No. 19-7645

IN THE

Supreme Court of the United States

RAMIRO F. GONZALES,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether this case is a viable vehicle to determine whether a change in decisional law alone may constitute an "extraordinary circumstance" under Federal Rule of Civil Procedure 60(b)(6), given that the legal standard rejected in this Court's new decisional law had not been applied in Petitioner's habeas application.

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BRIEF IN OPPOSITION

Ramiro Gonzales, a capitally-sentenced state inmate proceeding in federal habeas, sought, pursuant to 18 U.S.C. § 3599(f), almost 200 hours of expert assistance at no less than $36,000 to prove two things—that he has Fetal Alcohol Spectrum Disorder (FASD) and that another expert could have testified "synergistically" about the impact of various forms of abuse he suffered as a child. With this evidence, Gonzales alleges that he could prove trial counsel's ineffectiveness in discovering and presenting mitigation evidence. The district court denied Gonzales's funding requests. Despite this, Gonzales managed to present evidence from a FASD expert and a mitigation specialist to bolster his ineffective-assistance-of-trial-counsel (IATC-mitigation) claim.

The district court ultimately found that the IATC-mitigation claim was procedurally defaulted and, alternatively, that it failed on the merits under de novo review. Gonzales then sought a certificate of appealability (COA) in the Fifth Circuit as to the IATC-mitigation claim and another claim not before this Court, but he did not challenge the expert-funding issue until the petition-for-rehearing stage. This Court denied certiorari.

Two months after *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), was handed down, Gonzales moved to reopen his case under Rule 60(b)(6) of the Federal Rules of Civil Procedure asking for extraordinary relief regarding his funding

request as it related to his IATC-mitigation claim. The district court denied Gonzales's Rule 60(b) motion as successive, but on alternative grounds denied his motion on the merits. The Fifth Circuit panel denied Gonzales's request for a certificate of appealability on the district court's determination that Gonzales was not entitled to relief under Rule 60(b)(6).

STATEMENT OF THE CASE

I. Facts of the Crime

A Texas jury sentenced Gonzales to death for the cold-blooded murder of a young woman. There is no dispute about the facts underlying his crime and conviction:

> On January 15, 2001, Gonzales went to the home of his drug supplier, hoping to steal cocaine. Only his supplier's girlfriend, Bridget Townsend, was at the home, so he tied her up and stole what cash he could find, but did not find any drugs. He then carried the bound Townsend to his pickup truck, drove her out to the large ranch on which he lived, retrieved a hunting rifle, and marched Townsend out into the deserted brush. When he started loading the rifle, Townsend told Gonzales that she would give him money, drugs, or sex if he would spare her life. In response, Gonzales unloaded the rifle and took Townsend back to his truck, where he had sex with her. After she dressed, he reloaded the rifle, walked her back into the brush, and shot her. He left her body where it fell. Gonzales eventually confessed to his crimes.
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> At trial, a jury found Gonzales guilty of capital murder as charged. During the punishment phase, the prosecution called various witnesses in an effort to show that Gonzales did not feel remorse for his crime, had a history of bad conduct, did not suffer from mental illnesses, and would likely continue to be violent in prison. Among other witnesses, the prosecution called a woman whom Gonzales had abducted at knifepoint, brutally raped, and

locked in a closet on the same ranch where he had earlier killed Townsend. It was while he was in custody for those crimes that Gonzales confessed to having murdered Townsend. The prosecution also called Dr. Edward Gripon, a forensic psychiatrist, who testified that there was a serious risk Gonzales would continue to commit acts of violence in the prison setting. Dr. Gripon acknowledged that predictions of future dangerousness were highly controversial and that the American Psychiatric Association had taken the position that such predictions are unscientific and unreliable, but maintained that forensic psychiatrists as a whole believed that they were qualified to make such predictions.

The defense called a number of witnesses during the punishment phase as well, focusing primarily on Gonzales's family history and upbringing. Various witnesses testified that Gonzales was effectively abandoned by his mother and was left on a large ranch to be raised by his maternal grandparents, who often provided inadequate or no supervision throughout his childhood. Several of Gonzales's relatives testified that Gonzales's mother frequently drank alcohol, huffed spray paint, and abused drugs throughout her pregnancy and twice attempted to abort Gonzales. Numerous witnesses also detailed the physical and sexual abuse that Gonzales suffered throughout his childhood, including being kicked by his mother's boyfriend, being sexually abused by an older male cousin, and having a sexual relationship with an eighteen-year-old woman when he was twelve or fourteen years old.

The defense also called Dr. Daneen Milam, a neuropsychologist and sex offender treatment provider, to testify as to Gonzales's mental health. Dr. Milam explained that she had conducted a ten-hour neuropsychological examination of Gonzales; reviewed "literally stacks of records," including school records, probation records, and incident reports; went to the ranch on which Gonzales grew up, where she spoke with his grandparents, his cousin, and the ranch manager; and reviewed all of the interviews conducted by the defense team's mitigation investigator. Dr. Milam testified that from her evaluation, she found no evidence of brain damage, "none whatsoever." She said that Gonzales's IQ and brain were within normal limits, in spite of all of his and his mother's drug use. Dr. Milam stated that

