No. 22-94

In the Supreme Court of the United States

ROBERT ALAN FRATTA, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner has been tried twice for hiring a pair of hitmen, who twice shot his estranged wife in the head while he took their children to church classes. Petitioner has been twice convicted of capital murder. And he has been twice sentenced to death. The second conviction has been upheld on direct appeal, against multiple state petitions for writs of habeas corpus, and against a federal writ of habeas corpus. Although petitioner has repeatedly filed documents *pro se*, he has had appointed counsel through all major stages of this litigation. The questions presented are:

When a habeas petitioner's Rule 60(b) motion is denied or dismissed, does 28 U.S.C. section 2253(c) require a certificate of appealability (COA)?

When a Rule 60(b) motion seeks relief from a district court's final judgment that rejected the petitioner's habeas claims on the merits after finding them procedurally defaulted, is the motion subject to 28 U.S.C. section 2244(b) under *Gonzalez v. Crosby*, 545 U.S. 524 (2005)?

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 15.1, Respondent submits this supplemental statement of related proceedings:

Ex parte Fratta, No. WR-31,536-01 (Tex. Crim. App. July 31, 1996) (mandamus).

Ex parte Fratta, No. WR-31,536-03 (Tex. Crim. App. March 27, 2013) (mandamus).

Fratta v. Davis, No. 17-70023, 889 F.3d 225 (5th Cir. May 1, 2018) (denial of COA).

Fratta v. Davis, No. 4:13-CV-3438 (S.D. Tex, Jan. 21, 2021) (dismissal of Rule 60(b) Motion).

Fratta v. Lumpkin, No. 21-70001, 2022 WL 44576 (5th Cir. Jan. 5, 2022) (denial of COA), *petition for rehearing en banc denied* (Feb. 28, 2022).

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INTRODUCTION

This Court has observed that applying section 2253(c)'s COA requirement to motions for relief from judgment, Fed. R. Civ. P. 60(b), is a "plausible and effective screening requirement" that has a "sound[] basis in the [habeas] statute." *Gonzalez*, 545 U.S. at 535 n.7. Four courts of appeals enforce that requirement, including when a habeas petitioner's Rule 60(b) motion is denied or dismissed for lack of jurisdiction because it is subject to 28 U.S.C. section 2244(b)'s restrictions on second-or-successive habeas petitions. One court of appeals—the Fourth Circuit—disagrees. But the majority rule accords with the text and structure of AEDPA and is consistent with this Court's precedent.

And even if not, Fratta's appeal would be a poor vehicle for taking up the question of whether a COA is required to appeal an unsuccessful Rule 60(b) motion. His Rule 60(b) motion was untimely, and analyzing the question presented would be complicated because Fratta's motion contains both habeas claims and procedural challenges. Fratta's is not a clean example of the type of Rule 60(b) motion he asks the Court to address.

Fratta's second question presented amounts to a request for error correction. He contends the Fifth Circuit was wrong when it concluded his Rule 60(b) motion contained habeas claims because, as the court below explained, Fratta's motion for relief from judgment necessarily challenged the district court's rejection of Fratta's habeas claims on their merits. Even if the Fifth Circuit erred—though it did not—this Court need not correct case-specific errors in applying *Gonzalez v. Crosby*'s well-established standard. More

still, the claims at issue do not entitle Fratta to habeas relief even if they are reviewed de novo.

STATEMENT

I. Fratta Hired a Hit Man to Execute His Estranged Wife.

A. In 1992, Petitioner's wife, Farah, filed for divorce on the grounds of cruelty. 22 RR 65-66, 91-92. She sought full custody of the couple's two children. 22 RR 69, 95. Fratta was angry. 22 RR 69-70; 23 RR 19; 25 RR 130-31. Divorce proceedings continued for nearly two years, and Fratta became even more angry when his wife described his deviant sexual preferences at a deposition. 25 RR 123-24; *see Fratta v. State*, No. AP-76,188, 2011 WL 4582498, at *2, *7-10 (Tex. Crim. App. Oct. 5, 2011).

