No. 19-7222

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 SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Does the Fourth Circuit's straightforward application of this Court's decision in *Gonzalez* which correctly identified Petitioners Rule 60(6) motion as an improperly filed successive petition of habeas corpus present an issue worthy of certiorari review?

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INTRODUCTION

This case involves the straightforward and proper application of this Court's well-established law in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). In that case, this Court held that a Rule 60(b)(6) motion for relief from a judgment, as asserted in a federal habeas case under 28 U.S.C. § 2254, may not be treated as a successive habeas petition "if it does not assert, or reassert, claims of error in the movant's state conviction." *Id.* at 538. As *Gonzalez* made clear, a Rule 60(b) motion is not a successive petition if it challenges "some defect in the integrity of the federal habeas

proceedings." *Id.* But such a motion is a successive petition if it challenges "the substance of the federal court's resolution of a claim on the merits." *Id.* at 532.

In this case, petitioner Timothy Richardson requests that this Court review the decision of the Fourth Circuit Court of Appeals vacating a district court order which granted his Rule 60(b) motion. The Fourth Circuit held that Richardson's motion was a poorly disguised successive habeas petition. *Richardson v. Thomas*, 930 F.3d 587, 596 (4th Cir. 2019).

The straightforward application of *Gonzalez* to the particular facts of Richardson's case does not warrant this Court's review. Petitioner's Rule 60(b)(6) motion was merely a second try of his earlier intellectual disability claim from his first federal habeas petition, rejected by the district court in 2011. The Fourth Circuit was correct when it observed that "[o]ne can hardly imagine a second or successive habeas application that is so poorly disguised as a Rule 60(b)(6) motion." *Id.*

This case is also a poor vehicle for review as Richardson has raised in his petition to this Court a ground not argued in his Rule 60(b)(6) motion filed before the district court. In his motion for relief from judgment, Richardson raised a single ground: that "he has an intellectual disability that bars the State of North Carolina from executing him." (App. p 2, Doc 61 p 2; JA 1108) This was the "same claim (and essentially the identical argument) that he presented to the district court in 2011." *Richardson*, 930 F.3d at 596. In contrast here, he has argued that, in their prior adjudication of his intellectual disability claim, the district court and the Fourth

Circuit erroneously interpreted a state statute prohibiting the execution of intellectually disabled defendants. Thus, even if Richardson's petition had raised an issue worthy of certiorari review, this case is a poor vehicle to address that issue.

The State of North Carolina respectfully requests that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Procedural History

On 25 May 1995, Richardson was found guilty of first-degree murder of Tracy Marie Rich on three separate bases: (1) malice, premeditation, and deliberation; (2) felony murder; and (3) lying in wait. After a capital sentencing proceeding was held, Richardson was sentenced to death for the murder of Ms. Rich. The Supreme Court of North Carolina affirmed the jury's verdict and sentence. *State v. Richardson*, 346 N.C. 520, 488 S.E.2d 148 (1997). This Court denied Richardson's subsequent Petition for Writ of Certiorari. *Richardson v. North Carolina*, 522 U.S. 1056 (1998).

On 18 March 1999, Richardson filed a Motion for Appropriate Relief in the Superior Court of Nash County which included an amendment that contained a claim he was intellectually disabled. The Nash County Superior Court entered an Order on 9 April 2002, denying all claims but the intellectual disability claim. After conducting an evidentiary hearing on Petitioner's intellectual disability claim on 17 June 2005, the superior court denied the intellectual disability claim. Richardson sought review in the Supreme Court of North Carolina, which was denied. *State v. Richardson*, 362 N.C. 478, 667 S.E.2d 272 (2008).

Richardson filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, before the United States District Court on 7 November 2008. (JA 691) On 6 January 2011, the district court issued a writ of habeas corpus vacating Richardson's death sentence on the basis of ineffective assistance of counsel and ordered that he be removed from death row and sentenced to life imprisonment unless the State re-sentenced him within 180 days. The district court granted Respondent's motion for summary judgment on all other claims, including a claim that Richardson was intellectually disabled and could not be subjected to the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). (CA4 JA 872)[2]

On 6 February 2012, the Fourth Circuit reversed the portion of the district court's judgment granting the writ on Richardson's claim of ineffective assistance of counsel and affirmed the remainder of the district court's judgment rejecting the claim under *Atkins*. *Richardson v. Branker*, 668 F.3d 128 (4th Cir. 2012). The Court of Appeals denied Richardson's subsequent Petition for Rehearing and Rehearing *En Banc* on 5 March 2012. This Court denied review. *Richardson v. Branker*, 568 U.S. 948 (2012).