> educational records indicated Gonzales was developmentally delayed but that he started off with a normal brain. She opined that Gonzales "basically raised himself," which led him to have the emotional maturity of someone who is thirteen or fourteen years old. Dr. Milam also testified that some of the tests she attempted to conduct on Gonzales were invalid because he clearly tried to come across as mentally ill. She was able to conclude, however, that while Gonzales exhibited some schizotypal and antisocial personality features, his primary diagnosis was "reactive attachment disorder." Dr. Milam explained that reactive attachment disorder is due entirely to environmental factors wherein a young child was not able to form a stable, emotional bond with any adult and leads to being immature, insecure, solitary, and manipulative later in life. Dr. Milam next discussed Gonzales's mother's drug use while pregnant with Gonzales and the abuse Gonzales suffered as a child. Dr. Milam testified that Gonzales was probably in the top 10% of emotionally damaged children and now likely could be diagnosed with antisocial personality disorder, but stated that Gonzales was not mentally ill, had a normal IQ, and was not [intellectually disabled].
>
> In their closing argument during the punishment phase, defense counsel focused on the evidence that Gonzales essentially raised himself; was exposed to alcohol, marijuana, and paint fumes in utero; was sexually abused by a cousin starting at the age of four or six; started drinking and doing drugs at eleven; was sexually abused by an older woman at twelve or thirteen; and was sentenced to life in prison at just eighteen. In its rebuttal argument, the prosecution referenced Dr. Gripon's testimony as to future dangerousness and suggested that Gonzales's mother's use of drugs while pregnant with Gonzales was meaningless because there was no evidence that it affected him.
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> The jury unanimously made the findings required for capital punishment in Texas, and the judge entered a sentence of death.

Gonzales v. Stephens, 606 F. App'x 767, 768–70 (5th Cir. 2015) (footnote omitted).

II. Procedural History

A. Postconviction proceedings

Following an unsuccessful direct appeal, ROA.895–921, and state habeas proceeding, ROA.2327–28, Gonzales moved for appointment of federal habeas counsel, ROA.8–10. Germane to this appeal, Gonzales's first funding request was filed pre-petition. ROA.38–39. He asked for $7,500 for a mitigation specialist. ROA.38–39. The district court denied the request without prejudice. ROA.41–49.

Gonzales proceeded to file his initial petition, which included the claims relevant here—that trial counsel were ineffective for failing to retain and call experts in the fields of FASD and "sexual, emotional, physical, [and] biological abuse." ROA.71–83. As support for these claims, Gonzales attached a declaration from a physician who concluded "there is abundant information to support the conclusion that FASD should be HIGHLY SUSPECTED" and explained that it would cost anywhere from $29,500 to $36,000 to determine if Gonzales has FASD. ROA.216–20. Gonzales also supported the claims with an affidavit from a mitigation specialist detailing the trial team's mitigation investigation and explaining where he felt it came up short, including a failure to retain another expert. ROA.222–30.

Gonzales asked for the following funding: $6,375 for a mitigation specialist; $29,500 to $36,000 for FASD experts and neuroradiological testing;

and $850 for an expert to discuss "the significance of [Gonzales's] emotional, physical, and biological abuses and neglect factors." ROA.341–51. He also sought reimbursement for the work already done by the mitigation specialist retained by federal habeas counsel. ROA.352–60. The district court denied Gonzales's funding requests without prejudice. ROA.400–06.

Gonzales next filed his amended petition, again complaining of counsel's supposedly ineffective assistance vis-à-vis failing to retain and present certain experts at trial. ROA.425–37. The Director answered. ROA.521–600. The parties provided supplemental briefing in light of intervening Supreme Court precedent—*Trevino v. Thaler*, 569 U.S. 413 (2013). ROA.601–08, 615–20. After considering the pleadings and evidence, the district court denied federal habeas relief and a COA in a thorough memorandum opinion. ROA.621–714.

On appeal, Gonzales challenged the denial of relief by seeking COAs on his two expert-ineffective-assistance claims and his claims of trial court error concerning the admission of future dangerousness testimony from the State's expert. Brief in Support of Application for Certificate of Appealability 1–53, *Gonzales v. Davis*, 606 F. App'x 767 (No. 14-70006). Gonzales raised no complaint concerning the denial of funding. *See id.* The Fifth Circuit denied him his requested COAs. *Gonzales*, 606 F. App'x at 771–75. This Court denied his petition for writ of certiorari. *Gonzales v. Stephens*, 136 S. Ct. 586 (2015).

B. Gonzales's motion for relief from judgment

This Court decided *Ayestas v. Davis* on March 21, 2018. *See* 138 S.Ct. 1080. Two months later, Gonzales moved to reopen his case under Federal Rule of Civil Procedure 60(b)(6). ROA.745–89. In the motion, he claimed that the district court had used an unnecessarily high standard in denying his funding requests and asked the court to "grant him the previously-requested funding." ROA.752. According to Gonzales, this erroneous application of the funding standard was an exceptional circumstance warranting reopening of his habeas proceeding. ROA.784. He claimed that, under a proper reading of the funding statute, he was entitled to all the funding he previously requested. ROA.785–88. The Director opposed. ROA.806–16.

The district court declined to reopen the habeas proceeding. ROA.848–57. The district court found that Gonzales failed to show extraordinary circumstances that would justify reopening the final judgment. ROA.853. It noted that Gonzales primarily relied on a change in law, *Ayestas*, which is alone insufficient to warrant relief. ROA.854. But even if a change in law were sufficient, the district court explained, it has ""never cited nor relied on the 'substantial need' test denounced in *Ayestas*." ROA.854. Further, the district court found that there were no other factors indicating extraordinary circumstances, in part because Gonzales received merits adjudication of his ineffective-assistance claims, he did not raise the denial of funding on appeal,

and he could have filed his motion for relief from judgment much sooner given that the district court had not relied on the erroneous funding standard. ROA.855–56.

Gonzales asked for a COA on his ineffective assistance of trial counsel claims. Appl. COA 2; Appeal & Br. Supp. Appl. COA 23–36 [hereinafter "Pet'r Br."].[1] The Fifth Circuit, in denying a COA, stated, "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) (emphasis added) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005); *Adams v. Thaler*, 679 F.3d 312, 312–20 (5th Cir. 2012)). The Fifth Circuit panel denied Gonzales's request for a certificate of appealability on the district court's determination that Gonzales was not entitled to relief under Rule 60(b)(6) due to finding no extraordinary circumstances exist. *Gonzales*, 788 F. App'x at 253–54.

