No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN BOYER, *Plaintiff-Respondent,*

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY *Defendant-Petitioner.*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether and under what circumstances a motion to recall judgment attacking the erroneous application of the relitigation bar in 28 USCS 2254(d) should be recharacterized as a second or successive habeas petition?

LIST OF PRIOR PROCEEDINGS

The parties to the proceeding in the court below are contained in the caption of the case and this petition is not filed on behalf of a non-governmental corporation.

The following prior proceedings relate to the case in this court:

Federal habeas proceedings

- *Boyer v. Vannoy*, No. 16-30487 (5th Cir. 1/30/20)
- *Boyer v. Vannoy*, 863 F.3d 428 (5th Cir. 2017) cert denied 139 S.Ct. 54 (2018)
- *Boyer v. Cain*, No. 2:14-cv-914, 2016 U.S. Dist. LEXIS 41254 (W.D. La. Mar. 28, 2016)
- *Boyer v. Cain*, No. 14-cv-0914, 2016 U.S. Dist. LEXIS 41122 (W.D. La. Jan. 14, 2016)

Direct appeal proceedings

- *Boyer v. Louisiana*, 569 U.S. 238 (2013)
- *State v. Boyer*, 2011-0769 (La. 01/20/12), 78 So. 3d 138
- *State v. Boyer*, 10-693 (La. App. 3 Cir 02/02/11), 56 So. 3d 1119

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jonathan Boyer respectfully requests that the Court grant a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals denying his motion to recall the mandate.

The petitioner is the petitioner and petitioner-appellant in the courts below. The respondent is Darrel Vannoy, Warden, Louisiana State Penitentiary, the respondent and respondent-appellee in the courts below.

OPINIONS BELOW

The *per curiam* opinion of the Fifth Circuit Court of Appeals denying Mr. Boyer's motion to recall the mandate is at *Boyer v. Vannoy*, No. 16-30487 (5th Cir. 1/30/20) and is reprinted in the Appendix. App. A, A-1.

The panel opinion of the Fifth Circuit Court of Appeals affirming the denial of Mr. Boyer's habeas petition is at *Boyer v. Vannoy*, 863 F.3d 428 (5th Cir. 2017), and is reprinted in the Appendix. App. B, A-4.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals on the basis of 28 U.S.C.S. § 1254. The Court of Appeals opinion was issued on January 30, 2020.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented implicates the following provision of the United States Constitution and Code:

28 U.S.C.S. § 2244

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

28 U.S.C.S. § 2254

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

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

SUMMARY OF THE CASE

There was a seven year delay between Mr. Boyer's arrest and trial, the majority of which was caused by the State of Louisiana's failure to fund indigent capital defense. However, the state court held that delay caused by a lack of indigent defense funding does not count in the speedy trial analysis and denied Mr. Boyer's federal constitutional claim.

By a vote of two-to-one, the circuit court denied habeas relief on the basis that Mr. Boyer had not overcome the procedural hurdle of §2254(d)(1)'s relitigation bar. Following then Fifth Circuit law, the circuit court improperly applied *Richter's*[1] "could have supported" framework to a reasoned state court opinion even though the circuit court found the state court reasoning to rest on an obvious misapplication of this Court's precedent.

Mr. Boyer immediately pointed out this error in a timely application for rehearing and unsuccessfully sought certiorari in this Court on the same point.

Mr. Boyer promptly filed a motion to recall the mandate after the Fifth Circuit Court of Appeals, in *Langley v. Prince*, 926 F.3d 145 (2019) (*en banc*), held that the Fifth Circuit would no longer apply *Richter's* "could have supported" framework to reasoned state court decisions.

Mr. Boyer's motion to recall the mandate did not seek to attack his state court conviction nor rely upon a change in the substantive law governing his habeas claim. Instead, it attacked the failure of the circuit court to consider the application of

[1] *Harrington v. Richter*, 562 U.S. 86 (2011).

§2254(d)(1)'s procedural hurdle to the state court's reasoned opinion, thus precluding a merits determination on his federal constitutional claim. The remedy sought was for the court to properly consider, for the first time, whether §2254(d)(1)'s procedural hurdle was met.

The circuit court erroneously held that Mr. Boyer's motion to recall the mandate was an impermissible second or successive petition because it asked the court to revisit a claim it had decided on the merits. App A, A-3.

