No. 23-323

In The
Supreme Court of the United States

JOSEPH GAMBOA,

Petitioner,

v.

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

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF FORMER FEDERAL AND STATE PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE*[1]

Amici curiae, who are former federal and state prosecutors, respectfully submit this brief in support of petitioner Joseph Gamboa and urge that the Court grant the writ of certiorari.[2]

INTEREST OF THE *AMICI CURIAE*

Amici are four former federal and state prosecutors with different political, ideological, and geographic backgrounds.[3] They come together because what happened here—habeas counsel's abandonment never afforded petitioner an evaluation of his habeas claims on the merits—severely harms the legitimacy of the adversarial system.

As former prosecutors, *amici* have an interest in ensuring a fair criminal justice system and the public's confidence in the convictions secured. Federal habeas review plays a critical role in advancing these interests. Congress granted each state prisoner the right "to

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[1] Pursuant to Rule 37.6, *amici* certify that no party's counsel authored this brief in whole or in part and that no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. All counsel of record received timely notice of *amici*'s intent to file this brief. All parties consented to the filing of this brief.

[2] The brief relates to the petition for a writ of certiorari seeking review of the Fifth Circuit's order dated March 16, 2023, in court of appeals case number 16-70023.

[3] A complete list of the *amici* appears as an addendum to this brief.

one fair opportunity to seek federal habeas relief from his conviction" to conserve judicial resources and provide efficient finality to state court judgments. *Banister v. Davis*, 140 S. Ct. 1698, 1702, 1706 (2020). But this right is illusory when habeas counsel abandons the petitioner. Because of the prohibition against successive habeas petitions enacted by the Antiterrorism and Effective Death Penalty Act of 1996, Federal Rule of Civil Procedure 60(b) provides the only avenue for relief for habeas petitioners to vindicate their rights when abandoned by counsel.

The Fifth Circuit's blanket rule in *In re Edwards*, 865 F.3d 197, 204-05 (5th Cir. 2017), that Rule 60(b) never permits reopening a habeas judgment because of abandonment by counsel, is incompatible with the fair administration of justice and this Court's habeas precedent. Despite Congress's clear mandate to ensure fairness in capital habeas proceedings, the Fifth Circuit's holding permits the filing of a sham petition by "an attorney who is not operating as [petitioner's] agent in any meaningful sense of that word." *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring).

The Fifth Circuit's decision is also at odds with every other circuit court that has decided the issue. Each of these circuits have correctly held that attorney abandonment constitutes a defect in the habeas proceeding, thereby entitling a petitioner to Rule 60(b) relief. *See*, *e.g.*, *Harris v. United States*, 367 F.3d 74 (2d Cir. 2004); *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012); *Ramirez v. United States*, 799 F.3d 845 (7th Cir.

2015). The Fifth Circuit's split from this unanimous line of authority means that habeas petitioners in the Fifth Circuit have fewer rights and avenues for relief than similarly situated petitioners in other circuits. Such a capricious geographic distinction unacceptably jeopardizes the fair administration of justice.

The consequence of this case is this: Mr. Gamboa faces execution without *ever* receiving a single opportunity for a fair or proper federal habeas review of his death sentence. That is not permitted by the habeas laws and this Court's precedents. As former prosecutors, we believe habeas review constitutes an essential safeguard for state and federal convictions, especially in capital cases. Particularly when the stakes are this high, the Fifth Circuit's approval of clear and obvious failings by habeas counsel unacceptably threatens the legitimacy of the criminal justice system and prevents the fair administration of the death penalty.

SUMMARY OF ARGUMENT

This Court should grant certiorari so that Mr. Gamboa may receive an opportunity for federal habeas review on the merits of his claims.

The lower court decisions denying petitioner's Rule 60(b) motion contradict this Court's precedents on the relationship between Rule 60(b) and the limitations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244. The lower court decisions are also in direct tension with the

Second, Seventh, and Ninth Circuits, which have all found that attorney abandonment—like that experienced by Mr. Gamboa—constitutes an extraordinary circumstance warranting an exception to the general prohibition against using a Rule 60(b) motion to reopen a habeas petition. By holding that a petitioner's allegations of attorney abandonment can never constitute an exception to the rule against successive habeas petitions, the Fifth Circuit's rule also squarely conflicts with its own precedent on attorney conflict of interest in habeas proceedings.