REASONS FOR DENYING THE WRIT

I. This case would be a poor vehicle to resolve the split raised in the petition for certiorari—even if there were such a split.

Ayestas would not change the result in Gonzales's case, and he cannot show "extraordinary circumstances." So this case would be a poor one for addressing the circuit split posited in the petition. Even if the circuit split

[1] The Director will cite to Gonzales's petition for certiorari as "Cert. Pet."

Petitioner posits exists, *but see infra* Part II, this case is not a viable vehicle to resolve it.

A. Gonzales does not satisfy Rule 60(b)(6) even after *Ayestas*.

This case is a poor vehicle for three reasons. The change in decisional law Gonzales raised in his Rule 60(b)(6) motion did not factor into the lower courts' denial of funding. Gonzales's failure to pursue his funding request on appeal precludes a finding of "extraordinary circumstances." Finally, the district court's reasons for denying Gonzales's request for expert funding remain sound under *Ayestas*.

1. The Fifth Circuit's pre-*Ayestas* "substantial need" test was not used to deny Gonzales's request for expert funding.

In *Ayestas*, this Court held the Fifth Circuit's interpretation of 18 U.S.C. § 3599's "reasonably necessary" standard had been "too restrictive." 138 S. Ct. at 1093. Prior to *Ayestas*, the Fifth Circuit required a habeas petitioner to show a "substantial need" and "present 'a viable constitutional claim that is not procedurally barred.'" *Id.* (quoting *Ayestas v. Stephens*, 817 F.3d 888, 895 (5th Cir. 2016)). But that standard was not applied in this case.

The district court did not apply the "substantial need" test. Gonzales sought significantly more than $7,500—the statutory cap—so the district court could only grant his request if it could certify that such funding was "necessary to provide fair compensation for services of an unusual character or duration."

ROA.402 (quoting 18 U.S.C. § 3599(g)(2)). After explaining its rationale, the court concluded that Gonzales had "failed to convince [it] that any of the investigative or expert assistance requested . . . satisfie[d] the standard[] set forth in . . . Section 3599(g)(2) of Title 18, United States Code." ROA.405. The district court did not cite a single case referring to the substantial need test, let alone refer to that standard itself. ROA.400–06.

Gonzales asks this Court to assume error in the district court's funding denial. Cert. Pet. at 25–26. That assumption is unwarranted. This Court should not presume the use of a legal standard that the district below never once referenced.

2. Gonzales's "lack of diligence" in pursuing his expert funding request means he cannot show "extraordinary circumstances."

After the district court denied his request for funding under 18 U.S.C. § 3599(g)(2), Gonzales could have sought a COA and pursued the issue on appeal. He did not. *See* Brief in Support of Application for Certificate of Appealability 1–53, *Gonzales v. Davis*, 606 F. App'x 767 (No. 14-70006). In *Gonzalez*, the Court rejected the petitioner's argument for "extraordinary circumstances" based on a later-overturned interpretation of AEDPA's statute of limitations because the petitioner had failed to pursue the limitations issue on appeal. *See Gonzalez v. Crosby*, 545 U.S. 524, 537 (2005). In the same way, Gonzales did not challenge the lower court's denial of funding on appeal from

the denial of his initial habeas petition. Gonzales's "lack of diligence confirms that [*Ayestas*] is not an extraordinary circumstance justifying relief from the judgment in [this] case." *Ibid.*

And a motion for relief from judgment "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). As the Court explained in *Gonzalez*, "in cases where significant time has elapsed between a habeas judgment and the relevant change in procedural law, it [is] within a district court's discretion to leave such a judgment in repose." 545 U.S. at 542 n.4. Timeliness should be measured "as of the point in time when the moving party ha[d] grounds to make such a motion." *Clark v. Stephens*, 627 F. App'x 305, 309 (5th Cir. 2015).

Because the district court had not utilized the Fifth Circuit's pre-*Ayestas* substantial need test, *see supra* Part I.A.1, the challenge Gonzales raised in his Rule 60(b) motion was not foreclosed by circuit precedent the first time around. *Ayestas* changed nothing relevant to the denial of his initial habeas petition. So even after the district court denied his funding request, Gonzales could have requested the relief he now seeks by way of Rule 60(b)(6).

3. The district court's reasons for denying expert funding remain sound after *Ayestas*, so that decision is not an extraordinary circumstance warranting relief.

The circumstances here are not extraordinary "[b]ecause the reasons the district court gave for its ruling remain sound after *Ayestas*." *Mamou v. Davis*,

742 F. App'x 820, 824 (5th Cir. 2018) (unpublished). A district court "enjoy[s] broad discretion" in "determining whether funding is 'reasonably necessary.'" *Ayestas*, 138 S. Ct. at 1094. A district court must "consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id.*

Gonzales's request for FASD expert funding is tied to an ineffective-assistance claim that, in effect, alleges the ineffectiveness of the neuropsychologist retained by trial counsel. ROA.431 ("The expert used by the defense failed to administer the correct tests to [Gonzales] and failed to properly diagnose [Gonzales] as FASD."). "Counsel should be permitted to rely upon objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) (quoting *Smith v. Cockrell*, 311 F.3d 661, 676–77 (5th Cir. 2002)). There is no such thing as an ineffective-assistance-of-expert claim. *See Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010). Absent a plausible theory as to how *trial counsel* erred in failing to discover FASD after retaining a competent mental-health expert, Gonzales could not obtain relief on such a

claim. *See Segundo*, 831 F.3d at 352. He would not need expert funding to explore *counsel*'s diligence in retaining Dr. Milam.