As the final trial approached, Fratta "solicited many of his friends and acquaintances to kill [his wife] or to recommend someone who could kill her." *Id.* at *2; *see* 23 RR 202-03; 24 RR 173-74, 191-200, 235-43; 25 RR 28-50, 115-26, 180-82. Fratta told one friend that he would kill Farah himself, but he needed to make sure the children were with him so they would be safe. 25 RR 183; *see also* 25 RR 179.

Fratta's search for a hitman eventually led him to Joseph Prystash. *See Fratta*, 2011 WL 4582498, at *1. As summarized by the Texas Court of Criminal Appeals, "Prystash was not part of [Fratta's] regular circle of friends, but on several occasions in the weeks leading up to the offense, the two men were observed speaking privately together at a health club where they were both members." *Id.* at *2; 27 RR 14-16. Prystash told his girlfriend that Farah was going to be murdered on a Wednesday evening and that it was his job to find a triggerman, while Prystash himself would be the getaway driver. 27 RR 36-38, 41.

B. On Wednesday, November 9, 1994, Prystash's girlfriend "came home from work to find" Howard Guidry, a neighbor, "dressed in black, sitting on the steps in front of her apartment." *Fratta*, 2011 WL 4582498, at *2; *see* 27 RR 15-17, 20-23, 43-46. Guidry said he was waiting for Prystash. 27 RR 46. Prystash left with Guidry at approximately 6:00 p.m. 27 RR 46-48. He, too, was dressed in black. 27 RR 47.

Fratta had "planned the murder for a time when he knew that Farah would be waiting at home for him to return their children according to the visitation schedule." *Fratta*, 2011 WL 4582498, at *20. Specifically, Fratta was to drop the children off with their mother at 8:00 p.m. *See id.* When Farah arrived home to meet her children, Guidry was waiting instead.

Neighbors heard a gunshot, a scream, and another gunshot—then they saw Farah lying on the floor of her garage. 23 RR 100, 139, 141. The neighbors observed a black man dressed in black come from behind a shrub on the side of Farah's garage and hop into a car that picked him up in front of Farah's driveway. 23 RR 105-106, 110-11, 115, 130-31, 142-45.

Farah suffered two gunshot wounds to the head. 29 RR 94, 119. The first was not fatal; the bullet entered the left side of her forehead and exited the left side of her head. 29 RR 102. The second bullet wound was to the back of her head, 29 RR 109, and was fatal, 29 RR 120. The medical examiner later determined the gun was in contact with her skin when discharged. 29 RR 107, 118.

C. Meanwhile, "[Fratta] took the couple's three children to Wednesday-evening church classes and attended a parents' meeting at the church." *Fratta*, 2011 WL 4582498, at *1. Evidence showed that "[a]lthough the children regularly attended classes" at the church, "it

was unusual for [Fratta] to stay for the parents' meeting." *Id.* Nor was Fratta particularly interested in that night's meeting: he "repeatedly left the meeting to make and receive telephone calls in the church office." *Id.*; *see* 28 RR 158-161; 28 RR 186-90.

Police would eventually use the church's telephone records to connect Fratta, Prystash, and Guidry to Farah's murder. 29 RR 18-20; 28 RR 250-253. These records and other evidence established that while Fratta was at the church with the children, Prystash dropped Guidry off at Farah's house and then waited at a grocery store pay phone a half-mile away. *See* 29 RR 32. After killing Farah, Guidry used a cell phone to call the pay phone so Prystash could pick him up. 29 RR 32.

