CAPITAL CASE No._____

IN THE

Supreme Court of the United States

RAMIRO FELIX GONZALES,

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

The United States Courts of Appeals for the Fourth, Fifth, Sixth, and Eleventh Circuits adhere to a categorical rule that a change in decisional law cannot qualify as an "exceptional circumstance" justifying relief under Federal Rule of Civil Procedure 60(b)(6). *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016); *Raby v. Davis*, 907 F.3d 880, 884 (5th Cir. 2018); *Zagorski v. Mays*, 907 F.3d 901, 905 (6th Cir. 2018); *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014). As Justice Sotomayor recently observed, the application of Rule 60(b)(6) in these circuits is in "potential tension" with this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and is in conflict with decisions of the Courts of Appeals for the Third and Seventh Circuits. *Crutsinger v. Davis*, 140 S. Ct. 2, 2–3 (2019) (Sotomayor, J., respecting denial of certiorari).

When affirming the denial of Mr. Gonzales's Rule 60(b)(6) motion—which sought review of the district court's denial of reasonably necessary expert funding in light of this Court's decision in *Ayestas v. Davis*, 584 U.S. __, 138 S. Ct. 1080 (2018)—the Fifth Circuit invoked its well-established circuit precedent that changes in decisional law alone are not exceptional for purposes of Rule 60(b)(6) and cannot justify relief.

The question presented is:

Whether a change in decisional law may constitute an extraordinary circumstance justifying relief under Rule 60(b)(6).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF RELATED CASES

Pursuant to Rule 14.1(b)(iii), the following cases are related to the instant petition:

State Court Proceedings:

Trial	*State of Texas v. Ramiro Felix Gonzales*, No. 04–02–9091–CR, 38th Judicial District Court, Medina County, Texas (Judgment entered and sentence of death imposed on Sept. 6, 2006)
Direct Appeal	*Gonzales v. State*, No. AP–75540 Affirming judgment on appeal (June 17, 2009)
State Habeas Corpus	*Ex parte Gonzales*, No. WR–70,969–01 Denying habeas corpus relief (Sept. 23, 2009)
Second State Habeas Corpus	*Ex parte Gonzales*, No. WR–70,969–02 Dismissing application (Feb. 1, 2012)

U.S. District Court for the Western District of Texas

Federal Habeas Corpus	Memorandum Opinion and Order Denying Relief *Ramiro Gonzales v. William Stephens,* 5:10-cv-00165-OLG, 2014 WL 496876 (Jan. 15, 2014)
Rule 60(b)(6) Motion	Order on Motion for Relief from Judgment *Ramiro Gonzales v. Lorie Davis*, 5:10-cv-00165-OLG (unreported) (July 3, 2018)

U.S. Court of Appeals for the Fifth Circuit

Affirming Denial of Habeas Relief and COA	*Gonzales v. Stephens,* No. 14–70006 606 F. App'x 767 (5th Cir. Apr. 10, 2015)
Granting COA in part, Vacating in part, and Denying COA in part	*Gonzales v. Davis*, No. 18–70024 788 F. App'x 250 (5th Cir. Sept. 17, 2019)

U. S. Supreme Court

Petition for writ of certiorari from denial of direct appeal	*Gonzales v. Texas*, No. 09–7066 130 S. Ct. 1504, denying petition for writ of certiorari to the Texas Court of Criminal Appeals on February 22, 2010
Petition for writ of certiorari from denial of habeas relief	*Gonzales v. Stephens*, No. 15–5940 130 S. Ct. 586, denying petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit on December 7, 2015

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PETITION FOR A WRIT OF CERTIORARI

Ramiro Felix Gonzales petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

On September 17, 2019, the United States Court of Appeals for the Fifth Circuit entered judgment and issued an opinion granting a certificate of appealability ("COA") in part, vacating in part, and denying a COA on the district court's denial of Mr. Gonzales's motion brought under Fed. Rule Civ. Proc. 60(b)(6) seeking to reopen the final judgment in this case. This opinion is reported as *Gonzales v. Davis*, 788 F. App'x 250 (5th Cir. 2019) (unpublished). It is reproduced as Appendix A**.** The July 3, 2018 opinion issued by the United States District Court for the Western District of Texas dismissing the Rule 60(b)(6) motion and, in the alternative, denying relief is unreported and reproduced as Appendix B**.**

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on September 17, 2019. An extension of time in which to file this petition was granted by Justice Alito on December 2, 2019, permitting filing through February 14, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defence.

This case further involves the application of 18 U.S.C. § 3599(a)(2) and (f), which states:

> (a)(2) In any post conviction proceeding ... seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain ... investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
>
> ...
>
> (f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant ... .

Finally, this case involves the proper interpretation of Federal Rule of Civil Procedure Rule 60, "Relief from a Judgment or Order," provides in relevant part that:

> (b) On motion ... [a] court may relieve a party or its legal representative from a final judgment, order, or proceeding for ...
>
> (6) ... any other reason that justifies relief.

INTRODUCTION

Mr. Gonzales, a death-sentenced inmate, has had no opportunity to develop a compelling claim that his trial counsel ignored red flags—in the form of explicit recommendations from their mitigation specialist—and failed to develop potentially powerful mitigating evidence about the impact and consequences of the sexual abuse Mr. Gonzales was subjected to as a child and his *in utero* exposure to drugs and alcohol.

His first opportunity, in state habeas corpus proceedings, was squandered by court-appointed counsel who conducted no investigation—he failed to even interview his client—and filed a perfunctory, facially deficient habeas application that was deemed "frivolous" by the state's highest court.

Mr. Gonzales fared no better in his federal habeas corpus proceedings. Despite this Court's contemporaneous decision to allow habeas petitioners like Mr. Gonzales to present defaulted claims of ineffective assistance of trial counsel when the default was caused by ineffective state habeas counsel, Mr. Gonzales' repeated requests for the funding necessary to develop the issues identified by trial counsel's mitigation specialist were denied because Mr. Gonzales could not first prove his claims without the funding. The federal courts subsequently denied relief because Mr. Gonzales could not substantiate his allegations.