There is also the question of how Gonzales could have been *diagnosed* with FASD in 2006 as, even today, "[t]he term FASD[] is *not* meant for use as a clinical diagnosis.." Centers for Disease Control and Prevention, *Basics about FASDs*, https://www.cdc.gov/ncbddd/fasd/facts.html (last updated Mar. 29, 2019). Gonzales has never suggested such a diagnosis could have been made at the time of his trial.

Further, expert funding was not reasonably necessary because Dr. Milam testified that Gonzales had reactive attachment disorder, which explained his antisocial behavior. Dr. Milam testified Gonzales did not develop appropriate interaction and coping skills, resulting in an immature and aggressive personality. ROA.7330–33, 7340–42. To be sure, he testified Gonzales's reactive attachment disorder was caused by environmental factors: Gonzales was abandoned, physically and emotionally, by his mother; he lacked a surrogate parental replacement; and he suffered significant childhood trauma. But the jury rejected the environmental causation of Gonzales's criminal behavior and, thus, there is little chance that repackaging causation as organic would have had any effect on the jury. Because funding is not appropriate where it "stand[s] little hope of helping [the petitioner] win relief,"

Ayestas, 138 S. Ct. at 1094, the district court's denial of FASD-experts funding is not affected by *Ayestas*.

The same rationales apply to the denial of funding for a multimodal abuse expert. This funding request was tied to Gonzales's ineffective-assistance claim alleging deficiency for failing to call a "sexual, emotional, physical, [and] biological abuse" expert. ROA.432–37. As noted above, Gonzales *did* call an expert who provided "extensive testimony" regarding "Gonzales's deeply troubled upbringing, consequences of neglect, abuse, and drug use on Gonzales." *Gonzales*, 606 F. App'x at 774. An attorney cannot be found deficient for doing the very thing that they were accused of not doing.

Moreover, Dr. Milam was a mental-health expert, a "sex offender treatment provider," and conducted "sexual abuse" testing for clients of Child Protective Services. ROA.7391. In other words, Dr. Milam was an abuse expert. Thus, Gonzales's claim boils down to again challenging the effectiveness of an expert, but that is, again, not a claim. *See Earp*, 623 F.3d at 1077. In any event, the presentation of another abuse expert would have been cumulative, so neither deficiency nor prejudice could be established. *Gonzales*, 606 F. App'x at 774. Because these claims would have been denied even if Gonzales had proven everything he sought funding to develop, he was not entitled to expert funding. *See Ayestas*, 138 S. Ct. at 1094.

In addition, Gonzales never showed why he should have been given funding for Mark Steege, LCSW, LPC, the "abuse expert." At most, Gonzales described Steege as someone who could "evaluate and clarify the effect . . . of the sexual disorders and abuse" suffered by Gonzales. ROA.347. That is a far cry from the comprehensive abuse expert that Gonzales faulted counsel for not calling, at trial, to synergize the effect of multiple forms of abuse. In other words, if Steege was a sexual abuse expert, it still leaves out the emotional, physical, and biological abuse on which an expert was supposed to have opined. Thus, Gonzales failed to provide the necessary information so that the district court could assess "the potential merit of the claim[] . . . [he] want[ed] to pursue." *Ayestas*, 138 S. Ct. at 1094. Funding was properly denied.

Not only did Gonzales fail to connect Steege to his abuse-related ineffective-assistance claim, he also failed to prove any qualifications for him, whether he was willing to undertake appointment, what rate he would charge for services, and how much time he would need to evaluate Gonzales. ROA.341–50.[2] Without such information, the district court could not assess whether Steege could "generate useful and admissible evidence," so Gonzales failed to show reasonable necessity. *See Ayestas*, 138 S. Ct. at 1094. Stated

[2] In his proposed order following his funding motion, Gonzales listed needing "10 hours at the rate of $85.00 per hour" for a sexual abuse expert. ROA.351. This information, however, was not provided in the body of the motion. And he provided no explanation for the number of hours or rate.

differently, without such information, the district court would have been funding a "fishing expedition," which is improper. *Id.* (citing favorably *United States v. Alden*, 767 F.2d 314, 318–19 (7th Cir. 1984), for the proposition "that it is not proper to use the funding statute to subsidize a 'fishing expedition'").

* * *

As further addressed in Section II, the question raised in this petition should be resolved in a case where it will have at least a realistic chance of affecting the outcome. That is not the situation here.

B. The change in decisional law in *Ayestas* is not extraordinary.

This Court has made clear that not all changes in its interpretation of the habeas statutes justify relief under Rule 60(b)(6). *See Gonzalez*, 545 U.S. at 536–37. The change in decisional law that Gonzales relies upon, *Ayestas*, involves the same type of procedural statute that was at issue in *Gonzalez*. As in *Gonzalez*, "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Id.* at 536.

Ayestas's critique of the Fifth Circuit's "substantial need" test was limited, noting that the formulation between substantial need and reasonable necessity "may not be great," and "may be small." *Ayestas*, 138 S. Ct. at 1092–93. Indeed, the Court described the extant Fifth Circuit standard as only

"arguably more demanding." *Id.* And, ultimately, *Ayestas*'s reach goes only to whether funding should be provided to support claims.

In contrast, other decisions from this Court have had a sweeping effect on federal habeas law. For example, *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), have been described as "represent[ing] a remarkable sea change in decades-old precedent—law which lower courts and litigants understood as settled." *Haynes v. Davis*, 733 F. App'x 766, 771 (5th Cir. 2018) (Dennis, J., dissenting). Compared with *Martinez*/*Trevino*, *Ayestas* is simply not extraordinary.

II. The Fifth Circuit is not split with its sister circuit courts, nor would Gonzales be granted relief in any other circuit.

