claim that Rodriguez's trial lawyer "made fraudulent representations to the federal district

court and that the [lawyer] fraudulently concealed that [they] had deposed [the witness] relates to the *integrity of the federal habeas proceeding*," Rule 60(b) applied. *Id*. at 199. Therefore, in the view of this Court and the Second Circuit, the central focus is the taint on *how* the prior federal decision was reached. Under *Gonzalez*, it does not matter, as the Fourth Circuit asserted, that the federal habeas court reached the merits of the habeas petition.

Consistent with the mandate of *Gonzalez*, other federal circuits recognize that Rule 60(b) may apply in federal habeas cases even where the court re-opens a proceeding in which it previously reached the merits, but based its ruling on a flaw that undermines the integrity of the final judgment or order. *See Clark v. Davis*, 850 F.3d 770, 779-80 (5th Cir. 2017) (attorney's conflict of interest constitutes a defect in integrity of original proceeding warranting Rule 60(b) relief); *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009) (holding that fraud on the court is a defect affecting the integrity of original proceeding); *Pizzuto v. Ramirez*, 783 F.3d 1171, 1176 (9th Cir. 2015) (holding that Rule 60(b) relief is available based on whether there was error in prior habeas proceeding without regard to whether the earlier proceeding disposed of on merits or procedural grounds) ; *Zakrzewski v. McDonough*, 490 F.3d 1264, 1266 (11th Cir. 2007).

In short, other circuits clearly focus on whether the integrity of the previous proceeding has been undermined by the error which a petitioner seeks to correct through the equitable vehicle of Rule 60(b). By contrast, the Fourth Circuit approach fails to pay deference to a district court's conclusion that its earlier

judgment was affected by an error which undermined the integrity of the original case, and overlooks or simply ignores the importance of record evidence demonstrating a clarification of state law that justified Rule 60(b) relief.

The Fourth Circuit misapplied this Court's precedent when it held that Rule 60(b) relief is never available when the prior federal habeas proceeding results in a decision on the merits. The court's decision runs contrary to this Court's decision in *Gonzalez*, and contrary to its application by the Second, Fifth, Sixth, Ninth, and Eleventh Circuits.

This Court should grant certiorari review to correct the Fourth Circuit's significant error, and that court's erroneous and unfounded creation of a circuit split. Alternatively, the Court should grant certiorari to resolve the circuit split.

II. Contrary To The Holdings Of Other Federal Circuits, The Fourth Circuit Erred In Failing To Recognize That a Misinterpretation of State Law is a Defect in Prior Federal Proceedings Which May Be Rectified Under Rule 60(b).

Richardson relied on a clarification of state law as a ground for Rule 60(b) relief. *See Richardson,* 930 F.3d 587, 598, Pet.Appx. A 19. ("Richardson argues that the state court 'clarified' North Carolina's intellectual disability statute in 2015 (when it ruled upon his *Hall* claim), and that this clarification revealed that the district court misinterpreted *state law* when it denied his intellectual disability claim in 2011.").

Richardson's reliance on clarification of state law is crucial. While allowing subsequent changes in *federal* law to be addressed under Rule 60(b) may conflict with §2244 and Congress' goals of protecting comity under AEDPA, claims seeking

relief under Rule 60(b) due to a district court's prior erroneous interpretation of *state* law raise no such concerns. In fact, not only are changes or clarifications of state law *not governed* by Sections 2244 and 2254, a federal court's use of Rule 60 to correct erroneous federal interpretations of state law furthers AEDPA's goal of comity.

A. Because 28 U.S.C. Sections 2244 and 2254 Do Not Govern State Law Claims, a District Court's Correction Of An Erroneous Interpretation Of State Law That Has Been Subsequently Clarified By a State Court Is Properly Governed By Rule 60(b).

Section 2254 governs which claims a federal habeas court has jurisdiction to consider when reviewing state court judgments, and therefore, what filings should be considered habeas petitions. *See* 28 U.S.C. § 2254(a). Federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *only* on the grounds that he is in custody in violation of the Constitution or laws or treaties *of the United States*." *Id.* (emphasis added).