D. Prystash returned to his girlfriend's apartment between 8:30 and 9:00 p.m. 27 RR 59-60. He confessed to killing Farah, unloaded a handgun, and placed it under a pile of his clothes. 27 RR 60-61, 63, 67-68. He then left the apartment, saying he was going to the gym to meet Fratta. 27 RR 219-21. His girlfriend wrote down the make, model, and serial number engraved on the gun: "Police Bull Dog, .38 spl, Charter Arms Corps., Stratford, Conn., 771590." ROA.4562; *see* 27 RR 71-75; 29 RR 22-23. Later—concerned that police might find a murder weapon in her apartment—the girlfriend asked Prystash what he had done with the gun; Prystash said he had given it to Guidry for disposal. 27 RR 78-79.

Six months later, Guidry was arrested for robbing a bank. 28 RR 28. Guidry was carrying the .38 special, which was registered to Fratta. 27 RR 75; 28 RR 27-33, 39, 65-67.

II. Fratta Was Convicted of Capital Murder—Twice.

In 1997, Fratta was convicted of capital murder and sentenced to death. *See Fratta v. State*, No. AP-72,437 (Tex. Crim. App. June 30, 1999). Although the conviction was upheld on direct review, a federal district court granted Fratta habeas relief based on a Sixth Amendment violation during trial, and the Fifth Circuit affirmed. *Fratta v. Quarterman*, No. H-05-3392, 2007 WL 2872698 (S.D. Tex. Sep. 28, 2007), *aff'd*, 536 F.3d 485 (5th Cir. 2008).

In 2009, Fratta was retried and resentenced to death. His conviction was again affirmed on direct appeal. *See Fratta v. State*, No. AP-76,188, 2011 WL 4582498 (Tex. Crim. App. Oct. 5, 2011); Pet. App. 138a. This Court denied certiorari. *Fratta v. Texas*, 566 U.S. 1036 (2012). Represented by appointed counsel, Fratta filed a state habeas application, which was unsuccessful. *Ex parte Fratta*, No. WR-31,536-04, 2014 WL 631218 (Tex. Crim. App. Feb. 12, 2014), *cert. denied*, 574 U.S. 936 (2014); Pet. App. 136a. Fratta subsequently filed a number of *pro se* habeas applications, which the Texas courts denied as abuses of the writ. *Ex parte Fratta*, No. WR-31,536-05, 2021 WL 674530 (Tex. Crim. App. Jun. 30, 2021), *cert denied*, 142 S. Ct. 1448 (2022); *Ex parte Fratta*, No. WR-31,536-06, 2022 WL 1666045 (Tex. Crim. App. May 25, 2022).

III. Fratta Completed His Full and Fair Opportunity for Federal Habeas Review.

After the conclusion of his counseled state habeas proceedings, Fratta petitioned the federal district court for habeas relief. This time relief was denied. *Fratta v. Davis*, No. 4:13-CV-3438, 2017 WL 4169235 (S.D. Tex., Sep. 18, 2017); Pet. App. 38a-135a. Counsel filed a notice of appeal and requested a COA on five issues, which the

Fifth Circuit denied as to all five. *Fratta v. Davis*, 889 F.3d 225 (5th Cir. 2018); Pet. App. 25a-37a. This Court denied Fratta's petition for writ of certiorari. *Fratta v. Davis*, 139 S. Ct. 803 (2019). During this time, Fratta submitted a number of post-judgment motions and documents pro se, which the district court struck because he was represented by counsel. *See* Pet. App. 12a.

On October 12, 2020, Fratta's appointed counsel filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). ROA.1297-1319. The district court denied the motion on two alternative grounds: *first*, it found the motion to be an improperly filed successive habeas petition. Pet. App. 11a-18a. *Second*, it concluded Fratta failed to show the extraordinary circumstances necessary for relief from judgment under Rule 60(b). Pet. App. 18a-23a. Fratta unsuccessfully appealed to the Fifth Circuit, which denied his request for a COA, Pet. App. 2a-10a, and for en banc rehearing, Pet. App. 1a. He now seeks review of the Fifth Circuit's denial of a COA on his Rule 60(b) motion.