Gonzales says the Fifth Circuit has split from the Second, Third, Seventh, and Ninth Circuits. It has not. There is little, if any, daylight between the courts of appeals on this matter. And not a single petitioner in any of the habeas cases cited by Gonzales has been granted relief solely on a change in decisional law. And even if there were a circuit split, Gonzales's case is a poor vehicle to resolve it because Gonzales's motion would be denied just the same under the standards applied outside the Fifth Circuit. Indeed, the most Gonzales can bring himself to say on this score is that the result "might arguably" be different in another circuit. Cert. Pet. at 29–30.

A. The Fifth Circuit has correctly interpreted *Gonzalez*.

Gonzales challenges Fifth Circuit case law holding that a change in decisional law *alone* is not grounds for relief from judgment. Cert. Pet. at 23–24. Gonzales claims this per se rule created by the Fifth Circuit is a misapplication of this Court's decision in *Gonzalez*. *Id.* He misapprehends *Gonzalez* and misconstrues the lower courts' application of it to his case.

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

When considering a Rule 60(b) motion, the district court is permitted to consider a "wide range of factors" in determining whether extraordinary circumstances are present. ROA.853 (citing *Buck v. Davis*, 137 S. Ct. 759, 778 (2017)). "These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Id.* (quoting *Buck*, 137 S. Ct. at 777–78). "Moreover, a Rule 60(b)(6) movant must show that he can assert 'a good claim or defense' if his case is

reopened." *Ramirez v. Davis*, 780 F. App'x. 110, 116–18 (5th Cir. 2019) (quoting *Buck*, 137 S. Ct. at 780).

Gonzales, in his request for relief under Rule 60(b)(6), relied on merely a change in law—through this Court's decision in *Ayestas*—to demonstrate he deserves relief. However, as the district court recognized in denying the Rule 60(b) motion—*see* ROA.853–56—this Court's decision in *Gonzalez*, as applied in the Fifth Circuit's case law, was determinative of Gonzales's argument. In *Gonzalez* this Court found that Rule 60(b)(6) relief was unwarranted when a change in law arguably rendered the district court's ruling on a time-bar—which precluded a merits determination—incorrect. *Gonzalez*, 545 U.S. at 537. "It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Id.*

The Fifth Circuit's reading is correct. If a change in law that entirely precluded merits review—as in *Gonzalez*—is not sufficient to warrant Rule 60(b)(6) relief, then *Ayestas*'s change in the law on a lesser matter—funding to possibly support a claim for relief—is also insufficient. The Fifth Circuit has applied this same reasoning when deciding that reliance on *Martinez* and *Trevino* cannot, *by itself*, achieve relief under Rule 60(b). *See Adams*, 679 F.3d at 319–20 (concluding that *Martinez* was merely a change in decisional law and did not constitute extraordinary circumstances under Rule 60(b)); *see also Haynes*, 733 F. App'x at 769 (noting the petitioner's "acknowledge[ment] that

the change in decisional law effectuated by *Martinez* and *Trevino* [was] insufficient, on its own, to demonstrate 'extraordinary circumstances'"); *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013) (affirming that *Trevino* did not undermine *Adams*).

Gonzales attempts to contrast this Court's decisions in *Ayestas*, *Martinez*, and *Trevino* as something different than what was at issue in *Gonzalez*. Cert. Pet. at 23–30. But he relies on nothing other than semantics. The Fifth Circuit recently addressed why a Rule 60(b) motion based only on a claim of deficient representation, which is at the heart of Gonzales's motion, is not enough to demonstrate extraordinary circumstances. *See In re Johnson*, 935 F.3d 284, 289–90 (5th Cir. 2019). There, the Fifth Circuit held that "in a deficient representation case such as this, there needed to be some factor besides the representation." *Id.* The Fifth Circuit in *Johnson* said that pointing to deficient representation without also identifying a "good" claim that was omitted or defaulted without merits review because of the deficiency cannot amount to extraordinary circumstances. *In re Johnson*, 935 F.3d at 291 (citing *Gonzalez*, 545 U.S. at 532 n.5).

Gonzales's question presented is not a novel, or even difficult, one. The district court engaged in an exhaustive review of the factors presented by Gonzales, including his arguments regarding the change brought about by

Ayestas, and the prior review of the merits of Gonzales's IATC claims.[3] ROA.853–56. The district court even noted that "Petitioner acknowledges that the change in decisional law effectuated by *Ayestas* is insufficient, on its own, to demonstrate an extraordinary circumstance." ROA.855. From his own petition, Gonzales stated, "Mr. Gonzales acknowledges 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)." ROA.784 (internal quotation marks omitted). The lower courts gave Gonzales exactly what he now asks of this Court: full consideration of his case, including the changes in decisional law. And the courts did not misapply *Gonzalez* or any other case law from this Court when deciding the Rule 60(b) motion.

Further, as discussed in more detail below, in each habeas case cited by Gonzales to support his alleged "irreconcilable circuit split," the courts failed to grant extraordinary relief under Rule 60(b)(6) solely on the grounds of a

[3] Gonzales claims that he was not able to vindicate his constitutional right to effective assistance of counsel because his trial attorneys were ineffective. Cert. Pet at 26–30. That is no more or less extraordinary than any petitioner alleging ineffective assistance. And it is all the less extraordinary because Gonzales received merits review of his claims and they were found insubstantial. *See Gonzales*, 606 F. App'x at 771–74. And, in any event, the strength of a claim is only relevant "if 'there was no consideration of the merits.'" *Haynes*, 733 F. App'x at 769 (quoting *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)). Both the district court, ROA.688–703, and the Fifth Circuit have provided Gonzales merits review, *Gonzales*, 606 F. App'x at 771–74, of his ineffective-assistance claims.

change in decisional law. Instead, each circuit analyzed a change in decisional law, and then the individual case itself, and weighed various factors applicable to the facts of the case before determining if relief was warranted. *See Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) (holding that the decision to grant a motion for relief from judgment predicated on an intervening change in the law is a case-by-case inquiry that requires balancing numerous factors); *Ramirez v. United States*, 799 F.3d 845, 851–52 (7th Cir. 2015) ("Rule 60(b)(6) . . . requires the court to examine all the circumstances"); *Cox v. Horn*, 757 F.3d 113, 122, 126 (3d Cir. 2014) ("considering 'equitable factors' in addition to a change in law"). But just like the Third, Seventh, and Ninth Circuits, the district court here analyzed a wide range of factors—along with the change in decisional law—before denying Gonzales Rule 60(b)(6) relief.