The Fourth Circuit relied on *Gonzalez* to rule that "[a] Rule 60(b) motion that 'contend[s] that a *subsequent change in substantive law* is a 'reason justifying relief' from the previous denial of a claim . . . although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly.' *Richardson*, 930 F.3d at 598 , Pet. Appx. A 21 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005)). Here, the Fourth Circuit held that allowing such a claim to proceed under Rule 60(b) would conflict with §2244. *Id.* However, the Fourth Circuit

failed to acknowledge that Richardson's Rule 60(b) motion was based in part on a clarification of *state law*, not federal law.

In contrast, §2244(b)(2)(A) only governs claims that raise changes in federal law as grounds for habeas relief. *See* 28 U.S.C § 2244(b)(2)(A) (allowing jurisdiction to courts if the "applicant shows that the claim relies on a new rule of *constitutional law* . . .). Likewise, § 2254 grants federal courts jurisdiction to review habeas petitions from state prisoners only if they sought relief on federal grounds. 28 U.S.C. § 2254. In *Gonzalez* itself, the petitioner sought relief from the original judgment because of a change in how *federal* law was interpreted. 545 U.S. at 527. *Gonzalez's* prohibition on allowing these federal claims to go forward under Rule 60(b) is based on a conflict with § 2244(b)(2)(A,), for allowing federal changes in law to also be governed by Rule 60(b) would frustrate the limitations the AEDPA created. *Id.* at 531.

But there is no such concern when the Rule 60(b) motion's ground for relief could never be governed by Sections 2244(b)(2)(A) or 2254. *Gonzalez* governs claims and defines them in the Rule 60(b) context to mean "a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim." 545 U.S. at 532 n.4.

Consistent with *Gonzalez*, Richardson alleged under Rule 60(b) that the district court initially failed to correctly apply *state law*, N.C. Gen. Stat §15A-2005,

and that this defect undermined the integrity of the federal court's proceedings. A district court's misinterpretation of state law during an original habeas proceeding is not a factor that justifies a successive habeas petition pursuant to 28 U.S.C.§2244. No conflict exists between Rule 60(b) and §2244 in a case that seeks to challenge a federal court's misapplication of *state* law, and as such, the district court's decision to allow Richardson to proceed under Rule 60(b) was appropriate.

Other circuits have reached the same conclusion—that a subsequent clarification of state law permits a habeas petitioner to seek Rule 60(b) relief. The Sixth Circuit in *Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir 2009) ruled that a state's subsequent clarification of state law, which indicates the district court previously misinterpreted a state law, "undermines the principle of comity on which AEDPA is based" and is properly addressed under Rule 60(b). 580 F.3d at 442. There, during the petitioner's original habeas proceeding, the district court misinterpreted Tennessee's laws regarding claim exhaustion. *Id*. Due to this misinterpretation, the district court erroneously dismissed some of petitioner's claim as procedurally defaulted. *Id*. Subsequently, the Tennessee Supreme Court promulgated a rule "which clarified" the state rules. *Id*. In reviewing the district court's denial of petitioner's subsequent Rule 60(b) motion, the Sixth Circuit recognized that while the judgment had been final, "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Id.* at 44 (quoting *Sanders v. United States*, 373 U.S. 1, 8 (1963)) (internal quotations omitted). Because Tennessee's subsequent

clarification of procedural laws made clear that the federal district court previously misinterpreted state law, Rule 60(b) relief was warranted. *Id*. at 443. It is also warranted in the present case based upon Judge Sumner's 2015 clarification of state law.

Similarly, in *Bucklon v. Secretary*, 606 Fed. Appx. 490, 492 (11th Cir. 2015) the Eleventh Circuit recognized the importance of a state law clarification. There, after the federal habeas petition was initially denied based upon the district court's application of Florida law, the Florida courts clarified that same law, making Rule 60(b) relief subsequently available. *Bucklon v. Secretary*, 606 Fed. Appx. 490, 492 (11th Cir. 2015). On appeal from a denial of Rule 60(b) relief, the Eleventh Circuit considered the issue in light of *Gonzalez*. Like the Sixth Circuit in *Thompson*, the Eleventh Circuit held that "to not follow Florida's clarification of its 'own procedural rule' in *Cunningham* would 'undermin[e] the principle of comity on which AEDPA is based.'" *Id.* at 494 (quoting *Thompson*, 580 F.3d at 442).