Certiorari should also be granted because this case presents questions of national importance. First, fully litigating habeas claims on their merits is paramount to maintaining confidence in the fairness of our criminal justice system. Second, this Court's guidance is necessary to protect the equal enforcement of the constitutional right to litigate habeas claims on the merits. The Fifth Circuit's holding sets the untenable precedent that courts can deny a capital inmate's request for habeas relief even when wholly deprived of the legal representation to which he is guaranteed. *Martel v. Clair*, 565 U.S. 648, 652 (2012); 18 U.S.C. § 3599. Finally, the Fifth Circuit's split on this issue creates an imbalanced system for federal habeas relief. For these reasons, the Court's explicit affirmation of Rule 60(b) relief for habeas counsel abandonment is necessary.

ARGUMENT

I. Mr. Gamboa Never Had His "One Fair Opportunity" For Federal Habeas Relief As Guaranteed By This Court's Precedent.

As former prosecutors, we firmly believe the question presented implicates the fairness and efficacy of our criminal justice system. This Court has been clear: everyone gets "one fair opportunity to seek federal habeas relief from his conviction." *Banister*, 140 S. Ct. at 1702. Mr. Gamboa did not receive a "fair opportunity" to seek habeas relief in federal court because his counsel abandoned him. *Id.* And the Fifth Circuit's *Edwards* rule deprives Mr. Gamboa of any route to remedy this abandonment and get his "one fair opportunity" at federal habeas review.

The facts here speak for themselves. After unsuccessful state habeas proceedings, petitioner filed a motion seeking counsel to prepare his 28 U.S.C. § 2254 federal habeas petition. Pet. App. 11a. The court appointed John Ritenour, Jr., to represent Mr. Gamboa. Ritenour met with Mr. Gamboa *one time* before filing the petition. ROA.698 at para. 3, Exh. D Joseph Gamboa declaration. At this meeting, Mr. Gamboa provided evidence suggesting his innocence, including a copy of a woman's statement that her husband, *not Mr. Gamboa*, committed the murders alongside Mr. Gamboa's co-defendant. Ritenour failed to take these documents, or any other documents, with him. ROA. 698-99, Exh. D Joseph Gamboa declaration. In fact, Ritenour told Mr. Gamboa—after meeting him for the first time—that he thought Mr. Gamboa was guilty.

ROA.698, Exh. D Joseph Gamboa declaration. In the ensuing months, Ritenour never again met with Mr. Gamboa and conducted no further investigation into Mr. Gamboa's habeas claims, including claims of ineffective assistance of counsel, actual innocence, and *Brady* claims. *See* ROA.698 at para. 3, Exh. D Joseph Gamboa declaration. And despite the American Bar Association's standards for capital counsel requiring the formation of a habeas team and the hiring of an investigator, Ritenour did neither. *See* Pet. App. 16a n.6. In short, Ritenour abandoned Mr. Gamboa from virtually the second he was appointed as Mr. Gamboa's "counsel."

That's not the worst of it. On February 3, 2016—two days after the petition's filing deadline—Ritenour purported to file a petition on Mr. Gamboa's behalf. Not only did Ritenour fail to raise any claim specific to Mr. Gamboa's case, *see* Pet. App. 169a-185a, but Ritenour named the *wrong individual* in the petition. *See id*. In fact, with only minor edits, the claims for relief in the petition were mere copy-and-paste duplicates of the claims Ritenour filed on behalf of his other client, Obie Weather, in 2014. The prayer for relief in the petition even states Mr. Weather's name. Pet. App. 185a. Mr. Gamboa never saw the petition before it was submitted; and, thus, neither signed nor verified it as required under 28 U.S.C. § 2242. *See* Pet. App. 185a-187a. Had Ritenour consulted with Mr. Gamboa even once prior to the filing of the petition to discuss its contents, Mr. Gamboa could have known of Ritenour's complete

failings and taken steps for the appointment of new counsel before the limitations period ended.