Richardson then returned to state court and filed a fourth amendment to his motion for appropriate relief, on or about 20 January 2015. (CA4 JA 1126) In an Order filed 16 June 2015, the Nash County Superior Court denied Richardson's fourth amendment. (CA4 JA 1230) The order was signed by the Honorable Quentin

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[2] Citations to the Joint Appendix at the Fourth Circuit are identified as "CA4 JA."

T. Sumner, who had presided over Richardson's trial and his 2005 post-conviction evidentiary hearing on his intellectual disability claim. The superior court denied Richardson's subsequent Motion to Vacate by its Order of 23 July 2015. (CA4 JA 1289) Petitioner sought review before the Supreme Court of North Carolina, which denied review. *State v. Richardson*, 368 N.C. 770, 782 S.E.2d 736 (2016). (CA4 JA 1400)

On 5 April 2016, Richardson filed a motion pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure seeking relief from the federal district court judgment entered on 6 January 2011. (CA4 JA 1107) The district court granted Petitioner's 60(b)(6) motion and stayed proceedings for Respondent to appeal to the Fourth Circuit Court of Appeals. (CA4 JA 1601)

On 4 April 2018, Respondent filed a petition with the Fourth Circuit requesting permission to appeal the district court order pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure. (CA4 RSA 6) On 27 April 2018, the Fourth Circuit granted the Respondent's petition and granted permission to appeal the amended district court order. (CA4 RSA 14)

On 12 July 2019, the Fourth Circuit vacated the district court's order and remanded with instructions to dismiss the motion. *Richardson v. Thomas*, 930 F.3d 587, 600 (4th Cir. 2019) (Pet. App. A1) The Court of Appeals denied Richardson's subsequent Petition For Rehearing And Rehearing *En Banc* on 9 August 2019. (Pet. App. A51)

On 6 January 2020, Richardson filed the subject Petition For Writ Of Certiorari with this Court.

B. Factual Background

The facts of the murder of Ms. Rich are detailed by the Supreme Court of North Carolina in *State v. Richardson*, 346 N.C. at 526-28, 488 S.E.2d at 151-52. The full transcript of the 2005 state post-conviction evidentiary hearing on Richardson's intellectual disability claim was included in the Joint Appendix at CA 4 JA 104 to CA4 JA 376. At that 2005 hearing, the state court rejected the State's argument that Richardson failed to meet his burden of showing a threshold IQ score below 70 and that, as a consequence, the claim was insufficient to warrant an evidentiary hearing. (CA4 JA 109-112) Instead, the state court conducted a full evidentiary hearing and did not limit in any way Richardson's presentation of evidence regarding his alleged limitations in adaptive functioning.[4]

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[4] Richardson states in his petition that "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." (Pet. p 14 n.6) This assertion is incorrect. From the beginning of Richardson's attempt to assert his successive intellectual disability claim in state court, the State acknowledged that it had previously argued at the 2005 state court evidentiary hearing that the state superior court should not allow Richardson to present evidence of his alleged limitations in adaptive functioning because his IQ score was not low enough. The state superior court rejected that argument by the State and allowed Richardson to present any evidence he wished to present. (See transcript of 2005 hearing at CA4 JA 109-12, & 2015 state court response to successive MAR at CA4 JA 1219)

REASONS FOR DENYING THE PETITION

I. The Fourth Circuit correctly applied this Court's well-established law.

Richardson seeks review from this Court arguing that the Fourth Circuit's opinion directly conflicts with this Court's holding in *Gonzalez*. However, this Court's review is not warranted because, contrary to Richardson's assertions, the Fourth Circuit properly applied *Gonzalez* to Richardson's case.