In contrast to the Sixth and Eleventh Circuits, the Fourth Circuit failed to recognize that Richardson's Rule 60(b) motion was properly based on a clarification of *state* law, and thus not barred under *Gonzalez*

B. Allowing District Courts To Correct Erroneous Judgments Due To a Misinterpretation Of State Law Protects State Sovereignty Interests And Furthers AEDPA's Interests In Protecting Comity And Equity.

Gonzalez instructs that habeas courts addressing Rule 60(b) motions balance federalism, comity, and the interests of the parties to decide whether the Rule 60(b) motion would frustrate Congress' intent under the AEDPA. 545 U.S. at 532. In

Richardson's case, as in any case where federal courts inaccurately interpret and apply state law during habeas review, AEDPA's interests in comity and federalism weigh in favor of review and correction of the initial error.

Allowing district courts to correct errors in interpreting state law in the habeas context *furthers* the very comity and federalism interests that the AEDPA is designed to protect. The guiding principle behind Congress' passage of AEDPA was a recognition of a state's inherent sovereignty in determining its own laws and procedures. *See, e.g., Davis v Ayala*, 135 S Ct 2187, 2197 (2015) (discussing how reasons "reasons of finality, comity, and federalism" underlying what relief is available for habeas petitioners). State courts have the unique power to structure their own state criminal justice laws and procedures, so long as they do not conflict with the federal constitution. *See Thompson v. Wainwright*, 714 F.2d 1495, 1504 (11th Cir. 1983) (explaining one comity interest in the federal-state interaction is protecting a state's right to structure its criminal justice system). Inherent in a state's right to determine its own laws is a state's right to *interpret* its laws, and the requirement that federal courts respect the state's interpretation. *See Stringer v. Black*, 503 U.S. 222, 235 (1992) ("It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law.").

Enforcing a federal habeas court's judgment in a case where the judgment rests on an improper interpretation of state law, and closing any avenue to correct this error, "disserve[s] the comity interests enshrined in AEDPA by ignoring the state court's view of its own law." *See Thompson,* 580 F.3d at 442 (ruling that

enforcing a federal district court's decision based on erroneously interpreted state law, after state courts clarify the law's interpretation, would frustrate the comity interests AEDPA sought to protect); *Bucklon,* 606 Fed. Appx. at 494 (granting Rule 60(b)(6), holding that to refuse to follow Florida's clarification of its own rule would "undermine the principle of comity on which the AEDPA is based").

Richardson's Rule 60(b) motion for relief was prematurely terminated by the Fourth Circuit. Richardson should be permitted to proceed so that the district court may review its prior ruling in light of a clear misinterpretation of North Carolina law. Allowing the district court to fully review the Rule 60(b) motion advances the principles of comity, and allows a federal court to honor the will of the North Carolina General Assembly.

CONCLUSION

The Fourth Circuit impermissibly departed from this Court's precedent holding that a defect in the proceedings can properly be raised under Rule 60(b) even when a district court reached the merits of the original habeas petition. The Fourth Circuit erroneously conflated changes in state law with changes in federal law and failed to recognize that a misinterpretation of state law should be recognized as a basis for a Rule 60(b) motion. As set forth herein, the Fourth Circuit's interpretation of *Gonzalez* and the interplay between Rule 60(b) and §2244 is in conflict with that other circuits, and this Court should grant certiorari to resolve that conflict.

Additionally, the Fourth Circuit's decision fails to honor the prerogative of North Carolina courts to interpret their own state law, and thus runs contrary to the comity interests Congress sought to protect under the AEDPA.

Most significantly, however, this Court must grant review in order to ensure that the Fourth Circuit's erroneous procedural rulings do not ultimately permit the execution of a person with an intellectual disability. For these reasons, the Court should grant a writ of certiorari.

Date: January 6, 2020

Kenneth J. Rose
Counsel of Record
809 Carolina Avenue
Durham, NC 27705
919-886-0350
Email: Kenroseatty@gmail.com

Stanley F. Hammer
Wyatt, Early, Harris, Wheeler, LLP
P. O. Drawer 2086
High Point, N.C. 27261
Telephone: (336) 819-6-13
Email: Shammer@wehwlaw.com
NC State Bar No.: 12421