The district court specifically followed this Court's precedent in *Buck*, 137 S. Ct. at 777–78, as well as Fifth Circuit precedent. ROA.853. The district court analyzed the change in decisional law caused by *Ayestas* and concluded the "substantial need" test rejected in *Ayestas* had not been used in Gonzales's case. ROA.854–55. The district court then analyzed relevant equitable factors and concluded they weighed against granting Rule 60(b)(6) relief. ROA.855–56 (citing *Buck*, 137 S. Ct. at 777–78).

The Fifth Circuit then, in denying a COA, stated, "courts consistently recognize that a change in law after final judgment on a habeas petition *does*

not necessarily constitute extraordinary circumstances." *Gonzales*, 788 F. App'x at 253 (emphasis added) (citing *Gonzalez*, 545 U.S. at 536; *Adams*, 679 F.3d at 320). The Fifth Circuit panel denied Gonzales's request for a COA on the district court's determination that Gonzales was not entitled to relief under Rule 60(b)(6) due to the relevant equitable factors and the merits of Gonzales's IATC claims. *Gonzales*, 788 F. App'x at 253–54; ROA.855–56.

There is no realistic difference between how the Fifth Circuit analyzed Gonzales's case and how the Third, Seventh, or Ninth Circuit would analyze his case. The denial of Gonzales's Rule 60(b)(6) motion would not change under the precedent of any of the Fifth Circuit's sister courts. Even if there were a circuit split, this would be a poor vehicle to resolve it. Thus, this Court should deny certiorari.

B. The Second Circuit case cited by Gonzales is not grounded in habeas law, nor would Second Circuit precedent provide Gonzales any relief.

It is entirely unclear how the Second Circuit case cited by Gonzales, *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353 (2d Cir. 2013), is even tangentially related to the case at hand. *See* Cert. Pet. at 17. *In re Terrorist Attacks* involved two tort cases where the plaintiffs were suing foreign entities. 741 F.3d at 354. The Second Circuit found that conflicting circuit opinions caused two similarly situated tort plaintiffs to end up in diametrically opposed situations even though their cases arose from the same transaction or

occurrence. *Id.* at 355–57. One plaintiff was able to proceed with their cause of action, but the other plaintiff was denied the ability to proceed. *Id.* The Second Circuit found that Rule 60(b)(6) relief was warranted so that the similarly situated plaintiffs would be treated equally in their respective cases. *Id.* at 358.

The change in decisional law *In re Terrorist Attacks* arose from the Second Circuit's own inconsistent rulings in related cases. *In re Terrorist Attacks*, 741 F.3d at 356. Gonzales has not shown any case where a similarly situated petitioner was granted Rule 60(b)(6) relief. *See generally* Cert. Pet. Thus, any relation *In re Terrorist Attacks* may have to Gonzales's case is hypothetical, at best.

Moreover, *In re Terrorist Attacks* was a tort case involving injured plaintiffs. As this Court determined in *Gonzalez*, "[extraordinary circumstances] will rarely occur in the habeas context," *Gonzalez*, 545 U.S. at 535, which denotes that Rule 60(b) motions in the habeas context are distinct. Thus, *In re Terrorist Attacks*, as a tort case, has no useful relation to Gonzales's case.

Most importantly, Gonzales would still not be granted relief under the Second Circuit's own legal precedent. The petitioner in *In re Terrorist Attacks* was granted relief only due to the Second Circuit's own inconsistent rulings, which was an "extraordinary [circumstance], warranting relief." *In re Terrorist Attacks*, 741 F.3d at 356 (internal quotation marks omitted). The Second

Circuit was simply attempting to fix an obvious error in their own legal precedent. *Id.* at 359. This was not a court's existing legal precedent being overturned on appeal by a higher court, such as in *Ayestas*. The change in decisional law had an obvious and clear effect on the petitioner's case. *Id.* That is not the situation in the case at issue where, as argued in Part I., *Ayestas* does not effect the denial of Gonzales's funding request, nor can Gonzales show extraordinary circumstances even remotely similar to those found by the Second Circuit in *In re Terrorist Attacks*. Thus, the Second Circuit would not provide Gonzales the relief he seeks under their circuit precedent.

C. The Third Circuit would not provide Gonzales the relief he seeks, nor would the circuit provide relief from judgment based solely on a change in decisional law.

Gonzalez next cites to *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014). Cert. Pet. at 17–18. There, Gonzales points to the Third Circuit's holding that such court "ha[s] not foreclosed the possibility that a change in controlling precedent, even standing alone, might give reason for 60(b)(6) relief." *Cox*, 757 F.3d at 121.