REASONS TO DENY THE PETITION

I. Fratta's First Question Presented Is Not Certworthy—At Least in the Present Case.

Fratt first seeks this Court's review of whether a COA is necessary before appealing the denial of a Rule 60(b) motion for relief from judgment. Four courts of appeals have held that a COA is always necessary. The Fourth Circuit disagrees *if* that denial is jurisdictional—that is, if the motion is dismissed or denied because it contains habeas claims barred by 28 U.S.C. section 2244. Any split is thus narrow, lopsided, and could benefit from further percolation. Moreover, the Fifth Circuit has adopted the majority view, which is sound.

And even if the circuit split on jurisdictional denials warranted this Court's intervention, this case would be a poor vehicle for doing so for two reasons. *First*, Fratta's Rule 60(b) motion was untimely under this Court's decision last term in *Kemp v. United States*, 142 S. Ct. 1856 (2022). *Second*, the question on which the circuits have disagreed is not clearly presented: Fratta's motion included a mixture of arguments that were jurisdictionally improper second-or-successive habeas claims and procedural challenges that, if filed alone, might properly be considered in a Rule 60(b) motion under *Gonzalez*. The mixed nature of the motion would complicate review of whether a COA is necessary when a motion for relief fails because it is jurisdictionally barred as a second or successive habeas petition.

A. Any split is narrow, one sided, and does not warrant this Court's correction.

There is not currently a cert-worthy split regarding whether a COA is necessary when a district court dismisses or denies a motion for relief from judgment under Rule 60(b). This Court has held that a filing contains a habeas "claim" even if it is not denominated a petition if that filing "asserts" "that there exist … grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Gonzalez*, 545 U.S. at 532 n.4. As the Court explained in *Gonzalez*, "[w]hen a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim." *Id.* And a petitioner may not use Rule 60(b) "to present new claims for relief from a state court's judgment of conviction" and thereby "circumvent[] AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531

(citing 28 U.S.C. § 2244(b)(2)). The same principle prevents a federal habeas petitioner from using a Rule 60(b) motion to bring a habeas claim, including by arguing contend "that the court erred in denying habeas relief on the merits," *id.* at 532.

1. This Court has not ruled on how the COA requirement in 28 U.S.C. section 2253(c) applies to filings under Rule 60(b), but *Gonzalez* strongly suggested the lower courts were correct to require a COA. Even in 2005, "[m]any courts of appeals ha[d] construed 28 U.S.C. § 2253 to impose an additional limitation on appellate review by requiring a habeas petitioner to obtain a COA as a prerequisite to appealing the denial of a Rule 60(b) motion," the Court explained, and such a "requirement appears to be a more plausible and effective screening requirements, with sounder basis in the statute, than" the rule the Court rejected in *Gonzalez*. 545 U.S. at 535 & n.7.

As Fratta recognizes (at 14), since *Gonzalez*, the Third, Fifth, Ninth, and Eleventh Circuits have held that dismissal or denial of a Rule 60(b) motion is "the final order in a habeas corpus proceeding," 28 U.S.C. § 2253(c)(1)(A), and therefore requires a COA. *See Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 282-83 (3d Cir. 2021); *United States v. Winkles*, 795 F.3d 1134, 1141-42 (9th Cir. 2015); *Hamilton v. Sec'y, Florida Dep't of Corr.*, 793 F.3d 1261, 1265-66 (11th Cir. 2015) (per curiam).

