CAPITAL CASE No. 19-7645

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

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The circuits are clearly split on whether a change in decisional law alone may constitute an "extraordinary circumstance" under Federal Rule of Civil Procedure 60(b)(6). The Director attempts to convince this Court that no circuit split exists here, but these efforts cannot overcome the schism dividing the federal circuits' decisional law briefed in Mr. Gonzales's petition for a writ of certiorari. Because of this split, and because the Director concedes that Mr. Gonzales's Rule 60(b)(6) motion "relied on merely a change in law,"[1] this case presents the optimal vehicle to resolve the Question Presented.

1. The Fifth Circuit is plainly split with several sister circuits on the question presented: whether a change in law may constitute an extraordinary circumstance justifying relief from final judgment under Rule 60(b)(6).

At least one justice of this Court has already explicitly recognized the existence of the circuit split presented here. In *Crutsinger v. Davis*, Justice Sotomayor "wr[o]te separately to note the potential tension between this Court's decision in *Gonzalez* [*v. Crosby*, 545 U.S. 524 (2005)] and the Fifth Circuit's approach to Rule 60(b)(6)." *Crutsinger*, 140 S. Ct. 2 at 2 (2019) (Sotomayor, J., respecting denial of certiorari). Justice Sotomayor confirmed that the *Gonzalez* Court "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." *Id.* at 2–3. However, she noted, "[s]everal Circuits recognize" such a possibility, while "[o]thers, including the

[1] Respondent's Brief in Opposition ("BIO") at 19.

Fifth Circuit, appear to have announced a contrary, categorical rule." *Id.* at 3 (citing cases from the Third and Seventh Circuits and contrasting with Fourth, Fifth, and Sixth Circuit caselaw).

Nonetheless, the Director asserts that "[t]he Fifth Circuit is not split with its sister circuit courts," BIO at 17, devoting much space to parsing the facts and procedural history of individual cases. But the Director's attempts to thicken the forest with irrelevant trees cannot obscure the divide between circuits that have announced a per se categorical rule that a change in law can never be extraordinary under Rule 60(b)(6), like the Fifth Circuit, and those that reject such a rule, like the Third Circuit. *See Crutsinger*, 140 S. Ct. at 3 (observing split between circuit approaches); Petitioner's Brief at 15–21.

According to the Director, "[t]here is little, if any, daylight between the courts of appeals on this matter." BIO at 17. But the Third Circuit, for one, would disagree. The Fifth Circuit's per se rule as reflected in "*Adams*[2] is not concordant with [Third Circuit] precedent on Rule 60(b)(6)." *Cox v. Horn*, 757 F.3d 113, 120 (3d Cir. 2014). The Third Circuit has explicitly *rejected* "a per se rule that a change in decisional law, even in the habeas context, is inadequate, *either standing alone or in tandem* with other factors, to invoke relief from a final judgment under 60(b)(6)." *Id.* at 124 (emphasis supplied).

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[2] *Adams v. Thaler,* 679 F.3d 312 (5th Cir. 2012).

The Director attempts to recast the Third and Fifth Circuit approaches as "[s]imilar to" each other. BIO at 26. But that effort cannot overcome the Third Circuit's own determination that Fifth Circuit precedent "does not square with [Third Circuit] approach to Rule 60(b)(6)," nor its holding in *Cox* that the "[d]istrict [c]ourt abused its discretion when it based its decision solely on the reasoning of *Adams*" without following the Third Circuit's more flexible, case-specific approach.

Similarly, the Director examines in great detail the facts of the Seventh Circuit case *Ramirez v. United States.*[3] BIO at 27–30. Yet the Director concedes that in *Ramirez* "the Seventh Circuit adopted the Third Circuit's approach to relief in Rule 60(b)(6) motions." BIO at 27; *Ramirez*, 799 F.3d at 850 ("[w]e agree with the Third Circuit's approach in *Cox,* in which it rejected the absolute position that the Fifth Circuit's *Adams* decision may have reflected").