Ritenour doubled down on these failings by filing an untimely, two-paragraph reply brief that again failed to address any of Mr. Gamboa's arguments. Instead, without consulting Mr. Gamboa, Ritenour unilaterally *conceded* that the claims made in the petition were without merit and were procedurally barred:

> Respondent has affirmatively alleged that all of petitioner's claims are without merit, foreclosed by existing precedent, procedurally defaulted, and all but claim two are unexhausted. Respondent asserts that claim two is partially exhausted and partially unexhausted, but nevertheless is without merit.
>
> After considerable review and reflection, petitioner ***concedes*** that his argument regarding each of his claims has been foreclosed under currently existing, adversely decided, precedent. That said, petitioner neither waives nor abandons any issues, and continues to raise each to preserve it for further review as changes to the legal landscape may develop.

Pet. App. 137a-138a (emphasis added).

Less than three weeks after Mr. Gamboa learned that Ritenour had abandoned his one opportunity to seek federal habeas relief, he moved *pro se* for new counsel. Mr. Gamboa specifically mentioned Ritenour's failure to file his requested claims—or indeed, any appropriate claims—as well as Ritenour's failure to communicate with him. Mr. Gamboa stated that he felt

Ritenour's representation had been ineffective. ROA.1070-72, Exh. K Joseph Gamboa *Pro Se* Motion to Dismiss Counsel.

The district court simply struck Mr. Gamboa's *pro se* motion on procedural grounds[4] and, alternatively, denied it without offering Mr. Gamboa any opportunity to make the required showing for appointment of new counsel. Pet. App. 120a-125a. About a month after denying petitioner's *pro se* motion for new counsel, the district court denied his habeas petition. Pet. App. 40a-119a. In its denial, the court explicitly relied on Ritenour's unilateral concession that "all of [petitioner's] claims were foreclosed by well-settled legal authority," the exact concession that was made without Mr. Gamboa's knowledge or consent. Pet. App. 56a.

On appeal, Ritenour moved to withdraw, and the Fifth Circuit granted the motion. After obtaining new counsel, Mr. Gamboa obtained a stay in the appeals court so he could file a Rule 60(b) motion. But the district court denied Mr. Gamboa's Rule 60(b) motion as a second and successive habeas petition. The district court also concluded that the Rule 60(b) motion failed to show any extraordinary circumstances justifying Rule 60(b) relief, despite Ritenour's abandonment of Mr. Gamboa. Pet. App. 24a-33a.

Mr. Gamboa then sought a certificate of appealability from the Fifth Circuit to challenge the district

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[4] The district court struck the motion from the docket for failure to include a certificate of conference and a certificate of service. Pet. App. 120a-125a.

court's ruling on his Rule 60(b) motion. While the Fifth Circuit recognized the seriousness of Mr. Gamboa's allegations regarding the integrity of his habeas petition, it felt confined by its precedent, *Edwards*. 865 F.3d 197. *Edwards* held that even allegations of abandonment by counsel constitute a successive habeas petition because they inherently "seek[] to re-open the proceedings." *Id.* at 204. Thus, even though petitioner identified extensive and troubling defects in the petition, the Fifth Circuit denied petitioner a certificate of appealability. Pet. App. 10a-23a.

Throughout this tortured procedural history, no court has *ever* reviewed Mr. Gamboa's substantive habeas claims on the merits. Indeed, Ritenour's abandonment of Mr. Gamboa has prevented those claims from even being *presented* to a federal court. And the district court and Fifth Circuit's application of the *Edwards* rule foreclosed Mr. Gamboa's sole path to undoing Ritenour's abandonment: Rule 60(b).

II. The Decision Below Conflicts With This Court's Habeas Precedents And The Law Of The Second, Ninth, And Seventh Circuits.