2. In the seventeen years since *Gonzalez*, only a single circuit has disagreed, and even then only in a limited subset of circumstances. The Fourth Circuit holds that a COA is not required if a Rule 60(b) motion is dismissed as an unauthorized second-or-successive habeas petition under *Gonzalez*. *United States v. McRae*,

793 F.3d 392, 398-99 (4th Cir. 2015). It drew that holding from its reading of *Harbison v. Bell*, 556 U.S. 180 (2009), which held that a COA is not required to appeal the denial of a motion requesting enlargement of counsel's appointment to include state clemency proceedings. *Id.* at 183. In *Harbison*, this Court explained that the COA requirement applies to "the final order in a habeas corpus proceeding," 28 U.S.C. § 2253(c)), but "[a]n order that merely denies a motion to enlarge the authority of appointed counsel (or that denies a motion for appointment of counsel) is not such an order and is therefore not subject to the COA requirement." *Harbison*, 556 U.S. at 183. The Fourth Circuit thought that dismissing an improperly filed second-or-successive habeas petition "is so far removed from the merits of the underlying habeas petition" that it should not be subject to section 2253(c). *McRae*, 793 F.3d at 400.

That reasoning is unpersuasive for at least three reasons. *First*, *Harbison* does not support the Fourth Circuit's rule. An order denying appointment of counsel does not require a COA because it is not "*the final order* in a habeas corpus proceeding." 28 U.S.C. § 2253(c) (emphasis added). That is, it neither grants nor denies habeas relief on the merits. *See Gonzalez*, 545 U.S. at 532 n.4. A Rule 60(b) motion, however, is a collateral attack on an "already completed judgment" denying habeas relief. *Banister v. Davis*, 140 S. Ct. 1698, 1709 (2020). Its denial or dismissal gives rise to a final, appealable judgment. *See id.* at 1710. So, an order dismissing or denying a Rule 60(b) motion, unlike an order respecting appointment of counsel, is "the final order in a habeas corpus proceeding." 28 U.S.C. § 2253(c).

Second, neither is the Fourth Circuit's rule supported by *Gonzalez*'s interpretation of section

2244(b). *Gonzalez* distinguished different types of arguments raised in Rule 60(b) motions because "[a]s a textual matter, § 2244(b) applies only where the court acts pursuant to a prisoner's 'application' " for a writ of habeas corpus," and "an 'application' for habeas relief is a filing that contains one or more 'claims.'" 545 U.S. at 530 (quoting *Calderon v. Thompson*, 523 U.S. 538, 554 (1998)). But section 2253(c) does not refer to an "application" or a "claim"; section 2253(c) refers, as relevant here, to "the final order in a habeas corpus proceeding." 28 U.S.C. § 2253(c)(1)(A). *Gonzalez*'s rationale for distinguishing different types of arguments for relief from judgment—some of which are habeas "claims," while some are not—has no relevance to section 2253's distinct statutory language.

Finally, exempting dismissed Rule 60(b) motions from the COA requirement is inconsistent with the structure of AEDPA. Fratta does not dispute that an order dismissing an independently filed second-or-successive habeas petition under section 2244(b) would require a COA. There is no sound reason section 2253(c) should apply differently to a second-or-successive habeas application that is filed in the guise of a Rule 60(b) motion. Just like claims filed in their own action, habeas claims contained in a Rule 60(b) motion seek "habeas corpus relief." *Gonzalez*, 545 U.S. at 532 n.4. Treating one but not the other as "the final order in a habeas corpus proceeding" would allow petitioners to use strategic filings to avoid AEDPA's strictures.

Similarly, section 2253(c) requires a COA regardless of whether the district court denied habeas relief on the merits or because of a procedural bar. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As the Eleventh Circuit has observed, it would be inconsistent to treat the

Rule 60(b) motions differently for purposes of requiring a COA. *Hamilton*, 793 F.3d at 1265-66.