When this Court struck down the Fifth Circuit's overly stringent test for funding pursuant to 18 U.S.C. § 3599(f) in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), Mr. Gonzales promptly filed a motion to reopen his habeas proceedings for

reconsideration of the district court's complete denial of the funding reasonably necessary to substantiate his claim. Although Mr. Gonzales's request was within the proper scope of Federal Rule of Civil Procedure 60(b)(6), he faced a practically insurmountable obstacle not confronted by similarly-situated petitioners in some other circuits: the Fifth Circuit's categorical ban on Rule 60(b)(6) relief based on new decisional law. Circuit precedent thus compelled Mr. Gonzales to identify other extraordinary circumstances, but the motion was in direct response to *Ayestas*. The courts below were bound by circuit precedent precluding a holding that the new legal landscape—on which Mr. Gonzales is clearly entitled to the funding he sought to develop his Sixth Amendment claim—is not an extraordinary development for purposes of Rule 60(b)(6).

A Justice of this Court has already identified the circuit split implicated by the Fifth Circuit's categorical ban on Rule 60(b)(6) relief based on new decisional law, and described the Fifth Circuit's Rule 60(b)(6) jurisprudence as in "potential tension" with decisions of this Court. Because Mr. Gonzales's only opportunity for federal habeas corpus review of a substantial claim of ineffective assistance of trial counsel turns on whether the Fifth Circuit—and other circuits that apply the same gloss to Rule 60(b)(6)—has properly construed this Court's decisions, Mr. Gonzales's case is an appropriate one for resolving the entrenched division among the courts of appeals.

STATEMENT OF THE CASE

The underlying proceedings, including the denial of funding under the Fifth Circuit's pre-*Ayestas* rule, the resulting materially incomplete record, and the Fifth Circuit's subsequent rejection of Mr. Gonzales's undeveloped claim, are summarized below, culminating with the Rule 60(b)(6) motion and subsequent denial from which this petition arises.

A. State Court Proceedings.

The crime for which Mr. Gonzales was convicted and sentenced to death occurred 71 days after his eighteenth birthday. Although his appointed counsel knew that he had been sexually abused as a child by an older male cousin, trial counsel ignored the mitigation specialist's recommendation to retain an expert in childhood sexual abuse, and failed entirely to investigate and present competent evidence of the sexual abuse Mr. Gonzales suffered. Trial counsel failed entirely to explain the implications of this abuse with regard to the crime of conviction. Instead, trial counsel presented testimony of a few lay witnesses who suggested that they knew of the abuse, and/or had been abused themselves. *See, e.g.*, 41 RR 166–68 (maternal aunt testified that she did not witness abuse but "just had a feeling that there was something wrong"). Trial counsel also knew that Mr. Gonzales's mother abused drugs and alcohol while pregnant, *see* ROA 236–37, yet counsel again ignored the mitigation specialist's recommendation and failed to investigate the effects this may have had on Mr. Gonzales. Specifically, trial counsel failed to pursue a Fetal Alcohol Spectrum Disorder ("FASD") evaluation, instead presenting lay testimony from two maternal

aunts who observed Mr. Gonzales's mother "smoking dope and drinking," "huffing paint," and overdosing while pregnant. *See, e.g.*, 41 RR 156–57 (witness describing Mr. Gonzales's "sixteen or seventeen" year old mother "get[ting] high" while pregnant); *id.* at 191 (second maternal aunt describing Mr. Gonzales's mother "[s]moking dope and drinking" all through early pregnancy, including overdose that led to hospitalization). With little mitigating evidence presented and no explanation of how these formative experiences might have contributed to the crimes, Mr. Gonzales was convicted of capital murder and sentenced to death in September 2006. His conviction and sentence were affirmed on appeal in *Gonzales v. State,* No. AP-75540, 2009 WL 1684699 (Tex. Crim. App. Jun. 17, 2009) (unpublished).

San Antonio solo practitioner Terry McDonald was appointed pursuant to Tex. Code Crim. Proc. art. 11.071 §3 to represent Mr. Gonzales in state habeas corpus proceedings. The statute requires that counsel identify and investigate all legal and factual grounds for habeas corpus relief:

> Investigation of Grounds for Application
>
> Sec. 3(a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the Court of Criminal Appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.[1]

Further, the Texas's statutory scheme puts the onus on habeas corpus counsel to discover, investigate, and plead in the first habeas application *every* claim available

[1] Tex. Code Crim. Proc. art. 11.071 § 3.

through the exercise reasonable diligence.[2] The Texas statute thus requires a comprehensive legal and factual investigation of the case in advance of filing the first application for habeas corpus relief. This duty is described in the State Bar of Texas Guidelines and Standards for Texas Capital Counsel (Apr. 21, 2006) ("Texas Bar Guidelines"), which state that capital habeas "[c]ounsel should not accept an appointment if he or she is not prepared to undertake the comprehensive extra-record investigation that habeas corpus demands."[3] Counsel "must conduct a thorough and independent investigation," and "cannot rely on the work of, or representations made by, prior counsel to limit the scope of the post-conviction investigation."[4] Hence,

> [h]abeas corpus counsel must treat the habeas corpus stage as both the first and last meaningful opportunity to present new evidence to challenge the capital client's conviction and sentence. Therefore, counsel has a duty to conduct a searching inquiry to assess whether any constitutional violations may have taken place, including—but not limited to—claims involving police and prosecutorial misconduct, faulty eyewitness evidence, unreliable jailhouse informant testimony, coerced confessions, dubious or flawed forensic scientific methods, ineffective assistance of trial and appellate counsel, and juror misconduct.[5]

Mr. McDonald's work in prior and contemporaneous capital habeas cases demonstrated that he was unaware of and/or indifferent to his duties as habeas counsel. In this case, he failed to conduct any new investigation, failed to request funding for any expert assistance, and even failed to meet with Mr. Gonzales before

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[2] *Id*. at 11.071 § 5(e) (claims are not cognizable in subsequent habeas applications, and thus waived, unless "the factual basis was not ascertainable through the exercise of reasonable diligence" when the prior application was filed).

[3] Texas State Bar Guideline 12.2(B)(1)(a).