This petition seeks to answer a question left open by this court's decisions in *Banister v. Davis*, 207 L. Ed. 2d 58 (2020), *Gonzalez v. Crosby*, 545 U.S. 524 (2005) and *Calderon v. Thompson*, 523 U.S. 538 (1998): whether and in what circumstances a motion to recall judgment attacking the improper application of the relitigation bar in 28 USCS 2254(d)(1) should be recharacterized as a second or successive habeas petition.

The Fifth Circuit's holding splits with the approach in the 6th, 9th, 4th and 2nd circuits, all of which would hold that Mr. Boyer's post-judgment motion was not a barred successive habeas application but instead a permissible attack on a defect in the integrity of the federal proceedings.

The Fifth Circuit's approach is also inconsistent with this Court's prior holding in *Gonzalez* as to when a post-judgment motion will constitute a successive application for the purposes of §2244(b)(1).

This Court should grant certiorari to resolve this split and to vindicate Congress' intention that state prisoners would have one meaningful opportunity in

federal court for vindicating their federal constitutional rights following an extreme malfunction in the state court system.

Mr. Boyer does not seek a do-over, after having a federal court consider his federal constitutional claim. Instead, Mr. Boyer is asking that a federal court correctly consider, for the first time, whether he has overcome the procedural hurdle of § 2254(d)(1) so that his federal habeas claim may be considered on the merits.

STATEMENT OF THE CASE

A. Mr. Boyer's speedy trial claim was denied in state court on the basis that delay caused by a failure of the state to fund indigent defense should not be weighed against the state

Mr. Boyer was arrested on March 8, 2002, at the age of 19, and indicted on one count of first degree murder on June 6, 2002. For the next five years his case was stalled, mainly as a result of the State of Louisiana's failure to adequately fund indigent capital defense. *Boyer*, 863 F.3d at 444; App B, A-17, 18-19. After funded counsel was finally provided, the case moved forward.

On September 29, 2009, Mr. Boyer, was convicted of second degree murder and armed robbery.[2]

His convictions and sentences were affirmed on direct appeal by Louisiana's Third Circuit Court of Appeal. *State v. Boyer*, 10-693 (La. App. 3 Cir. 02/02/11); 56 So. 3d 1119 *writ denied* 2011-K-769; 78 So. 3d 138. In addressing Mr. Boyer's speedy trial claim, the state court held that the majority of the delay in the case was caused

[2] The jury that convicted Mr. Boyer was unable to reach a unanimous verdict on the murder count, voting 11:1, but was unanimous as to the armed robbery count.

by the lack of funding but refused to weigh that delay against the state as the progression of the prosecution was "out of the State's control". *Id.* at 1145; *Boyer*, 863 F.3d at 444; App B, A-17.

This Court initially granted certiorari but then denied certiorari as improvidently granted after oral argument by a 5:4 vote. *Boyer v. Louisiana*, 569 U.S. 238 (2013). The dissenting justices lamented the denial of certiorari, describing the state court's decision as "based on a critical misapprehension of our precedents," and involving a "fundamental error." *Boyer*, 569 U.S. at 246-7 (2013) (Sotomayor J., dissenting).

B. The §2254(d) relitigation bar was incorrectly applied by the circuit court to bar merits review of Mr. Boyer's federal speedy trial claim

Mr. Boyer timely sought habeas relief in federal court. Habeas relief was denied in the district court but a certificate of appealability was granted.

On appeal, Respondent argued that § 2254(d)(1) was limited to the objective reasonableness of the state court's ultimate determination, while Mr. Boyer argued that the objective unreasonableness of the state court's reasoned opinion met the exception contained in § 2254(d)(1).

The circuit court found that the state court had made an obvious error and misapplied this Court's precedent in failing to weigh the delay caused by the lack of indigent defense funding against the state. *Boyer*, 863 F.3d at 444-5; App B, A-19.

However, the circuit court then erroneously applied the §2254(d) relitigation bar by ignoring the state court's unreasonable reasons and instead asking whether the ultimate decision to deny the claim was objectively unreasonable. Citing *Richter*,

the circuit court asked whether fairminded jurists could disagree on the correctness of "the state court's decision." *Boyer*, 863 F.3d at 445 & n.75; App B, A-19.

This was consistent with the Fifth Circuit's then jurisprudence, which "stated that review under § 2254(d)(1) encompasses not just the arguments and legal theories the state court's opinion actually gave, but also any arguments or legal theories the state court reasonably could have given: that is, *Richter's* "could have supported" framework applied even where a state-court opinion exists. *Langley v. Prince*, 890 F.3d 504, 515 & n.14 (5th Cir. 2018).