Finally, the Director fails entirely to engage with the fact that the Ninth Circuit explicitly disclaimed its own prior *per se* rule that "a change in the applicable law after a judgment has become final is not a sufficient basis"[4] for relief under Rule 60(b)(6). Ninth Circuit law conflicts with the Fifth Circuit not only in rule but also in the proper interpretation of this Court's decision in *Gonzalez*. *Cf. Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) (overruling, in light of *Gonzalez,* prior categorical rule and holding that a "case-by-case inquiry, and not the *per se* rule . . . should

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[3] 799 F.3d 845 (7th Cir. 2015).

[4] *Tomlin v. McDaniel,* 865 F.2d 209, 210 (9th Cir.1989) (overruled by *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009).

govern Rule 60(b)(6) in *Gonzalez*'s wake."), *with Adams*, 679 F.3d at 320 (a 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)).

The question presented here is not whether the particulars of any given case are analogous to or distinguishable from the underlying facts of Mr. Gonzales's case,[5] but rather whether a change in decisional law may constitute an extraordinary circumstance justifying relief under Rule 60(b)(6). In the Second, Third, Seventh, and Ninth Circuits, that possibility is left open. In the Fifth Circuit, it is not.

2. Because Mr. Gonzales's motion for Rule 60(b)(6) relief relied "on merely a change in law," this case presents the optimal vehicle for this Court to address the circuit split.

The Director concedes that Mr. "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*[6]—to demonstrate he deserves relief." BIO at 19. The district court denied Mr. Gonzales *any* funding for expert or investigative assistance under § 3599, and

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[5] The Director's attempts to distinguish Second Circuit Rule 60(b)(6) jurisprudence are similarly hyperfocused on the facts of the Second Circuit case cited in Mr. Gonzales's opening brief, *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353 (2d Cir. 2013). BIO at 23–25 (comparing the changes in law at issue and claiming that "any relation *In re Terrorist Attacks* may have to Gonzales's case is hypothetical, at best.").

This "distinction" misses the point—the question presented is whether the various circuits apply irreconcilably-different analyses when considering Rule 60(b)(6) motions predicated on an intervening change in law. More importantly, other Second Circuit decisions suggest that its rule is indeed more flexible than the categorical approach of the Fifth Circuit. *See Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004) (noting 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) . . . [but granting relief because] for all of the reasons discussed above, this case is different."(emphasis supplied)).

[6] *Ayestas v. Davis,* 138 S. Ct. 1080 (2018).

he promptly moved for relief under Rule 60(b)(6) after *Ayestas*.[7] Although this Court's decisions have left the possibility open, under "the Fifth Circuit's case law," a change in law cannot and does not constitute extraordinary circumstances warranting reopening under Rule 60(b)(6). *See Crutsinger*, 140 S. Ct. at 2 (Sotomayor, J., respecting denial of certiorari) ("not[ing] potential tension between this Court's decision in *Gonzalez* and the Fifth Circuit's approach to Rule 60(b)(6)"). Because the circuits are split on whether a change in law may constitute an extraordinary circumstance, and because Mr. Gonzales's motion for Rule 60(b)(6) relies on a change in law, this case is a fitting vehicle for this Court to take up and resolve the question left open in *Gonzalez*.

a. Contrary to the Director's assertions, the district court's denial of § 3599 funding entirely prevented Mr. Gonzales from developing or presenting any expert evidence in support of the claim at issue.

The Director opens with the contention that, "[d]espite" the denial of § 3599 funding, Mr. "Gonzales managed to present evidence from a FASD expert and a mitigation specialist to bolster his ineffective assistance of trial counsel (IATC-mitigation) claim." BIO at 1. But this assertion is misleading, and cannot defeat Mr. Gonzales's claim, because no actual evidence was in fact presented.