3. Although the Fourth Circuit has disagreed with its sister circuits, the conflict is both stale and "too narrow to warrant review." STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE 505 (10th ed. 2013). A Key Cite search reveals that the Fourth Circuit has been asked to apply *McRae* only in a couple dozen cases per year. But, in the seven years since *McRae* was announced, no other court of appeals has adopted its flawed reasoning. To the contrary, the Third and Fifth Circuits have continued to apply their prior precedent. *See, e.g.*, *Storey v. Lumpkin*, 8 F.4th 382, 387 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2576 (2022); *Bracey*, 986 F.3d at 281-83 & n.9. And this Court has declined to review at least one such decision. *See Jones v. Tice*, 137 S. Ct. 239 (2016); Petition for Writ of Certiorari, *Jones v. Tice*, 2016 WL 4176860, at *i (U.S. July 29, 2016) (No. 16-174) (raising the issue as the first question presented). No further need has developed for this Court to review the issue in the intervening time.

B. Fratta's case is a poor vehicle for addressing whether a COA is required in this circumstance.

Even if the time had come for this Court's intercession, at least two obstacles stand in the way of taking up Fratta's case to resolve if and when a COA is required following the denial or dismissal of a motion under Rule 60(b). *First*, Fratta's motion was not timely under Rule 60(b)(1). *Second*, Fratta's motion, at best, was "mixed"—it both challenged the district court's procedural-default ruling and sought to relitigate his habeas claims on the merits. So even if no COA is necessary for proper Rule 60(b) motions not subject to

section 2244(b), as Fratta contends, Fratta would still need a COA. And the mixed nature of his filing complicates the analysis in any event.

1. Fratta's motion was untimely.

Even if Fratta were correct that his Rule 60(b) motion was proper under *Gonzalez,* its filing was untimely. Fratta sought relief from what he contends (at 18-19) was an erroneous procedural default ruling. In September 2017, the district court had denied certain of his federal habeas claims based on Texas's bar against hybrid representation—namely, because Fratta had improperly submitted filings pro se when he was represented by counsel. Pet. App. 77a-78a. Fratta filed his Rule 60(b) motion on October 12, 2020, and argued that the district court mistakenly treated that state-law prohibition on hybrid representation as an adequate and independent state law ground for denying his federal habeas claims. ROA.1297-319. Based on *Garza v. Idaho*, 139 S. Ct. 738 (2019), and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the motion argued, the district court should not have allowed the Texas bar on hybrid representation to procedurally bar the habeas claims Fratta raised in his disallowed pro se filings in state court. ROA.1309-12. In other words, he argued the district court had made a legal error.

Last term, this Court held that Rule 60(b)(1) is the proper vehicle for seeking to correct errors of law in a district court's decision. *Kemp*, 142 S. Ct. at 1861-65. But Rule 60(b)(1) motions must be filed within one year of judgment. *Id.* at 1861 (citing Fed. R. Civ. P. 60(c)(1)). Fratta's motion, filed three years after the district court's September 2017 final judgment, failed to meet that deadline. Pet. App. 11a. Indeed, Fratta's motion was filed more than a year after the most recent decision that

formed the basis for his motion, *Garza*, was decided in February 2019. (*McCoy* was decided just eight months after the district court's 2017 judgment and more than two years before Fratta filed his Rule 60(b) motion.) Given this independent defect in his Rule 60(b) motion, Fratta's case would be a poor one for resolving the circuit split regarding COAs.

And in any event, *Kemp* was decided just months ago. It would be premature to take up a case that requires addressing its rule now, before the lower courts have an opportunity to develop its contours.

2. Fratta's motion does not cleanly present the narrow question on which the circuits have disagreed.

Even if the Court were to overlook this procedural defect, Fratta's petition does not squarely present the question about which he seeks review because his motion raised a mix of issues. *Gonzalez* held that a Rule 60(b) motion may properly be filed in a habeas case if it attacks not the denial of habeas relief "on the merits," but rather a "defect" in the federal proceedings or a procedural ruling that "precluded a merits determination." 545 U.S. at 532 & n.4. The Fifth Circuit concluded Fratta's Rule 60(b) motion was a second-or-successive habeas petition because, even though it argued the district court had erred in its finding of procedural default, the motion also sought a second chance to litigate the merits. Pet. App. 5a-7a. Indeed, Fratta's Rule 60(b) motion asked the court to "reopen the judgment" based on the "nature and strength" of his claims on the merits. ROA.1312-13.