The panel majority concluded that while the state court's ultimate decision to deny relief was debatable,[3] it was not objectively unreasonable. *Id.* The dissenting judge would have granted habeas relief, concluding that even considering only the outcome and not the reasoning, the state court's decision to deny relief was objectively unreasonable. *Id.* at 457-8; App B, A-29.

As a result, the majority of the panel held that consideration of the merits of Mr. Boyer's federal constitutional speedy trial claim was barred by the relitigation bar in §2254(d)(1) and affirmed the denial of relief. *Id.* at 455-6; App B, A-27.

C. Mr. Boyer timely sought rehearing, arguing that the state court's unreasonable reasoned decision satisfied § 2254(d)(1) and suggesting the circuit court hold the case for Wilson

On July 31, 2017, Mr. Boyer timely applied for panel rehearing, explicitly arguing that the circuit court erred in holding that the application of § 2254(d)(1)

[3] In addition to finding the state court's treatment of the second *Barker* factor to be clearly erroneous, the circuit court held that "jurists could disagree with the state appellate court's decision finding [the third and fourth *Barker* factors] not 'present.'" *Boyer*, 863 F.3d at 443; App B, A-18.

focused exclusively on the ultimate determination, rather than unreasonable application of Supreme Court law in the state court's reasoning.

On September 2, 2017, Mr. Boyer filed a Rule 28j letter, advising the circuit court that certiorari had been granted in *Wilson v Sellers*, 16-6855, that it was to be argued on October 30, 2017 and that the issue before the Fifth Circuit on rehearing appeared to be implicated in *Wilson* such that it may be appropriate to hold this case until the *Wilson* opinion was issued.

On November 9, 2017, rehearing was denied without reasons.

On February 26, 2018, Mr. Boyer unsuccessfully applied to this Court for a writ of certiorari, raising as the question presented the correctness of reviewing only the ultimate state court determination and not the state court reasons when applying §2254(d)(1). *Boyer v. Vannoy*, 139 S.Ct. 54 (2018) (cert denied). Respondent filed a brief in opposition to the grant of certiorari arguing that "a federal court may only grant habeas relief if the resulting balance of all four *Barker* factors was objectively unreasonable."[4]

D. This Court issued its decision in Wilson, holding that §2254(d)'s test requires focus on the state court reasons and that the "could have supported" framework does not apply to a reasoned state court decision

On April 17, 2018, this Court issued its opinion in *Wilson*, holding that federal courts under §2254(d) must review for reasonableness the specific reasons given by the state court and that *Richter's* "could have supported" framework does not apply

[4] *Brief in Opposition* at 14.

where, as here, the state court offers a reasoned opinion. *Wilson v. Sellers*, 138 S.Ct. 1188, 1191-2, 1195, 1196-7 (2018).

E. Following Wilson, the Fifth Circuit was uncertain as to the status of its existing precedent that required §2254(d) review to focus only on the state court's ultimate determination

On April 18, 2018, the day after *Wilson* was handed down, the Fifth Circuit panel considering another § 2254 case, *Langley v. Prince*, requested letter briefs from the parties regarding the effect of *Wilson*. On May 14, 2018, that panel issued its opinion, noting the tension between Fifth Circuit precedent and *Wilson* but holding that "[w]e leave *Wilson's* impact to be decided another day." *Langley*, 890 F.3d at 515.

On August 2, 2018, another panel of the circuit court noted the tension between circuit law and *Wilson*, observing the uncertainty in the state of the law. *Thomas v. Vannoy*, 898 F.3d 561, 568 (5th Cir. 2018) ("The continued viability of [the Fifth Circuit's] approach after the Supreme Court's decision in *Wilson v. Sellers* is uncertain, however.")

On October 12, 2018, the *en banc* of the Fifth Circuit granted rehearing in *Langley v. Prince*, 905 F.3d 924 (5th Cir. 2018).

On October 15, 2018, the Fifth Circuit *en banc* in *Langley* issued a briefing order, directing counsel for each party in its brief to "address the Supreme Court's intervening opinion in *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)". The cited passage of this Court's opinion is precisely the passage relied upon by Mr. Boyer.