The evidentiary proffer that "FASD should be HIGHLY SUSPECTED" and a thorough evaluation should be performed, ROA 220, is the only "evidence from a FASD" expert in this record. After pleading a claim for relief in his initial petition

[7] This Court decided *Ayestas* on March 21, 2018. Mr. Gonzales filed his Rule 60(b) motion in the district court on May 22, 2018. ROA 745.

alleging that trial counsel was ineffective for failing to obtain and present proper expert testimony (Claim II), Mr. Gonzales sought funding for expert assistance "pursuant to 18 U.S.C. § 3599" to develop evidence in support of this claim. ROA 341. Summarizing the preliminary affidavits attached to his initial application, Mr. Gonzales explained that his

> request for expert assistance is reasonably necessary because the failure to obtain proper experts issue requires Dr. Adler and his FASD group to properly evaluate the Petitioner for FASD; requires Mark Steege, LCSW, LPC to properly evaluate and clarify the effect on the Petitioner of the sexual disorders and abuse; and requires Gerald Byington, LCSW to perform the mitigation expert's investigation to present the claim for relief. In order to properly prepare the failure to obtain proper experts claim at this federal habeas stage, the Petitioner requires the assistance of the above experts to investigate, research and present this claim for relief. *This request for these experts is both necessary and reasonable because the nature of the claim requires* that counsel be provided the services of these experts . . . . The nature of the claim requires *the Petitioner to produce and prove the existence of the above described mitigation evidence.*

ROA 347–48.

This request for expert funding brought under § 3599 was denied, ROA 400–06, leaving Mr. Gonzales with only his initial proffer that "FASD should be HIGHLY SUSPECTED." ROA 216–20. He was thus prevented from producing *evidence* with which to *prove* his claim.

After denying funding for evaluation and diagnosis of fetal alcohol spectrum disorder, the district court purported to "alternatively" review the merits of the unfunded and procedurally defaulted claim. ROA 689–97.[8] The district court

[8] The district court opinion includes a similar "alternative" review of the undeveloped claims related to lack of mitigation and sexual abuse expert evidence. ROA 699–703.

specifically *faulted* Mr. Gonzales for failing to present "[any] fact-specific allegations showing any qualified mental health expert has ever diagnosed [him] with fetal alcohol spectrum disorder." ROA 691–92. The district court's own treatment of this undeveloped claim demonstrates that the preliminary unfunded affidavit of an expert in support of a "thorough diagnostic evaluation," ROA 220, that was never performed is hardly the "evidence from an FASD expert" the Director suggests.

b. The § 3599 law of the Fifth Circuit has changed as a result of this Court's decision in *Ayestas v. Davis*.

The Director also contends that the Fifth Circuit's pre-*Ayestas* interpretation of § 3599 "was not used to deny Gonzales's request for expert funding" because Mr. Gonzales requested more funding than the funding statute contemplates and because the district court did not explicitly cite the "substantial need" test rejected by this Court in *Ayestas*. BIO 9-10. Neither argument holds water.

Mr. Gonzales requested funding for expert assistance under § 3599, specifically arguing that the services were "reasonably necessary" under § 3599. ROA 341–51. It is true that the total amount of expert assistance requested exceeded the presumptive statutory cap, but the district court denied Mr. Gonzales *any* investigative or expert assistance, not just the amount exceeding $7,500. ROA 405–06. And his request was entirely denied by a district court necessarily operating under the Fifth Circuit's then-existing approach to such requests.

That lower courts are bound by the decisions of higher courts is one of the most basic principles of our legal system. Unsurprisingly, Texas district courts—including the Western District, from which this case originates—have explicitly acknowledged

that they must follow and apply Fifth Circuit precedent. *See, e.g.*, *Perez v. Abbott*, 250 F.Supp.3d 123, 139 (W.D. Tex. Apr. 20, 2017) ("[A] district court is bound by a circuit decision unless or until it is overturned by an *en banc* decision of the circuit court or a decision of the Supreme Court.") (citation omitted); *accord Fleming Companies, Inc. v. United States Dept. of Agriculture*, 322 F.Supp.2d 744, 745 (E.D. Tex. June 4, 2004). So, too, are federal district courts bound by governing circuits' interpretation of federal statutes. *See Sunburst Minerals, LLC v. Emerald Copper Corp.*, 300 F. Supp.3d 1056, 1065 (D. Ariz. Jan. 11, 2018) (acknowledging that the "[district] court is bound by the [governing] Circuit's interpretation of a federal statute" and "it would be manifest error to disregard [circuit] authority").