[4] *Id.*

[5] *Id.* at 12.2(B)(1)(c).

filing a facially deficient *nine-page* habeas corpus application that the Texas Court of Criminal Appeals ultimately deemed "frivolous." The application consisted of four record-based claims, two of which had been raised on direct appeal and thus were procedurally barred in state habeas proceedings under well-established state law.[6] ROA 185–92. As one Texas Court of Criminal Appeals judge observed about the era in which Mr. Gonzales's application for state habeas relief was filed:

> Over the past thirteen years that I have been on this Court, I have reviewed numerous 11.071 applications. Some of them have been just as poorly pled as this application. Yet, in those cases, we denied relief, despite the appalling deficiencies. … The applicants in those cases were victims of deficient and inadequate lawyering that was a result of ignorance but not necessarily incompetence. … The outcome in the past has been the same—the death-row client's one opportunity to seek habeas relief is lost.[7]

Mr. Gonzales's was one of the capital habeas cases marred by deficient and inadequate lawyering.

Notably, the Texas Court of Criminal Appeals specifically declined to adopt many of the trial court's proposed findings and conclusions[8] with respect to whether Mr. Gonzales had received effective assistance of counsel at trial, but adopted the

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[6] *See Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006) ("[c]laims that have already been raised and rejected are not cognizable" on habeas corpus); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) ("Generally, a claim which was previously raised and rejected on direct appeal is not cognizable on habeas corpus").

[7] *Ex parte Medina*, 361 S.W.3d 633, 647 (Tex. Crim. App. 2011) (Keasler, J., joined by Hervey, J., dissenting) (footnote omitted). In response to the widespread deficient lawyering in capital habeas corpus cases, the Texas legislature replaced the court-appointment system with a statewide capital state post-conviction public defender office in 2009—a reform that came too late for Mr. Gonzales.

[8] One month after the application was filed, James Simmonds, a visiting judge who had not presided at trial and who had not been assigned to preside over the state habeas proceedings, signed findings of fact and conclusions of law recommending denial of habeas relief. ROA 205. Although Judge Simmonds was not legally authorized to preside over the case, Mr. McDonald did not object to him doing so.

ultimate conclusion that "as a matter of Fact and Law [...] Applicant Ramiro Felix Gonzales' Application for Writ of Habeas Corpus should be in all things denied as being *frivolous* and without merit." ROA 208, 214 (emphasis supplied).

B. Prior Federal Court Proceedings.

Pursuant to 18 U.S.C. § 3599, the district court appointed undersigned counsel Michael C. Gross to represent Mr. Gonzales in federal habeas corpus proceedings. On August 26, 2010, Mr. Gonzales submitted a sealed *ex parte* request for funds to retain a mitigation expert to evaluate the mitigation evidence in this case. ROA 41. In support of this request, Mr. Gonzales explained that the requested funds were "reasonably necessary" under 18 U.S.C. § 3599 because state habeas counsel had conducted no apparent investigation of the case whatsoever and, as a result, had failed to allege even a single cognizable ground for habeas relief:

> The state habeas [application] in this case was nine pages in length and covered only record based claims. When counsel requested the file from state habeas counsel, the undersigned was given five pages of typed notes. There was no state habeas mitigation information provided to counsel. Counsel did receive from trial defense counsel a mitigation file, but counsel needs the assistance of a mitigation expert to interpret the test results of the trial defense experts contained in the mitigation file and to conduct a mitigation investigation.

Id.

The district court simultaneously unsealed and denied the motion. Concluding that "petitioner has not alleged any facts sufficient to satisfy this standard or to justify expending public funds in the search for additional 'mitigation' at this late date," the district court denied Mr. Gonzales's request for funding to retain a mitigation specialist in its entirety. *See* ROA 44–52.

On January 20, 2011, having been denied any funding to retain expert or investigative assistance, Mr. Gonzales filed his initial petition for writ of habeas corpus. ROA 53. Among other claims for relief, Mr. Gonzales alleged that trial counsel was ineffective for failing to investigate and present evidence that Mr. Gonzales suffers from Fetal Alcohol Spectrum Disorder (FASD) as a result of *in utero* exposure to drugs and alcohol ingested by his mother during pregnancy, ROA 79–81, and for failing to investigate and present evidence of the effects of sexual abuse he endured as a child at the hands of an older male cousin. ROA 81–86 (hereinafter "the *Wiggins*[9] claim"). Specifically, Mr. Gonzales alleged that trial counsel performed deficiently when they failed to obtain appropriate experts to assess Mr. Gonzales for FASD; failed to evaluate the impact of childhood sexual abuse, physical and emotional abuse, neglect, and rejection by caregivers; and failed to properly investigate and present evidence of the abuse despite numerous red flags known to counsel.

In support of the claim, Mr. Gonzales submitted a declaration by Dr. Richard S. Adler, M.D., the director of FASDExperts, a multidisciplinary assessment group that conducts forensic evaluations in cases of suspected Fetal Alcohol Spectrum Disorders. ROA 216–33. Dr. Adler conducted a preliminary review of the trial record, prior psychological test results of Mr. Gonzales, and other materials related to the trial; however, because the district court had denied Mr. Gonzales's motion for expert and investigative assistance, Dr. Adler was unable to conduct an evaluation of him. *Id*. After reviewing these materials, Dr. Adler concluded "that there is basis for

[9] *Wiggins v. Smith*, 539 U.S. 510 (2003).

further evaluation to determine definitively whether FASD is present or not." ROA 218. Dr. Adler summarized the "*abundant information*" available to trial counsel that supports "the conclusion that *FASD should be HIGHLY SUSPECTED and that a thorough diagnostic evaluation to address this should be undertaken*." ROA 220 (emphasis in original).

In addition, Mr. Gonzales submitted an affidavit by mitigation specialist Gerald Byington, ROA 225, attaching notes by the trial team's mitigation specialist reflecting that "[d]ue to the sexual nature of both crimes, [she] highly encourage[d]" an assessment for sexual offenders, and recommended Mark Steege, LCSW, LPC, a specialist in sexual disorders and sexual abuse. ROA 235. In addition to the explicit identification of the sexual abuse issue and recommendation for retention of a sexual abuse expert, Mr. Byington's affidavit includes numerous red flags that should have been pursued and developed by trial counsel. *See* ROA 225–32.