The Third Circuit in *Cox* stated that "[f]irst, and importantly, we agree with the District Court that the jurisprudential change rendered by *Martinez*, without more, does not entitle a habeas petitioner to Rule 60(b)(6) relief." *Cox*, 757 F.3d at 124. The Third Circuit expanded upon its *Martinez* determination by stating that "[t]o be sure, *Martinez's* change to the federal rules of procedural default, though "limited," was "remarkable." *Id.* (citing *Lopez v.*

Ryan, 678 F.3d 1131, 1136 (9th Cir. 2012)). But even when remanded to the district court, after the Third Circuit's ruling, the district court still denied Rule 60(b) relief finding that extraordinary circumstances were still not present. *Cox v. Horn*, No. CV 00-5188, 2018 WL 4094963, at *16 (E.D. Pa. Aug. 28, 2018). Nor was the change in decisional law alone enough to warrant Rule 60(b)(6) relief. *Id.*

As argued previously, if *Martinez* and *Trevino* are not extraordinary enough to warrant relief, certainly the change in law caused by *Ayestas* is not extraordinary enough to warrant relief in this case. The petitioner in *Cox* still failed to show that this change in decisional law qualified as "extraordinary circumstances." Gonzales would still not be granted relief under the Third Circuit's test.

Similar to the Fifth Circuit, the Third Circuit determined that "[they had] long employed a flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law, that takes into account all the particulars of a movant's case." *Cox*, 757 F.3d at 122 (noting, in the context of a 60(b)(6) analysis, the propriety of "explicit[ly]" considering "equitable factors" in addition to a change in law) (citations omitted). The Third Circuit focused specifically on the petitioner's diligence in *Cox*. *Id*. at 115, 126 ("one of the critical factors in the equitable and case-dependent nature of the 60(b)(6) analysis is whether the [] motion under review was brought within a

reasonable time. . ."). But, as noted previously, after remand the district court in *Cox* denied relief finding that *Cox* did not file his Rule 60(b)(6) motion "within a reasonable time." *Cox*, 2018 WL 4094963, at *8–10.

Gonzales was not timely nor diligent in filing his Rule 60(b)(6) motion. ROA.855–56 ("[Gonzales's] motion has not been presented "'within a reasonable time.'"); *see* Part I. The Third Circuit would seemingly not provide relief to Gonzales based on this equitable factor alone. Yet, the district court and Fifth Circuit denied relief based on numerous other factors. ROA.853–53; *Gonzales*, 788 F. App'x at 253–54 (citing *Buck*, 137 S. Ct. at 777). Thus, the Third Circuit would not provide the relief that Gonzales seeks, nor is there any discernable difference between the Third and Fifth Circuits' legal frameworks.

D. The Seventh Circuit would not provide *Gonzales* relief based on a change in decisional law alone.

Gonzales further cites to the Seventh Circuit decision in *Ramirez v. United States*, where the Seventh Circuit adopted the Third Circuit's approach to relief in Rule 60(b)(6) motions. *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015)[4]; Cert. Pet. at 18. But despite the Seventh Circuit adopting the Third Circuit's approach to Rule 60(b)(6) relief, the petitioner in *Ramirez* was still not granted relief based solely on a change in decisional law. *Ramirez*, 799

[4] Notably, *Ramirez* is a direct appeal, but does cite to relevant habeas case law in the Seventh Circuit.

F.3d at 852, 856. Gonzales would not be granted relief under the Seventh Circuit's legal framework either.

In *Ramirez*, the petitioner pleaded guilty to possessing marijuana with intent to distribute. *Id.* at 847. The petitioner argued that his trial counsel was ineffective when he failed to object to two prior Texas convictions for assault that caused petitioner to be classified as a career offender. *Id.* Petitioner also argued that his postconviction counsel was ineffective when he failed to keep the petitioner informed, and then failed to timely request a certificate of appealability. *Id.* at 847–48.

"The change in law between *Coleman*, on the one hand, and *Martinez, Maples,* and *Trevino"* was only a part of the Seventh Circuit's evaluation of Ramirez's Rule 60(b)(6) motion. *Id.* at 852. The ineffectiveness of his postconviction attorney was the other critical part. *Id.* The Seventh Circuit also agreed that petitioner's trial counsel's performance was deficient. *Id.* at 855. Most notably, the Seventh Circuit remanded the case back to the district court stating that "[w]e conclude that Ramirez's situation fits the framework articulated in *Maples*, *Trevino* and *Martinez*. The district court was apparently unaware of those decisions and thus categorically denied Ramirez's motion under Rule 60(b)(6)." *Id.* at 856. The Seventh Circuit also determined that "the district court's decision [denying petitioner's] Rule 60(b)(6) motion . . . was based on a clear error of law." *Id.* at 851–52. Specifically, the Seventh Circuit

noted, "[a]t the time the [district] court wrote [its opinion], all three of the Supreme Court decisions on which Ramirez relies were on the books," referring to *Maples*, *Martinez*, and *Trevino*. *Id.* at 852. The Seventh Circuit also noted that they had previously determined in *Nash v. Hepp*, 740 F.3d 1075 (7th Cir. 2014), that "extraordinary circumstances for purposes of Rule 60(b)(6) did not exist, despite the change in law brought about by *Martinez*, *Maples*, and *Trevino*." *Id.* at 851. On the instructions of the Seventh Circuit, the district court granted the petitioner's Rule 60(b)(6) motion, analyzed the merits of his claims, and granted relief. *Ramirez v. United States*, No. 08-CR-30182, 2016 WL 1058965, at *2–4 (S.D. Ill. Mar. 17, 2016).

The Seventh Circuit's legal framework would still not give Gonzales the relief he seeks. The Seventh Circuit agrees with both the Third and Fifth Circuits that the changes in decisional law brought about by *Martinez*/*Trevino* are not, by themselves, enough to warrant extraordinary circumstances. *Ramirez*, 799 F.3d at 851.