This Court made clear in *Gonzalez* that an assertion of error is based "on the merits" of the adjudication of a claim when a movant asserts grounds for relief pursuant to 28 U.S.C. § 2254(a) or (d), or claims that a previous determination as to those grounds was done in error. *Gonzalez*, 545 U.S. 524, 532 n.4. Here Richardson's Rule 60(b) motion directly attacked "the federal court's previous resolution of a claim on the merits" which was his intellectual disability claim. *Richardson*, 930 F.3d at 597 (quoting *Gonzalez*, 545 U.S. at 532). The Fourth Circuit noted that the district court too had found that Richardson's Rule 60(b) motion "directly attack[ed] th[e] court's merits adjudication [of his intellectual disability claim] in light of *Hall [v. Florida*, 572 U.S. 701 (2014)]". *Id.* As such, the Fourth Circuit faulted the district court for failing to "dismiss the Rule 60(b) motion as an unauthorized, successive § 2254 petition," or to transfer it to the Fourth Circuit for "a decision as to whether Richardson should be allowed to file the claim under § 2244(b)." *Richardson*, 930 F.3d at 597. This was a straightforward and correct application of *Gonzalez*.

The Fourth Circuit correctly observed that the district court erred by considering whether this Court's "decision in *Hall* should be retroactively applied to cases on collateral review and, after assuming that it should, held that the motion was timely filed and that *Hall* was an extraordinary circumstance for purposes of Rule 60(b)(6)." *Richardson*, 930 F.3d at 597. This was error, the Fourth Circuit observed, because the district court bypassed what "should have been the threshold inquiry under *Gonzalez*—whether the Rule 60(b) motion attacked the district court's prior resolution of a habeas claim on the merits (or raised an entirely new claim), or merely asserted a procedural defect in the integrity of the original proceedings that had precluded an adjudication on the merits of the claim." *Id.* at 597.

Contrary to Richardson's assertion, the Fourth Circuit's review of the district court's failure to appropriately dismiss or transfer a claim which was a direct attack on the district court's prior merits adjudication did not "directly contradict" this Court's opinion in *Gonzalez*. As the Fourth Circuit accurately held, Richardson's Rule 60(b) motion "asserted that his previous claim of intellectual disability was wrongly decided on the merits" based upon this Court's opinion in *Hall v. Florida*, and asserted "that his previous claim of intellectual disability was wrongly decided on the merits based upon the state court's 2015 decision." *Richardson*, 930 F.3d at 600. Thus, a clear application of *Gonzalez* made these "habeas claims not properly brought in a Rule 60(b) motion." *Id.*

It is clear from this record that Richardson's Rule 60(b)(6) motion is a successive habeas petition. As the Fourth Circuit observed, "[o]ne can hardly imagine a second or successive habeas application that is so poorly disguised as a Rule 60(b)(6) motion." *Richardson*, 930 F.3d at 596.

Because the Fourth Circuit Court of Appeals correctly applied this Court's opinion in *Gonzalez* to Richardson's Rule 60(b)(6) motion, this case does not merit review.

II. This Case Does Not Implicate a Widespread Split of Authority.

This Court's review is not warranted because the petition does not identify any meaningful division of authority among the lower courts. Richardson's attempt to create a meaningful split based on *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009) and *Bucklon v. Secretary*, 606 F. App'x 490, 492 (11th Cir. 2015) (unpublished), is without merit.

Distinguishable from an attack on the adjudication of the merits, in both *Thompson* and *Bucklon* the petitioners asserted errors in the dismissal of their claims as procedurally defaulted. *Thompson*, 580 F.3d at 442; *Bucklon*, 606 F. App'x at 492. Bucklon filed a Rule 60(b)(6) motion and the Eleventh Circuit found he had shown an extraordinary circumstance based on an amended Florida state law which made clear that some claims had not been procedurally barred in his first petition. *Bucklon*, 606 F. App'x at 493. Similarly, in *Thompson*, the petitioner argued that the Tennessee Supreme Court's promulgation of a rule eliminating the requirement that criminal

defendants appeal post-collateral relief actions to the state Supreme Court to exhaust their claims was an extraordinary circumstance. *Thompson*, 580 F.3d at 442.