On January 25, 2011, five days after his initial habeas petition was filed with the district court, Mr. Gonzales filed a motion for authorization of funds to retain experts in support of his ineffective assistance of trial counsel claim and to perform the FASD and sexual abuse evaluations that trial counsel failed to pursue. ROA 341.

On January 31, 2011, the district court stayed the federal cause and sent Mr. Gonzales back to state court to exhaust any available state remedies for the unexhausted claims presented in his initial federal petition, noting that the new claims "ha[d] not yet been factually or legally developed." ROA 385; App. C.[10]

[10] The January 31, 2011 order (Electronic Filing Document 16) is inexplicably missing from the Fifth Circuit record in this case. It is attached as Appendix C.

On February 23, 2011, Mr. Gonzales filed a subsequent state habeas petition raising, *inter alia,* an ineffective assistance of trial counsel claim containing numerous allegations of ineffectiveness including "Lack of Fetal Alcohol Spectrum Disorders Expert." *See* ROA 383. Mr. Gonzales also filed a "Motion for Funding for Expert Assistance" in the successive state habeas proceeding. On February 1, 2012, the state court summarily dismissed the application for state habeas corpus relief as an abuse of the writ, and summarily dismissed the motion for funding in the same order. *See* ROA 394.

After the state court refused to hear his subsequent application and denied him funding to develop his ineffective assistance claims, Mr. Gonzales resumed the pending federal habeas proceedings. On September 14, 2012, the district court denied Mr. Gonzales's extant motion for expert funding and assistance. ROA 400, 405.

On October 25, 2012, Mr. Gonzales filed an amended federal habeas petition with the district court re-urging, *inter alia*, the ineffective assistance of counsel claim for which funding was requested. ROA 407. While the amended petition was pending before the district court, this Court decided *Trevino v. Thaler,* 569 U.S. 413 (2013), which held that Texas habeas petitioners who received ineffective assistance of counsel in state collateral proceedings may establish cause for procedural default of an ineffective assistance of *trial* counsel claim. On July 24, 2013, Mr. Gonzales filed a second motion to stay the federal cause and return to state court, ROA 604, which the district court denied the next day. ROA 610, 613.

On January 15, 2014, the district court entered a memorandum opinion and

order recommending that habeas relief be denied. ROA 621. The district court found many of the claims advanced by Mr. Gonzales procedurally defaulted, including the claim for which investigative and expert funding was requested. *Id.* The district court also denied a certificate of appealability ("COA"). *Id.* In April 2015, the Fifth Circuit affirmed, and denied a COA. *Gonzales v. Stephens,* 606 F. App'x 767 (5th Cir. 2015).

C. Rule 60(b)(6) Motion.

On March 21, 2018, this Court decided *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), holding that the Fifth Circuit had been consistently misconstruing the § 3599 "reasonably necessary" standard and placing an unduly onerous burden on federal habeas petitioners seeking to demonstrate an entitlement to funding.

On May 22, 2018, Mr. Gonzales filed a motion for relief from final judgment under Federal Rule of Civil Procedure 60(b)(6). In his Rule 60(b)(6) motion, Mr. Gonzales argued that the district court's repeated denial of his expert funding requests under an erroneous legal standard resulted in a defect in the integrity of Mr. Gonzales's federal proceedings that warranted reopening. Mr. Gonzales requested reconsideration of his requests for funding and argued that, under the proper reading of § 3599, he could demonstrate that the requested funding was reasonably necessary for his representation.

On July 3, 2018, the district court ruled that the motion was an unauthorized successive habeas petition and, in the alternative, found that Mr. Gonzales did not establish "extraordinary circumstances" warranting relief under Rule 60(b)(6). Reciting the Fifth Circuit's long-held rule that "a change in decisional law does not,

on its own, constitute an extraordinary circumstance warranting relief from judgment," the district court pointed out that Mr. Gonzales (as required by circuit precedent) "acknowledge[d] that the change in decisional law effectuated by *Ayestas* is insufficient, on its own, to demonstrate an extraordinary circumstance." ROA 854–55.

Mr. Gonzales then filed an appeal and sought a COA, challenging both the district court's characterization of the Rule 60(b) motion as a successive habeas petition and the alternative merits adjudication.

On September 17, 2019, the Fifth Circuit denied a certificate of appealability related to the district court's denial of the Rule 60(b)(6) motion on the merits.[11] The Fifth Circuit held that "courts consistently recognize that a change in law after final judgment on a habeas petition does not necessarily constitute extraordinary circumstances." *Gonzales v. Davis*, 788 F. App'x 250, 253 (5th Cir. 2019). The lower court, while acknowledging Justice Sotomayor's statement in *Crutsinger*, specifically invoked binding circuit precedent imposing a categorical bar to Rule 60(b)(6) relief in similar circumstances: "Supreme Court decisions changing governing law on procedural default did not constitute extraordinary circumstances." *Id.* (citing *Adams v. Thaler*, 679 F.3d 312–20 (5th Cir. 2012)). Thus, "the change in decisional law brought about in *Ayestas*" could not qualify as an extraordinary circumstance in the court below. *Id.*

[11] Because controlling circuit precedent "squarely establishes" that the motion "[was] not a successive petition," *see Crutsinger v. Davis*, 929 F.3d 259, 264–66 (5th Cir. 2019), the Fifth Circuit also granted COA and vacated the initial portion of the district court's order dismissing the motion as successive.

The Fifth Circuit noted that it had previously "rejected [Mr.] Gonzales's contention that his state habeas counsel was ineffective" and held that Mr. Gonzales "failed to raise a substantial claim of ineffective assistance of trial counsel." *Gonzales*, 788 F. App'x at 253 (citing prior opinion in *Gonzales v. Stephens*, 606 F. App'x 767, 772 (5th Cir. 2015)). Relying "[o]n th[o]se facts," the Fifth Circuit held that "no reasonable jurist could conclude that the district court abused its discretion in finding no extraordinary circumstances exist." *Id.* This petition arises from the appeal of the denial of that motion.