Although the Seventh Circuit in *Ramirez* cites relevant habeas case law, it is ultimately a direct appeal. *Id.* at 850. As argued in Part II.B., Rule 60(b) motions in the habeas context are distinct. *See Gonzalez*, 545 U.S. at 535. But, the Seventh Circuit, like the Fifth and Third Circuit, still analyze equitable factors in the context of a Rule 60(b)(6) motion. *Ramirez*, 799 F.3d at 850–51 (agreeing with the Third Circuit's approach that takes into account all the

particulars of a movant's case) (citing *Cox*, 757 F.3d at 121). The Seventh Circuit even notes that the Third Circuit's multifactor approach "may *not* be inconsistent with that of the Fifth Circuit, which reviewed other equitable factors in a later case similar to *Adams* before rejecting the petitioner's claim." *Ramirez*, 799 F.3d at 851 (emphasis added) (citing *Diaz*, 731 F.3d 370). Although it is difficult to make a direct comparison between *Ramirez* and Gonzales's case, the Seventh Circuit's adoption of *Cox* would seem to indicate that they would also deny Gonzales relief due to his lack of diligence in pursuing Rule 60(b)(6) relief, as discussed in Part II.C. Ultimately though, Gonzales's case fails to have the extraordinary circumstance of being "abandoned" by counsel on appeal as the petitioner in *Ramirez* was abandoned. *See Ramirez*, 799 F.3d at 850 ("importantly, postconviction counsel abandoned Ramirez on appeal, thus depriving him of the opportunity to pursue his Sixth Amendment claims."). Thus, Gonzales is unlikely to find any relief under the Seventh Circuit's precedent.

E. Ninth Circuit would fail to find any reason to provide Gonzales relief under their own case-law.

Finally, Gonzales cites to *Henson v. Fidelity National Finance, Inc.*, 943 F.3d 434 (9th Cir. 2019), and *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009). *Phelps* shows that Gonzales would not be provided the relief he seeks

under the legal framework the Ninth Circuit has adopted in the habeas context, especially not due to *Ayestas*.[5]

In *Phelps*, again, a change in decisional law was not enough to warrant Rule 60(b)(6) relief. *See generally id.* Instead, the Ninth Circuit granted relief based on the combination of the petitioner in *Phelps* being continually denied merits review on procedural grounds with the unsettled law at the time of the initial habeas petition after analyzing six equitable factors. *Id.* at 1123–40. And the *Phelps* petitioner's claims were ultimately denied. *Phelps v. Hill*, No. C 98-2002 MMC, 2012 WL 3115198, at *20 (N.D. Cal. July 31, 2012). The Ninth Circuit, too, would not grant Gonzales relief based on a change in decisional law alone.

Much like in Gonzales's case, the Ninth Circuit analyzed numerous equitable factors before determining if Rule 60(b)(6) relief was warranted. The Ninth Circuit in *Phelps* determined that "the decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors." *Phelps*, 569 F.3d at 1133 (internal quotation marks omitted). The Ninth Circuit then went on to analyze the petitioner's case using the two factors enumerated by this Court in *Gonzalez*. *Id*. at 1135–37 (citing to

[5] *Henson* simply addressed "whether the same Rule 60(b)(6) factors [the Ninth Circuit] identified in *Phelps* [were] also applicable beyond the habeas corpus context." *Henson*, 943 F.3d at 439–40 (citing *Phelps*, 569 F.3d at 1135 n.19). It is not relevant here.

Gonzalez, 545 U.S. at 536). The Ninth Circuit determined that the two factors, unlike here or *Gonzalez*, "cut in [petitioner's] favor." *Compare Id.* at 1136 *to* ROA.853–56. The court in *Phelps* then analyzed four additional factors that they adopted from the Eleventh Circuit in *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987). *Id.* at 1137–40. The Ninth Circuit found that:

> "[T]he lack of clarity in the law at the time of the district court's original decision, the diligence Phelps has exhibited in seeking review of his original claim, the lack of reliance by either party on the finality of the original judgment, the short amount of time between the original judgment becoming final and the initial motion to reconsider, the close relationship between the underlying decision and the now controlling precedent that resolved the preexisting conflict in the law, and the fact that Phelps does not challenge a judgment on the merits of his *habeas* petition but rather a judgment that has prevented review of those merits all weigh strongly in favor of granting Rule 60(b)(6) relief."

Phelps, 569 F.3d at 1140.

Gonzales's case was analyzed in much the same way with the district court weighing numerous equitable factors and deciding to deny relief based on a case-by-case analysis of Gonzales's circumstances. ROA.853–56. The Fifth Circuit determined that "[o]n these facts. . .no reasonable jurist could conclude that the district court abused its discretion in finding no extraordinary circumstances exist." *Gonzales*, 788 Fed. Appx. at 254 (citing *Buck*, 137 S. Ct. at 777). However, unlike in *Phelps*, the equitable factors simply cut the other way for Gonzales. ROA.853–56. The change in decisional law is not applicable

to the denial of Gonzales's expert assistance funding. ROA.854; *see supra* Part I. Gonzales was not timely nor diligent in filing his Rule 60(b)(6) motion. *Compare* ROA.855–56 ("[Gonzales's] motion has not been presented "'within a reasonable time.'") *to Phelps*, 569 F.3d at 1138. The district court also determined that Gonzales's "final [judgment] should not be lightly disturbed." ROA.855 (citing *Seven Elves, Inc.*, 635 F.2d at 402). The Ninth Circuit, just like its sister circuits, would fail to find any reason to provide Gonzales relief under their own case-law.

CONCLUSION

Gonzales fails to show how the change in decisional law at issue, *Ayestas*, applies to the denial of expert funding in his case. Nor has Gonzales shown the extraordinary circumstances required for Rule 60(b)(6) relief. Finally, Gonzales's case is a poor vehicle to resolve any potential circuit split especially because the Fifth Circuit's sister courts would also deny Gonzales relief. The petition for a writ of certiorari should be denied.

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