Bucklon and *Thompson* are similar to each other, but not to the present case. In *Bucklon* and *Thompson*, habeas claims were procedurally defaulted, incorrectly, due to an unclear understanding of state law. These habeas claims were not adjudicated on the merits. Rather, a procedural defect prevented a merits adjudication. Distinguishable here, Richardson's assertion of his intellectual disability claim was adjudicated on the merits and his Rule 60(b) motion attacked the district court's prior resolution of the merits of this claim. Richardson did not assert "a procedural defect in the integrity of the original proceedings that had precluded an adjudication on the merits of the claim," an inquiry which the Fourth Circuit correctly identified as the threshold inquiry in evaluating a Rule 60(b) motion. *Richardson*, 930 F.3d at 697.

Richardson attempts to analogize his case to *Bucklon* and *Thompson* by arguing that the alleged defect here was a similar misunderstanding of state law by the federal courts relating to a "bright line" test for IQ scores in North Carolina. This argument is without merit.

First, and distinguishable from both *Bucklon* and *Thompson*, the claim at issue here, Richardson's alleged intellectual disability, was previously addressed on the merits. As the Fourth Circuit correctly identified, Richardson's 60(b) motion "asserts the same claim that he asserted in his § 2254 petition—that his intellectual disability

prohibits his execution under the Eighth Amendment." *Richardson*, 930 F.3d at 599. The Fourth Circuit correctly rejected this ground, noting that the district court and the Fourth Circuit had previously "denied that claim on the merits under § 2254(d)" and that Richardson "plainly seeks a readjudication of the merits of his claim[.]" *Richardson*, 930 F.3d at 599. Even though Richardson based his request for readjudication on the "purported change in substantive state law that revealed an error in the district court's prior adjudication of the merits of his claim[,]" the Fourth Circuit noted that his claim was "'effectually indistinguishable" from his prior habeas claim. *Id.* (citing *Gonzalez*, 545 U.S. at 532). In the end, what Richardson actually sought was "'a second chance to have the merits [of his claim] determined favorably' based on a subsequently-issued decision." *Id.* (citing *Gonzalez*, 545 U.S. at 532-33 n.5).

Richardson's petition does not identify any meaningful division of authority among the lower courts and the facts and procedural posture of this case are distinct from the cases he points to in support. As a result, this case does not merit review by this Court.

III. This Case Is a Poor Vehicle to Decide the Issues Raised in the Petition.

Even if Richardson had identified a meaningful division of authority on the broad issues raised by his petition, or an actual conflict with the opinions of this Court, this case would be a poor vehicle for resolving those issues because the issues which Richardson now raises were not asserted before the district court.

In his motion to the district court, Richardson did not raise the issues he seeks to now argue here. The Fourth Circuit correctly held that, because of this failure, Richardson's new argument cannot serve to "validate the district court's erroneous exercise of jurisdiction over the Rule 60(b) motion[.]" *Richardson*, 930 F.3d at 598. Before the district court, Richardson's single ground raised for relief from the judgment was his alleged intellectual disability barring his execution. *Id.* at 596. But before the Fourth Circuit and this Court, he now argues that this Court's decision in *Hall* retroactively applies to his case and that this change in law was "an extraordinary circumstance warranting Rule 60(b) relief from the district court's 2011 final judgment denying his claim on the merits." *Id.* at 596 (citing J.A. 1119 n.6 and 1122). For the reasons argued above, these new grounds have no more merit than the one ground he actually raised in his Rule 60(b)(6) motion and do not provide an adequate vehicle for this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted, this the 10th day of February, 2020.

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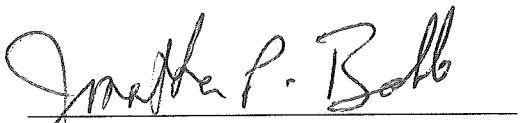
ATTORNEY GENERAL



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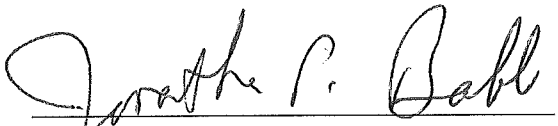
CERTIFICATE OF COMPLIANCE WITH RULE 33

I, Jonathan P. Babb, Special Deputy Attorney General for the State of North Carolina and a member of the bar of this Court, hereby certify that the State of North Carolina's brief in opposition is in compliance with Rule 33 in that it is printed in twelve-point Century Schoolbook font and it neither exceeds 40 pages, nor does the body to the brief, including footnotes and citations, contain more than 9,000 words as indicated by Microsoft Word, the program used to prepare the brief.

This the 10th day of February, 2020.



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