REASONS FOR GRANTING THE WRIT

I. The federal Courts of Appeal are irreconcilably split on the issue of whether a change in decisional law alone may justify Rule 60(b)(6) relief.

Recently, Justice Sotomayor issued a statement respecting the denial of certiorari in another Texas capital case in which she called into question the Fifth Circuit's rule that subsequent changes in decisional law can never be an "extraordinary circumstance" warranting reopening of a final judgment under Rule 60(b)(6). *Crutsinger v. Davis*, 140 S. Ct. 2 (2019) (Sotomayor, J., respecting denial of certiorari). Justice Sotomayor "note[d] [the] potential tension between this Court's decision in *Gonzalez*[12] and the Fifth Circuit's [categorical rule]." *Crutsinger*, 140 S. Ct. at 2. Though rejecting the vehicle presented in *Crutsinger*, Justice Sotomayor also pointed to an apparent circuit split on the issue, *id.* at 3, and suggested that application of the Fifth Circuit's rule "may cause friction with *Gonzalez*" and, "[i]n an

[12] *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

appropriate case … could warrant the Court's review." *Id.*

As Justice Sotomayor observed, several Circuit Courts of Appeal—the Second, Third, Seventh and Ninth Circuits—recognize that a change in law may constitute an extraordinary circumstance warranting relief under Rule 60(b)(6), while at least three others have adopted the categorical, contrary rule that a change in law *can never* be an extraordinary circumstance justifying reopening. This categorical rule conflicts not only with the law of other circuits but also with this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

The Fifth Circuit has adopted such a categorical rule. *See Adams v. Thaler*, 679 F.3d 312, 319–20 (5th Cir. 2012) ("[A] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment under Rule 60(b)(6).").

Further, the Fifth, Ninth, and Eleventh Circuits have explicitly grounded their conflicting precedent in diametrically opposed, irreconcilable interpretations of *Gonzalez*. *Compare Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) ("The Supreme Court directly refuted [a *per se*] rule in [*Gonzalez*].") *with Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) ("[T]he U.S. Supreme Court has … told us that a change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)."), *accord Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012). And the Third and Seventh Circuits have each expressly disavowed the Fifth Circuit's categorical rule. *See infra.* Because there exists a clear and well-established split among the circuits, Mr. Gonzales respectfully requests that

certiorari be granted to clarify the proper interpretation of *Gonzalez* and Rule 60(b)(6), dispel confusion between and amongst the lower courts,[13] and correct the Fifth Circuit's overly-restrictive approach to Rule 60(b)(6) review.

A. At least four Circuit Courts of Appeal recognize the possibility of Rule 60(b)(6) relief based on a change in the law.

In the Second, Third, Seventh, and Ninth Circuit Courts of Appeal, a change in decisional law alone may justify Rule 60(b)(6) relief. Moreover, both the Third and Seventh Circuits have explicitly considered and rejected the categorical rules of the Fifth and Eleventh Circuits in published decisions, further entrenching the circuit split here.

1. Second Circuit

The Second Circuit has recognized that, "as a general matter, a mere change in decisional law does not constitute an 'extraordinary circumstance' for the purposes of Rule 60(b)(6)." *In re Terrorist Attacks on September 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013) (citation omitted). However, in the Second Circuit, "[t]hat general rule … is not absolute." *Id.* (granting relief under Rule 60(b)(6) on motion based on two conflicting opinions of the Circuit, one overruling the other).

2. Third Circuit

In the Third Circuit, the Court of Appeals "ha[s] not foreclosed the possibility that a change in controlling precedent, even standing alone, might give reason for

[13] In at least two circuits, various opinions seem to fall on either side of the established split without overruling or abrogating each other. *Compare, e.g.*, *Henness v. Badgley,* 766 F.3d 550, 557 (6th Cir. 2014) ("a change in decisional law is usually not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief.") *with Zagorski v. Mays*, 907 F.3d 901, 905 (6th Cir. 2018) ("we have determined that changes in decisional law alone do not establish grounds for Rule 60(b)(6) relief"). The Tenth Circuit's internal conflict is discussed *infra*.

60(b)(6) relief." *Cox v. Horn*, 757 F.3d 113, 121 (3d Cir. 2014) (examining and rejecting the Fifth and Eleventh Circuits *per se* rules to the contrary). In *Cox,* the Third Circuit held that "[the Fifth Circuit's rule in] *Adams* does not square with our approach to Rule 60(b)(6)" and the district court "abused its discretion when it based its decision solely on the reasoning of *Adams*." *Cox*, 757 F.3d at 120–21, 124. The Third Circuit also warned that "the Eleventh Circuit extracts too broad a rule from *Gonzalez*, which … did not say that a new interpretation of the federal habeas statutes—much less, the equitable principles invoked to aid their enforcement—is *always* insufficient to sustain a Rule 60(b)(6) motion." *Id*. at 123.

3. Seventh Circuit

The Seventh Circuit has explicitly "rejected the absolute position that the Fifth Circuit's *Adams* decision may have reflected, to the effect that intervening changes in the law *never* can support relief under Rule 60(b)(6)." *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015) (emphasis in original). Instead, the Seventh Circuit embraced the Third Circuit's "flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a postjudgment change in the law, that takes into account all the particulars of a movant's case." *Id*. at 850–51 (quoting *Cox*, 757 F.3d at 122).

4. Ninth Circuit

The Ninth Circuit has also explicitly held that "a change in the controlling law can—but does not always—provide a sufficient basis for granting relief under Rule 60(b)(6)." *Henson v. Fidelity National Financial, Inc.,* 943 F.3d 434 (9th Cir. 2019) (citing *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009)). In *Phelps*, the Ninth

Circuit considered and rejected its prior "*per se* rule that Rule 60(b)(6) motions cannot be predicated on intervening changes in the law." *Phelps*, 569 F.3d at 1133 (overruling *Tomlin v. McDaniel*, 865 F.2d 209 (9th Cir. 1989)). The Ninth Circuit determined that the *per se* rule was "no longer good law" because "[this] Court directly refuted" that approach in *Gonzalez*, and endorsed in its place "a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Id.* (quoting *Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007)).

B. The Fourth, Fifth, Sixth, and Eleventh Circuits have adopted a contrary, categorical rule rejecting the possibility of Rule 60(b)(6) relief under the same decision of this Court.