Clearly then, by October 2018, Mr. Boyer had been assiduously and determinedly pursuing his rights and raising his claim that the circuit court had erred in understanding the scope of the relitigation bar and applied it in circumstances in which it did not apply. Further, by October 2018, panels of the Fifth Circuit had noted that the viability of the line of Fifth Circuit reasoning relied upon by the circuit court was uncertain and the *en banc* had specifically requested briefing on the effect of *Wilson*. Any application to recall the mandate would have been premature at this point until the *Langley en banc* resolved the uncertainty in the circuit of the effect of *Wilson*.

F. The Fifth Circuit en banc announced its decision in Langley, applying Wilson to consider the reasonableness of state court reasons and panels since have embraced the rule in Wilson

On June 6, 2019, the *en banc* announced its opinion in *Langley v. Prince*, 926 F.3d 145 (2019)(*en banc*). In that opinion, the majority specifically cited to and applied[5] *Wilson's* holding that §2254(d)'s test for reasonableness is to be applied to the state court's reasons and not its ultimate determination and further, that a reviewing court may not apply the "could have supported" framework where there is a reasoned state court opinion. See *Langley*. 926 F.3d at 159, 163, 168.

Within two weeks of the *en banc* opinion in *Langley* being released, two Fifth Circuit panels directly cited *Wilson* for the proposition that §2254(d) requires the

[5] The dissent argued that the majority did not correctly apply this rule to the case but there was no dispute that the proper approach under §2254(d)(1) was to review the state court's opinion for reasonableness and not to defer to the ultimate determination on the basis that other reasons "could have supported" the denial of relief.

federal court to focus upon the reasons provided in the state court opinion in determining reasonableness. *Smith v. Davis*, 927 F.3d 313, 321 (5th Cir. June 13, 2019); *Gardner v. Davis*, 779 Fed. Appx. 187, 189 (5th Cir. June 19, 2019).

G. Mr. Boyer diligently sought to recall the mandate based upon the decisions in Wilson and Langley showing that the panel's holding that the §2254 relitigation bar applied to a case like Mr. Boyer's had been repudiated

On August 9, 2019 Mr. Boyer filed a motion to recall the mandate in his proceeding, citing the following extraordinary circumstances:

- subsequent decisions of the Supreme Court and the *en banc* rendered the circuit court's previous decision demonstrably wrong;
- Mr. Boyer conscientiously and diligently advanced exactly the new proposition of law relied upon in the circuit court and this Court;
- the relief sought was modest: relief from the improper imposition of the relitigation bar to allow merits consideration of the constitutional claim;
- the circuit court had already found the state court's reasoning to have misapplied Supreme Court precedent and subsequent Louisiana caselaw repudiates the error in Mr. Boyer's case;
- the delay in Mr. Boyer's case was extreme and his claim for relief unusually meritorious;
- the public interest in the enforcement of the speedy trial guarantee.

In particular, Mr. Boyer argued that *Wilson* and *Langley* (*en banc)* had repudiated the line of Fifth Circuit case law holding that the relitigation bar extended to cases where there were reasons that "could have supported" the state court

determination, even where the specific reasons relied upon by the state court were objectively unreasonable.

Respondent filed an opposition, arguing that the motion to recall the mandate should be denied because it amounted "to an end-run around AEDPA's bar on filing second or successive petitions."

H. The circuit court refused to recall the mandate, holding that Mr. Boyer's application was a prohibited second or successive petition

On January 30, 2020 the circuit court issued a *per curiam* opinion denying Mr. Boyer's motion to recall the mandate on the sole basis that it was barred as a second or successive application for the purposes of 28 U.S.C. § 2244(b):

> Boyer's petition asks us to revisit a claim we decided on the merits; we thus regard it as a successive petition barred by § 2244(b)(1).

App-A, A-3.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter

A. The Fifth Circuit decided that a post-judgment motion is barred by §2244(b)(1) when it asks the court to revisit a claim decided on the merits

The Fifth Circuit entered a decision that a post-judgment motion was barred by §2244(b)(1) where it would ask the court to revisit a claim decided on the merits:

> Boyer's petition asks us to revisit a claim we decided on the merits; we thus regard it as a successive petition barred by § 2244(b)(1).

App A, A-3.

Mr. Boyer's motion to recall the mandate did not seek to attack his state court conviction nor rely upon a change in the substantive law governing his habeas claim. Nor did it seek to attack the correctness of the circuit court's answer to the §2254(d)(1) question as rendered: instead, it attacked the circuit court's failure to ask the right question under §2254(d)(1) at all, thus precluding consideration of the merits of Mr. Boyer's claim. The remedy sought was for the court to properly consider, for the first time, whether §2254(d)(1)'s procedural hurdle was met.