1. The *Edwards* Rule Is Fundamentally Flawed

The Fifth Circuit's rule that attorney abandonment can *never* be a basis for Rule 60(b) relief directly conflicts with this Court's precedent in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). *Gonzalez* established the relationship between AEDPA and Rule 60(b): AEDPA

precludes a Rule 60(b) motion when a state prisoner seeks to use a Rule 60(b) motion to advance claims from a state court judgment. *Id.* Such "claims" include an attack on a federal court's previous resolution of a claim on the merits. *Id.* at 532. But when a Rule 60(b) motion is premised "not [on] the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," such as a fraud on the court, then it is not a successive habeas application. *Id.*; *see id.* at 532 n.5.

In *amici*'s experience as former prosecutors with decades of experience, it is difficult to consider the "representation" of Mr. Gamboa's habeas counsel as anything less than a fraud on the court. The facts of Mr. Gamboa's case exemplify the exact defects in the integrity of habeas proceedings carved out by *Gonzalez* as requiring relief under Rule 60(b): Ritenour met with Mr. Gamboa only once and immediately expressed his belief in Mr. Gamboa's guilt; despite the standards for counsel in death penalty habeas cases, Ritenour failed to form a habeas team of attorneys, investigators, and experts; Ritenour failed to speak with Mr. Gamboa's family members or investigate any claims Mr. Gamboa raised; Ritenour failed to conduct any legal research related to the petition until the day before he filed it; Ritenour failed to communicate with Mr. Gamboa throughout the habeas proceeding; Ritenour filed the petition without Mr. Gamboa's review or verification; Ritenour filed a generic seven-claim petition that was copied and pasted from another client's habeas

petition; and Ritenour filed a two-paragraph reply brief that unilaterally conceded Mr. Gamboa's claims. Pet. App. 16a n.6. But because Ritenour filed a petition—really, a sham petition—AEDPA prevented Mr. Gamboa from filing a successive petition. Rule 60(b), therefore, provided the only safety-valve available to rectify Mr. Gamboa's right to "one fair opportunity" for habeas review. *Banister*, 140 S. Ct. at 1702. But *Edwards*'s broad denial of such relief in the face of attorney abandonment contradicts *Gonzalez*, which calls for Rule 60(b) relief when petitioners allege facts amounting to a defect in the habeas proceeding.

Across a variety of contexts, this Court has repeatedly made clear that counsel's misconduct cannot prevent habeas petitioners from getting their "one fair opportunity" for federal habeas review. In *Holland v. Florida*, 560 U.S. 631 (2010), for instance, the "professional misconduct" and "egregious behavior" of habeas counsel in failing to meet deadlines warranted the equitable tolling of the one-year statute of limitations under §2244(d). *Id.* at 651. As the Court explained, when counsel "seriously prejudice[s] a client who thereby los[es] what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence," such conduct constitutes an extraordinary circumstance warranting relief. *Id.* at 653.

The actions of Mr. Gamboa's habeas counsel directly parallel the "egregious behavior" this Court rejected in *Holland*. *Id.* at 651. The *Edwards* rule subjects future capital and non-capital defendants in

the Fifth Circuit to the same "seriously prejudic[ial]" actions by delinquent, unprofessional, or even absent counsel who waste their "single opportunity for federal habeas review." *Holland*, 560 U.S. at 653. What's worse, in such a scenario, the petitioner's sole chance at a meaningful federal review would be precluded not after any meaningful consideration of the facts of his case, but because the act of filing the petition itself—by counsel who may not even get the defendant's name right in the petition—triggers the blanket *Edwards* rule barring Rule 60(b) relief.

Indeed, this Court has consistently refused to penalize habeas petitioners for the abandonment by their counsel. In *Maples v. Thomas*, 565 U.S. 266, 283 (2012), for instance, this Court permitted otherwise defaulted claims in a federal habeas petition when egregious conduct by counsel led to the default in the earlier state-court proceeding. Petitioner's habeas counsel had left their firm while the state petition was pending without alerting either petitioner or the court, which resulted in petitioner's failure to appeal the petition denial by the deadline. *Id.* at 276-78. Initially, the federal district court denied his federal habeas petition because of the state default. But because petitioner's counsel "abandoned" him, this Court reversed and held that counsel's acts or omissions cannot be held against petitioner. *Id.* at 283 ("[A] client cannot be charged with the acts or omissions of an attorney who has abandoned him.").