On the other side of the split, the Fourth and Eleventh Circuits have joined the Fifth Circuit in refusing to recognize that a change in the law may provide a basis for relief under Rule 60(b)(6). Justice Sotomayor also counts the Sixth Circuit among those that "appear to have announced a contrary, categorical rule." *See Crutsinger,* 140 S. Ct. at 3 (citing, *inter alia*, *Zagorski v. Mays*, 907 F.3d 901, 905 (6th Cir. 2018) ("we have determined that changes in decisional law alone do not establish grounds for Rule 60(b)(6) relief")).[14] The fact that the Fifth and Eleventh Circuits base their

[14] Earlier Sixth Circuit decisions seem to have left open the possibility that a change in law may permit the re-opening of final judgments under Rule 60(b)(6) in some cases. *See, e.g.*., *McGuire v. Warden*, *Chillicothe Corr. Inst*., 738 F.3d 741, 750 (6th Cir. 2013) ("a change in decisional law is *usually* not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief") (citations omitted, emphasis supplied); *Henness v. Badgley,* 766 F.3d 550, 557 (6th Cir. 2014) (same). However, without explicitly overruling *McGuire*, *Henness*, and other cases with similar holdings, the Sixth Circuit has more recently announced a categorical rule more in line with the Fifth and Eleventh Circuits, as noted by Justice Sotomayor. *See, e.g., Zagorski*, 907 F.3d 901 at 905 ("we have determined that changes in decisional law alone do not establish grounds for Rule 60(b)(6) relief") (citing *Abdur'Rahman v.*

rule on a misinterpretation of this Court's precedent provides an additional reason why certiorari should be granted here.

1. Fourth Circuit

In the Fourth Circuit, it is settled that "a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." *See, e.g.*, *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016) (citation omitted).

2. Fifth Circuit

Fifth Circuit precedent has long held that "a change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment under Rule 60(b)(6)." *Adams*, 679 F.3d at 319 (citation omitted); *see also Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013); *Crutsinger v. Davis*, 936 F.3d 265, 270 (5th Cir. 2019) (Fifth "Circuit precedent ... squarely forecloses [such a] claim").

The Fifth Circuit's Rule 60(b)(6) jurisprudence rests on an exaggerated and overbroad reading of *Gonzalez*, categorically refusing to consider changes in law as a basis for Rule 60(b)(6) relief. *See*, *e.g.*, *Adams*, 679 F.3d at 320 (change in law "does not constitute an 'extraordinary circumstance' *under Supreme Court and* our precedent to warrant Rule 60(b)(6) relief") (citing *Gonzalez*, 545 U.S. at 536) (emphasis supplied). But again, this Court has never announced such a categorical rule; if anything, *Gonzalez* should be read to the contrary, as Justice Sotomayor's statement in *Crutsinger* made clear. *Crutsinger*, 140 S. Ct. at 2–3 ("*Gonzalez* left open

Carpenter, 805 F.3d 710, 714 (6th Cir. 2015)).

the possibility that in an appropriate case, a change in decisional law, alone, may supply an extraordinary circumstance justifying Rule 60(b)(6) relief.")

3. Eleventh Circuit

Like the Fifth Circuit, the Eleventh Circuit erroneously couches its categorical approach in this Court's own precedent. Mischaracterizing *Gonzalez* itself as announcing a *per se* rule, the Eleventh Circuit has held that "the U.S. Supreme Court has … told us that a change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)." *Arthur*, 739 F.3d at 631. This interpretation of *Gonzalez* is in direct conflict with the Ninth Circuit's approach; more importantly, as Justice Sotomayor recently made clear, this Court has told the lower courts no such thing. Instead, *Gonzalez* explicitly "left open the possibility that in an appropriate case, a change in decisional law, alone, *may* supply an extraordinary circumstance justifying Rule 60(b)(6) relief." *Crutsinger*, 140 S. Ct. at 2–3 (emphasis supplied).

C. In the First, Eighth, and Tenth Circuits the law is less clear.

While other circuits may not have squarely decided the question,[15] relevant dicta and other Rule 60(b)(6) decisions in each circuit indicate that the First, Eighth, and Tenth Circuits do not favor or impose a categorical bar to Rule 60(b)(6) relief on the basis of a change in the law. *See Biggins v. Hazen Paper Co.*, 111 F.3d 205, 211 (1st Cir. 1997) (while "case law is very hostile to using a mistake of state law, still less a *change* in state common law, as grounds for a motion to reopen a final judgment

[15] The District of Columbia Circuit has yet to issue a relevant opinion from which a position can be drawn.

under Rule 60(b)(6) ... the door is not quite closed" to relief); *Ungar v. Palestine Liberation Organization*, 599 F.3d 79, 84–85, 87 (1st Cir. 2010) (reversing a lower court order that erroneously "focused on what it improvidently believed to be a categorical bar to relief," because the First Circuit has "never laid down an explicit, broad-scale categorical rule concerning willful defaults in the Rule 60(b)(6) milieu" and "the flexible nature of Rule 60(b)(6) does not lend itself to a categorical bar to relief").

The Eighth Circuit has not announced a clear rule governing consideration of Rule 60(b)(6) motions in the context of a change in relevant law, but its precedent suggests a rejection of a categorical bar against reopening. *See Cornell v. Nix*, 119 F.3d 1329, 1333 (8th Cir. 1997) (considering whether *Schlup v. Delo,* 513 U.S. 298 (1995) "[was] a change in the law constituting sufficient extraordinary circumstances to warrant relief from a judgment under Rule 60(b)"). The court seems to implicitly acknowledge that a change in law *can* constitute an extraordinary circumstance for Rule 60(b)(6) purposes while performing case-specific analyses of such motions. *See, e.g.*, *Williams v. Kelley*, 854 F.3d 1002, 1008 (8th Cir. 2017) (discussing rules that apply "[w]hen a petitioner seeks Rule 60(b) relief based on a subsequent change in substantive law" but finding the instant motion instead a substantive attack on the merits of a prior resolution and therefore barred by *Gonzalez*).