Mr. Boyer's post-judgment motion had nothing to do with the proper application of the Speedy Trial clause but was focused on whether, in a federal habeas proceeding, the §2254(d)(1) exception to the relitigation bar was to be applied to the state court's reasoned decision or only to its ultimate determination.

Nevertheless, the Fifth Circuit held that such a motion is a successive habeas corpus application under section 2254 and thus barred by § 2244(b)(1).

B. The Fifth Circuit's decision conflicts with the decisions of other courts of appeal, which ask whether the post-judgment motion contains a claim attacking the state conviction or merely attacks the integrity of the federal habeas proceeding

The Fifth Circuit's decision is at odds with decisions of the 6th, 9th, 4th and 2nd circuits considering whether a post-judgment motion is a successive application under § 2244(b).[6] Mr. Boyer's motion would not have been barred as successive in those circuits.

[6] The cases cited below arise in the context of a Fed. R. Civ. P. 60(b) motion, rather than a motion to recall the mandate, but the construction of §2244(b) to determine whether a post-judgment motion contains "a claim presented in a second or successive habeas corpus application" is identical in each posture. This is also true at a practical level, as a Rule 60(b) motion may be brought long after the

In direct contrast to the Fifth Circuit, the Sixth Circuit holds that the focus under § 2244(b)(1) is not whether the court previously reached the merits of a particular claim but whether the post-judgment motion contains a claim. *Tyler v. Anderson*, 749 F.3d 499, 507 (6th Cir. 2014) ("the focus of our inquiry is 'on whether the Rule 60(b) motion contains a claim.'"); *Mitchell v. Rees*, 261 Fed. Appx. 825, 829 (6th Cir. 2008) ("the focus of the inquiry is not on whether the court reached the merits of the original petition but on whether the Rule 60(b) motion contains a claim."). If a post-judgment motion does not attack a prior determination on the merits but asserts that a previous ruling precluding merits determination was in error, then it is not a successive habeas petition. *Tyler*, 749 F.3d at 507.

Similarly, Ninth Circuit precedent requires the court to focus on the substance of the post-judgment motion and determine whether the motion contains a claim as opposed to, for example, alleging an error in a procedural ruling that actually precluded a merits determination. *United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011); *United States v. Washington*, 653 F.3d 1057, 1063 (9th Cir. 2011).

The Fourth Circuit also focuses on the substance of the post-judgment motion, holding that "the proper treatment of the motion depends on the nature of the claims presented." *United States v. Winestock*, 340 F.3d 200, 206-07 (4th Cir. 2003). In the Fourth Circuit, the court asks whether the motion attacks the conviction or sentence

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mandate of the appellate court has issued and, for this reason, motions to recall the mandate and 60(b) motions often travel in company.

(a successive claim) or seeks a remedy for some defect in the collateral review process (a proper post-judgment motion). *Id.*

The Second Circuit also focuses on the relief sought in the post-judgment motion which, as is the situation in Mr. Boyer's case, "may well have nothing to do with the alleged violations of federal rights during the state criminal trial that are asserted as a basis for the habeas." *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001). Thus, in the Second Circuit, where the post-judgment motion seeks to vacate the judgment dismissing the habeas petition, rather than invalidating the state conviction, it is not a successive claim within the meaning of 28 U.S.C. § 2244(b). *Id.* at 198-9.

II. The circuit court has decided an important federal question in a way that conflicts with relevant decisions of this court

A. This Court has previously held that a Rule 60(b) motion is not a successive motion for the purposes of § 2244(b)(1) if it attacks a defect in the federal habeas proceeding precluding a merits ruling

In *Thompson*, this Court held that motions to recall the mandate in § 2254 proceedings are also governed by § 2244(b), though in that case the matter before the Court was a *sua sponte* recall of the mandate by the circuit court, rather than the filing of an application to which § 2244(b) applied. *Calderon v. Thompson*, 523 U.S. 538 (1998). Nevertheless, the Court in *Thompson* opined in *dicta* that "a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b)." *Thompson*, 523 U.S. at 553. Because this was not the posture before the Court, the decision did not explore when such a motion would or would not be regarded as a

successive application, nor when a motion did or did not seek recall "on the basis of the merits".