As the Fifth Circuit explained in another recent case (of which this Court denied review), even an alternative merits decision is "a *determination* that there exist or do not exist grounds entitling a petitioner to habeas corpus

relief." *Will v. Lumpkin*, 978 F.3d 933, 938 & n.28 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 579 (2021) (quoting *Gonzalez*, 545 U.S. at 532 n.4); *see* Pet. App. 6a-7a.

Perhaps because the Court denied review on the same question just last year, Fratta does not seek review of the Fifth Circuit's assessment of alternative merits denials. Instead, Fratta contends the Court can ignore that issue because "the alternative merits analysis . . . may not have been the same analysis those claims would have received absent the procedural default ruling." Pet. 20-21. That argument gives the game away: to ask for a new merits analysis is to ask for "a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5.

In any event, before the Court could reach the COA question, it would have to confront the proper assessment of "mixed" Rule 60(b) motions under section 2244(b). Fratta's motion included, at best, both permissible and impermissible Rule 60(b) arguments. ROA.1309-17. Some courts of appeals hold that "the jurisdictional effect of § 2244(b)(3) extends to all claims in the application, including those that would not be subject to the limits on successive applications if presented separately." *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *see also Pennington v. Norris*, 257 F.3d 857, 859 (8th Cir. 2001). Others allow the district court to consider part of the filing while transferring the rest to the court of appeals for authorization under section 2244. *See Spitznas v. Boone*, 464 F.3d 1213, 1217 (10th Cir. 2006). Fratta has never asked the lower courts to consider his filing in part or otherwise raised the mixed-filing question for their consideration. This unsettled, predecessor issue would further complicate this Court's review and renders

Fratta's petition a poor vehicle to resolve the first question presented.

II. Fratta's Second Question Is a Fact-Bound Dispute Over Application of *Gonzalez v. Crosby* That Does Not Warrant This Court's Review.

Fratta's second question presented similarly does not warrant this Court's review because it is entirely fact bound. Fratta insists (at 18-19) that he filed a proper Rule 60(b) motion and not a successive habeas petition. The district court and the Fifth Circuit disagreed. Pet. App. 6a-9a, 13a-18a. And the Fifth Circuit explained that Fratta's constitutional claims would not warrant a COA in any event. Pet. App. 10a. There is no call for this Court's review.

A. Even if both lower courts were wrong, Fratta does not dispute that *Gonzalez* provides the rule of decision for whether a purported Rule 60(b) filing is subject to section 2244(b)'s gatekeeping requirements. This Court ordinarily does not grant certiorari to correct "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This case is no different.

B. Fratta's criticism is misplaced in any event. None of the four purported errors he cites demonstrate that the Fifth Circuit misapplied *Gonzalez*—or any other question warranting this Court's time and resources.

First, Fratta contends (at 20) his motion was permissible under *Gonzalez*'s allowance of a Rule 60(b) motion that challenges "a previous ruling which precluded a merits determination," such as "a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." 545 U.S. at 532 n.4. Although Fratta's Rule 60(b) filing included attacks on the district court's conclusion his claims were procedurally defaulted, ROA.1309-12, it also re-argued the merits of

his habeas claims, ROA.1312-13. And because the district court could not grant relief from judgment without revisiting its merits decision, the motion was a second-or-successive habeas application subject to section 2244(b) under *Gonzalez*. *See* 545 U.S. at 532 & n.4.