The Tenth Circuit appears not to have addressed the question in the capital habeas or criminal context, but has acknowledged "that Rule 60(b)(6) is the appropriate mechanism for addressing a change in the law subsequent to the entry

of final judgment" in certain circumstances. *See Dowell by Dowell v. Board of Educ. of Oklahoma City Public Schools, Independent Dist. No. 89, Oklahoma City, Okl.*, 8 F.3d 1501, 1509 (10th Cir. 1993) (recognizing "that Rule 60(b)(6) is the appropriate mechanism for addressing a change in the law subsequent to the entry of final judgment … [where] without the benefit of the change in the law, the parties might not have developed essential aspects of the record") (citing *Wilson v. Al McCord Inc.*, 858 F.2d 1469, 1478 (10th Cir. 1988))). However, that same year, a different panel of the same circuit noted that "[a]bsent a post-judgment change in the law *in a factually-related case*, however, 'we have held that a change in the law or in the judicial view of an established rule of law' does not justify relief under Rule 60(b)(6).'" *Johnston v. Cigna Corp.*, 14 F.3d 486, 497 (10th Cir. 1993) (quoting *Van Skiver v. United States,* 952 F.2d 1241, 1245 (10th Cir. 1991) (quoting *Collins v. City of Wichita,* 254 F.2d 837, 839 (10th Cir. 1958)) (emphasis supplied),

D. The Fifth Circuit's approach to Rule 60(b)(6) relies on an erroneous interpretation of *Gonzalez v. Crosby* and conflicts with this Court's holding in *Gonzalez*, as several sister circuits have recognized.

As Justice Sotomayor observed, "*Gonzalez* left open the possibility that in an appropriate case, a change in decisional law, alone, may supply an extraordinary circumstance justifying Rule 60(b)(6) relief," and the Fifth Circuit's categorical rule to the contrary stands "in potential tension" with this Court's decision in *Gonzalez. Crutsinger,* 140 S. Ct. at 2–3. Justice Sotomayor noted that, in direct conflict with the Fifth Circuit, "[s]everal circuits recognize that a change in decisional law, by itself, may justify Rule 60(b)(6) relief." *Id*. at 3 (citing *Cox*, 757 F.3d at 121 (3d Cir. 2014)

and *Ramirez*, 799 F.3d at 850 (7th Cir. 2015)).

The Third and Seventh Circuits have both asserted that the Fifth Circuit's categorical bar to Rule 60(b)(6) relief in this context is based on an incorrect and overbroad reading of this Court's decision in *Gonzalez*. The Third Circuit has explicitly rejected the Fifth Circuit's approach and affirmed that its own permissive rule "retains vitality post-*Gonzalez*." Cox, 799 F.3d at 124. In fact, a district court in the Third Circuit "abuse[s] its direction when it base[s] its decision solely on the reasoning of *Adams*" to deny a Rule 60(b)(6) motion because "*Adams* does not square with [the Third Circuit's] approach to Rule 60(b)(6)." *See id.* at 121, 124; *see also Ramirez*, 799 F.3d at 850 ("agree[ing] with the Third Circuit's ... reject[ion] [of] the absolute position that the Fifth Circuit's decision in *Adams* may have reflected").

The Ninth Circuit correctly interpreted *Gonzalez* to overrule that circuit's prior categorical rule, holding that "[t]he [prior] *per se* rule that Rule 60(b)(6) motions cannot be predicated on intervening changes in the law was, however, no longer good law. The Supreme Court directly refuted [that] rule in ... *Gonzalez v. Crosby*." *Phelps*, 569 F.3d at 1132; *see also id.* at 1133 ("*Gonzalez* and [a *per se* rule] are clearly irreconcilable in their analytical approaches to Rule 60(b)(6).").

This clear and entrenched conflict among the circuits is therefore both well-established and precisely the sort of situation that calls for clarification, and for that reason Mr. Gonzales respectfully requests that certiorari be granted.

II. This case presents an ideal vehicle to resolve the circuit split on this issue.

In her statement respecting denial of certiorari in *Crutsinger*, Justice Sotomayor observed that the case "did not pivot" on the Fifth Circuit's categorical rule and thus was not an appropriate case for reviewing the question, but concluded that "[i]n an appropriate case, this issue could warrant the Court's review." 140 S. Ct. at 3. Unlike *Crutsinger*, Mr. Gonzalez's case *did* pivot on the Fifth Circuit's categorical rule, and thus presents an appropriate case to review this issue.

A. This Court's correction in *Ayestas* of the Fifth Circuit's unduly burdensome standard applicable to funding requests under 18 U.S.C. § 3599 constitutes precisely the sort of "change in law" that should justify relief under Rule 60(b).

In *Ayestas*, this Court held that the Fifth Circuit had been incorrectly imposing a higher burden on funding applicants than is required by the proper reading of § 3599. While the language of § 3599 requires a showing of "reasonabl[e] necess[ity]" and no more, "[t]he Fifth Circuit's [prior] test—'substantial need'—is arguably more demanding." *Ayestas*, 138 S. Ct. at 1093. This Court held that "the Fifth Circuit exacerbated the problem by invoking precedent to the effect that a habeas petitioner seeking funding must present a viable constitutional claim that is not procedurally barred." *Id.*

Mr. Gonzales's Rule 60(b)(6) motion sought reopening based on the *Ayestas* decision and requested restoration to the point at which he requested funding under § 3599 for consideration of his requests under the correct test. The "change in law" on which Mr. Gonzales's Rule 60(b)(6) motion is based is therefore not a change in interpretation of the complex and labyrinthine statutes setting forth habeas

requirements, like the one rejected in *Gonzalez*. Instead, Mr. Gonzales relies on an this Court's clarification of the proper standard by which to evaluate funding requests under 18 U.S.C. § 3599, an explicit rejection of the Fifth Circuit's established long-held misapplication of clearly defined Congressional intent as codified in federal statute.

B. The change in the law raised in Mr. Gonzales's motion for Rule 60(b)(6) relief implicates the integrity of the federal habeas proceedings and warrants reopening in the interests of justice.