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court gave direct consideration to §2244(b) and its application to post-judgment motions; in that case a Rule 60(b) motion. The Court held that "so long as the motion 'attacks the federal court's previous resolution of a claim on the merits'" it counts as a second or successive habeas application. *Banister v. Davis*, 207 L. Ed. 2d 58, 72, (2020) quoting *Gonzalez*, 545 US at 532. However, a motion that attacks "some defect in the integrity of the federal habeas proceedings" is not a successive motion, including a motion that "asserts that a previous ruling which precluded a merits determination was in error." *Gonzalez*, 545 US at 534 & n.4.

In doing so, the *Gonzalez* court grappled with an unanswered question in *Thompson*: under what circumstances a post-judgment motion "attacks the federal court's previous resolution of a claim *on the merits*." *Gonzalez*, 545 US at 532 (emphasis in original). The Court held that "on the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." (emphasis added). Thus an attack "on the merits" must relate to the entitlement to relief under § 2254(a) and not merely the procedural hurdle of § 2254(d).

In *Banister*, this Court addressed post-judgment motions that unquestionably attack the federal court's previous resolution of a claim on the merits and found that such motions brought under Rule 59(e) are not barred by § 2244(b)(1) but that Rule

60(b) motions and motions to recall the mandate are barred. However, the Court took the opportunity to reaffirm the critical distinction that "a Rule 60(b) motion that attacks 'some defect in the integrity of the federal habeas proceedings'—like the mistaken application of a statute of limitations—does not count as a habeas petition at all, and so can proceed." *Banister*, 140 S.Ct. at n.7.

B. This Court has previously held that § 2254(d) operates as a procedural hurdle and a relitigation bar, rather than defining any entitlement to habeas relief

This Court has repeatedly held that § 2254(d) represents a procedural hurdle – a relitigation bar - that a habeas petitioner must clear before a court can reach the merits of a claim. *See Brumfield v. Cain*, 576 U.S. 305, 324 (2015) (describing the court's §2254(d) ruling as determining whether the habeas applicant "cleared AEDPA's procedural hurdles" to permit review of the underlying habeas claim); *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (describing §2254(d) as setting forth "a precondition to the grant of habeas relief . . . not an entitlement to it"). *See also Greene v. Fisher*, 565 U.S. 34, 29 (2011) (describing the provision as a "relitigation bar"); *Richter*, 562 U.S. at 100 (same).

As such, an attack on an improper application of § 2254(d)(1), independent of the merits of the underlying claim, "merely asserts that a previous ruling which precluded a merits determination was in error" and is not a barred successive application. *Gonzalez*, 545 U.S. at n.4.

III. Mr. Boyer's case presents an excellent vehicle to decide the question presented and he should be given the opportunity to have his motion to recall the mandate considered on the merits

Mr. Boyer's case presents an excellent vehicle to decide the question presented. The circuit court denied the motion to recall the mandate on the sole basis that it represented an impermissible successive habeas application under § 2244(b)(1). The question is squarely presented and unclouded by any ambiguity in the basis for the lower court's decision or any alternative basis for denying relief. There is a distinct circuit split and the question would have been answered differently in multiple other circuits.

Further, the answer to the question doesn't just matter for other cases, it matters in this case.

Mr. Boyer's underlying claim of a violation of his federal constitutional rights is unusually strong, with a seven year delay to trial, the majority of which was due to the State of Louisiana's egregious and chronic failure to fund its indigent defense system.[7] Yet, despite properly and timely raising the claim in every available forum, Mr. Boyer has been unable to have a state or federal court consider his constitutional speedy trial claim on the merits in accordance with clearly established federal law, as determined by this Court.

Mr. Boyer is clearly correct that the circuit court misapplied §2254(d)(1) in his case and is clearly correct that the state court misapplied this Court's precedent in denying his speedy trial claim but he nevertheless remains convicted and sentenced to life imprisonment without parole, probation or suspension of sentence.

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[7] *Boyer v. Louisiana*, 569 U.S. 238, 246-7 (2013) (Sotomayor J., dissenting) (describing Louisiana's long documented history of failing to fund or adequately staff its public defender system.

The Fifth Circuit's holding extends the plain text of § 2244(b) to prevent a federal appellate court from correcting its own egregious error that undermines the integrity of the federal habeas proceeding and thus allows the violation of the constitutional rights of state prisoners to remain unaddressed in circumstances that congress did not intend.

CONCLUSION

It is respectfully submitted that this Court should grant certiorari.

Respectfully submitted,

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RICHARD BOURKE, *Counsel of Record*
Attorney for Petitioner
Dated: June 29, 2020.