Second, Fratta points to *Gonzalez's* allowance for motions raising "some defect in the integrity of the federal habeas proceedings." *Id.* at 532. Fratta contends (at 20) that his motion was permissible because it argued "he was precluded from raising errors in the alternate merits analysis under then-binding circuit precedent" that this Court overruled in *Banister*. But the district court denied his pro se Rule 59(e) motion because hybrid representation is prohibited in federal court; it did not dismiss the motion as improperly filed pursuant to now-superseded circuit precedent. *See* Pet. App. 12a, 17a-18a. And even if that could qualify as a "defect in the integrity of the federal habeas proceedings," Fratta necessarily also sought a second chance to litigate the merits of the habeas claims the district court had already rejected. This contention gets Fratta no further around the district court's merits denial.

Third, attempting to sidestep that his claims were rejected on the merits, Fratta argues (at 20-21) the district court's merits analysis "may not have been the same analysis those claims would have received absent the procedural default ruling." Even setting aside that this makes his motion a second-or successive habeas petition, he provides no support for that theory: the district court expressly stated that it "had reviewed the merits of those claims and, if fully available for federal review, the Court would nonetheless deny habeas relief." Pet. App. 90a. Fratta's 60(b) motion asked the district court to revisit that conclusion, *see* ROA.1312-14, and

"alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Gonzalez*, 545 U.S. at 532. Fratta's Rule 60(b) motion contained habeas claims, so it was barred by section 2244(c) under *Gonzalez*.

Fourth, Fratta says (at 21) that the Court should grant certiorari in order "to reject the Fifth Circuit's overly narrow view of the *Gonzalez* standard." He does not explain exactly what about the Fifth Circuit's reading of *Gonzalez* is overly narrow—except that it did not extend to his case. That is the definition of a fact-bound request for error correction that does not merit this Court's decision. Shapiro, *supra*, at 278-82.

And in any event, the Fifth Circuit's decision in this case followed *Gonzalez* to the letter. As the Fifth Circuit stated, "[w]e have identified two circumstances in which a district court may properly consider a Rule 60(b) motion in a [habeas] proceeding: (1) the motion attacks a defect in the integrity of the federal habeas proceeding, or (2) the motion attacks a procedural ruling which precluded a merits determination." Pet. App. 6a (citing *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (internal quotation marks omitted)). Neither of those circumstances exists here, the Fifth Circuit concluded. In addition to recognizing that the district court had rejected Fratta's claims on the merits, Pet. App. 6a-7a, the Fifth Circuit rejected Fratta's contention that his motion raised "a defect in the integrity of the federal habeas proceeding[s]," Pet. App. 7a. In *Gonzalez*, this Court pointed to "fraud" as one example of such a defect. *Id.* (quoting *Gonzalez*, 545 U.S. at 532 n.5). The Fifth Circuit has found "qualifying defects when an underlying

feature of the habeas proceeding prevented the petitioner from presenting his claims." Pet. App. 7a. But Fratta's motion did not allege any such defect. Pet. App. 7a. He makes no further attempt to do so now.

Although the line drawn in *Gonzalez* is not always easy to discern, *see Banister*, 140 S. Ct. at 1709 n.7, that is because of the myriad ways habeas petitioners attack their convictions—not to mention the numerous limitations on federal habeas review embodied in AEDPA to cut off many such attacks. No two cases are exactly alike, and no two post-judgment motions are exactly alike. But Fratta has not pointed to any widespread lower-court misunderstanding that this Court could correct by granting his petition.

C. Even if he had identified a certworthy issue, Fratta's petition would not present a good vehicle for this issue either. After all, he does not seek review of the Fifth Circuit's alternative reason for denying him a COA: the arguments raised in his Rule 60(b) motion "fail[ed] to state 'a valid claim of the denial of a constitutional right.'" Pet. App. 10a (quoting *Slack*, 529 U.S. at 484). Fratta's motion sought reconsideration of habeas claims that lack any conceivable merit. The district court rejected them after *de novo* review of the record, and both turn on questions of Texas law governing the necessary fit between an indictment and the jury charge. *See* Pet. App. 10a. Because the claims are not colorable, this Court's review of the questions presented would not change the result of Fratta's appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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