The district court denied Mr. Gonzales investigative and expert funding under an erroneously heightened standard, yet faulted Mr. Gonzales for failing to prove that his sentencing-phase ineffective assistance of trial counsel ("*Wiggins*") claim was meritorious in the request for funding to investigate the underlying basis of that very ineffectiveness claim. This approach is clearly wrong under the proper application of § 3599, as this Court made clear in *Ayestas*. *See* 138 S. Ct. 1080 ("a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks") (emphasis in original). This Court's decision in *Ayestas* was a "change" of the sort that, in the interests of justice, should warrant reopening for correct application of the law.

A claim that trial counsel rendered ineffective assistance of counsel at the penalty phase of a capital trial necessarily requires the petitioner to produce and present the evidence that prior counsel unreasonably failed to develop. *See*, *e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (observing that assessment of *Strickland*[16]

[16] *Strickland v. Washington*, 466 U.S. 668 (1984).

prejudice entails reweighing "the evidence in aggravation against the totality of available mitigating evidence," including evidence that trial counsel "failed to discover and present"). Thus, without the funding to develop the evidentiary basis in support of his claim, Mr. Gonzales could neither prove the claim on the merits nor establish cause and prejudice to overcome the procedural default. *See Martinez v. Ryan*, 566 U.S. 1, 11–12 (2012) (observing that "[c]laims of ineffective assistance at trial often require investigative work," and that a prisoner needs "an effective attorney" to present a claim of ineffective assistance at trial because "the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record").

Mr. Gonzales requested investigative funding under § 3599(f) to develop evidence in support of his undeveloped, unexhausted *Wiggins* claim, pointing to trial counsel's "failure to obtain proper experts to present mitigation evidence, failure to obtain a fetal alcohol spectrum disorders (FASD) expert, and failure to obtain sexual, emotional, physical, biological, and abuse expert." ROA 341. Mr. Gonzales cited to 18 U.S.C. § 3599 and argued, consistent with the appropriate standard, that the requested expert assistance "is reasonably necessary for the representation of the Petitioner in this cause." *Id.* In support of the request, Mr. Gonzales attached an affidavit of Dr. Richard Adler to demonstrate that a claim of potential merit existed and to demonstrate that "the expert assistance requested is ... reasonably necessary for ... counsel's ability to adequately represent the Petitioner according to the mandates of 18 U.S.C. § 3599, *McFarland,* and *Ake*." ROA 347–49. Mr. Gonzales

also proffered the affidavit of a mitigation specialist identifying the "red flags" that warranted engaging expert assistance and evaluation. ROA 344–47 (citing to Exhibit 11 (affidavit of Gerald Byington, LMSW)).

In granting a stay of the federal proceedings and allowing Mr. Gonzales to return to state court to attempt to exhaust his ineffective assistance of counsel claim, the district court acknowledged that Mr. Gonzales had "furnished ... a highly detailed recitation of the reasons for believing [he] suffers from fetal alcohol syndrome." App. C at 9. However, after the state court dismissed Mr. Gonzales's application as a subsequent habeas application and denied his request for funding, the district court—bound by then-existing Fifth Circuit precedent—denied Mr. Gonzales's funding motions. As a result, Mr. Gonzales was forced to plead the still-undeveloped claim in his amended federal petition.

Having denied Mr. Gonzales *any* funding whatsoever to conduct an evaluation of whether he suffers from FASD or to investigate the effects of childhood sexual abuse, the district court then proceeded to deny the claim on the merits because Mr. Gonzales failed to show that "any qualified mental health expert has ever diagnosed petitioner with [FASD]," ROA 691, or to show "exactly what other expert testimony was available" at the time of his trial related to the mental health consequences of sexual trauma. ROA 701. But habeas counsel provided the courts in this case with affidavits and testimony indicating that (1) trial counsel knew, but did not investigate, that Mr. Gonzales's mother was observed abusing numerous substances while pregnant; (2) a leading expert in the diagnosis of FASD reviewed materials in

the case, found that "there is abundant evidence to support the conclusion that FASD should be HIGHLY SUSPECTED," and recommended testing;[17] (3) trial counsel knew, but did not substantiate, that Mr. Gonzales had been sexually abused as a child; and (4) despite explicit encouragement from the trial mitigation specialist to do so, trial counsel failed to engage an expert on sexual abuse to explain how Mr. Gonzales's own past trauma related to the facts of the offense. Yet the district court repeatedly denied Mr. Gonzales *any* funding to investigate these claims in postconviction. The fact that his claims may not have appeared substantial to the district court is the direct result of the district court's denial of funding, and the lack of substantiation a natural consequence for which he is not at fault.

In denying Mr. Gonzales a certificate of appealability as to the district court's denial of his Rule 60(b)(6) motion, the Fifth Circuit again referred back to its prior COA denial in this case to remind that it "ha[d] already rejected Gonzales's contention that state habeas counsel was ineffective." *Gonzales*, 788 F.3d at 253–54. But the Fifth's Circuit prior rejection was of an unfunded, undeveloped claim on a record deprived of supporting evidence by the denial of funding. The lower courts' rejection of Mr. Gonzales's claims for failing to develop evidence in support of his ineffective assistance of counsel claim is precisely the type of "cart before the horse" analysis rejected by this Court in *Ayestas*.

Ayestas wrought the specific sort of change in the law—one that removes unjustified impediments to developing of essential aspects of the record—that might

[17] ROA 220.

arguably justify Rule 60(b)(6) relief in another circuit. *See Dowell,* 8 F.3d at 1509 (recognizing "that Rule 60(b)(6) is the appropriate mechanism for addressing a change in the law subsequent to the entry of final judgment ... [where] without the benefit of the change in the law, the parties might not have developed essential aspects of the record.")

Because the change in law providing the basis of Mr. Gonzales's Rule 60(b)(6) motion occurred when this Court corrected the Fifth Circuit's § 3599 approach in *Ayestas*, and because the record in this case clearly establishes that the application of the erroneous § 3599 standard is inextricably intertwined with the underlying substance and ultimate resolution of the undeveloped *Wiggins* claim, Mr. Gonzales respectfully submits that this case is an ideal vehicle in which to resolve the circuit split regarding when, if ever, a change in law may warrant Rule 60(b)(6) relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 14th day of February, 2020,

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