At the time of the § 3599 funding request at issue here, the Fifth Circuit—and, necessarily, the district courts within it—applied the erroneously-heightened "substantial need" test since rejected by this Court in *Ayestas*. The fact that additional funding above the presumptive statutory cap was requested does not undermine the bottom line: the district court in this case was bound to apply circuit precedent when considering requests for funding under § 3599. Nor does the fact that the district court did not use the words "substantial need" mean that the district court instead analyzed Mr. Gonzales's request under the correct standard despite well-established circuit precedent dictating otherwise.

c. Nothing in the Fifth Circuit's denial of a certificate of appealability cures the circuit split implicated here.

Finally, though the Director emphasizes that the panel opinion below notes "courts consistently recognize that a change in law after final judgment on a habeas

petition *does not necessarily* constitute extraordinary circumstances," BIO at 8, these three words do not resolve the circuit split nor evade the application of settled circuit precedent.

Decades of Fifth Circuit precedent—both pre- and post-*Gonzalez*, and both in the habeas context and beyond it—has established and entrenched the circuit rule that a change in decisional law does not constitute an extraordinary circumstance under Rule 60(b)(6). *See, e.g.*, *Crutsinger v. Davis*, 936 F.3d 265, 270 (5th Cir. 2019) ("Mere changes in decisional law, without more, do not constitute extraordinary circumstances."); *Diaz v. Stephens*, 731 F.3d 370, 375–76 (5th Cir. 2013) (citing *Batts v. Tow-Motor Forklift Co.*, 66 F.2d 743, 749 (5th Cir. 1993), and *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990) in the habeas context); *Adams*, 679 F.3d at 319–20 (same); *Hernandez v. Thaler*, 630 F.3d 420, 430 (5th Cir. 2011) ("Well-settled precedent dictates" that a change in law "does not constitute exceptional circumstances" and this *pre-existing principle* "applies with equal force" in habeas context); *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002) ("Under our precedents, changes in decisional law . . . do not constitute the 'extraordinary circumstances' required for granting Rule 60(b)(6) relief."); *Batts*, 66 F.2d at 749 (concluding that exercise of diversity jurisdiction "strengthens, rather than undermines, the proposition that a change in decisional law is insufficient to constitute an extraordinary circumstance"); *Bailey*, 894 F.2d at 160 ("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.").

At best, the Director's citation demonstrates that the Fifth Circuit—following Justice Sotomayor's statement in *Crutsinger*—may recognize that its established position is untenable and vulnerable to correction by this Court.[9] If anything, this provides further reason to *grant* certiorari here to resolve the split amongst the circuits: whether a change in law after final judgment on a habeas petition can constitute an extraordinary circumstance under Rule 60(b)(6).

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Gonzales prays that this Court grant a writ of certiorari to resolve the Question Presented.

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[9] The sentence of the panel opinion hedging the Fifth Circuit's settled rule concludes with the citation:

> *Compare Gonzalez*, 545 U.S. at 536; *Adams v. Thaler*, 679 F.3d 312–20 (5th Cir. 2012) (explaining that Supreme Court decisions changing governing law on procedural default did not constitute extraordinary circumstances), *with* 588 U.S. ___ (2019) (Sotomayor, J., concurring) ("*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.").

Respectfully submitted this 21st day of April, 2020,

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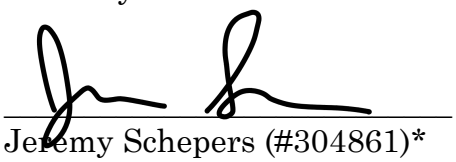
by



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