The Fifth Circuit's blanket *Edwards* rule cannot be reconciled with these precedents. By precluding

Rule 60(b) relief for instances of wholesale abandonment by habeas counsel, *Edwards* effectively eliminates the procedural safeguards established to guarantee federal habeas relief, including the guarantee of review of claims on the merits. Such a holding cannot stand under this Court's established law.

2. The Fifth Circuit's *Edwards* Rule Conflicts With Precedent In Every Other Circuit To Confront This Issue

Edwards directly conflicts with established law in the Second, Ninth, and Seventh Circuit that provide petitioners with recourse through Rule 60(b). *See Harris*, 367 F.3d 74; *Mackey*, 682 F.3d 1247; *Ramirez*, 799 F.3d 845. In *Harris*, the Second Circuit ruled that to use Rule 60(b) to reopen a judgment, a habeas petitioner "must show that his lawyer abandoned the case and prevented the client from being heard, either through counsel or *pro se*." 367 F.3d at 77. The Second Circuit explained that abandonment constitutes an "extraordinary circumstance" that undermines the "integrity of [the] habeas proceeding." *Id.* at 81-82.

The Ninth Circuit similarly held that when a habeas petitioner is "inexcusably and grossly neglected by his counsel" in a way that amounts to abandonment that jeopardized petitioner's appellate rights in a federal habeas proceeding, the district court may grant relief under Rule 60(b)(6). *Mackey*, 682 F.3d at 1253.

And in *Ramirez*, the Seventh Circuit held that a Rule 60(b) motion premised on a defect in the habeas proceeding on grounds of attorney abandonment is "not a disguised second or successive motion under section 2255." 799 F.3d at 849, 850. Because petitioner was not seeking to present a new reason for relief from his conviction but rather trying to reopen his proceeding to rectify a procedural barrier, abandonment is a "rare circumstance[]" in which a prisoner may use Rule 60(b). *Id.*

Allowing the *Edwards* rule to stand renders the system of federal habeas review untenable. As former prosecutors, we recognize that the circuit split on this issue is particularly offensive to notions of justice because a petitioner's federal rights should not depend on geography. Through his grossly non-existent representation, Ritenour abandoned Mr. Gamboa and unjustly squandered Mr. Gamboa's opportunity for honest federal habeas review. It is directly in line with this Court's prior rulings and basic principles of justice to hold that abandonment by habeas counsel constitutes a fraud on the court and, therefore, a defect in the habeas proceeding.

3. The *Edwards* Rule Creates Illogical Results

The *Edwards* rule also creates illogical results, which undermine confidence in the judicial system. Under this Court's precedent, filing a proper petition *after* the deadline constitutes a basis to reopen the

judgment under Rule 60(b). *Holland*, 560 U.S. at 651, 653. But when counsel files an unauthorized, sham petition *before* the deadline, *Edwards* categorically bars any such relief. 865 F.3d at 204-05.

This is an entirely arbitrary distinction. In both cases, the failures of counsel have prevented the court from reviewing the petitioner's habeas claims on the merits. As Justice Oliver Wendell Holmes stated: "Habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes from the outside, not in subordination of the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915). Counsel who abandons his client and files a sham petition makes the habeas proceeding nothing "more than an empty shell." *Id.* When counsel thwarts a petitioner's "opportunity to be heard" in this way, "the processes of justice are actually subverted." *Id.* at 347 ("Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard . . . . We are not speaking of . . . mere irregularities in procedure, but of a case where the processes of justice are actually subverted.").

Judge Dennis recognized this exact tension in his concurrence in Mr. Gamboa's underlying action. Pet. App. 19a, 21a (noting that the *Edwards* holding is "overly broad and misses the mark" because abandonment is distinguishable from "ordinary omissions by

counsel"). In fact, Judge Dennis called for *Edwards* to be overruled because a Rule 60(b) motion alleging abandonment by counsel constitutes a defect in the integrity of the habeas proceedings. Pet. App. 18a-20a. Applying this Court's decision in *Gonzalez*, Judge Dennis noted that "extraordinary omissions by counsel may rise to the level of a defect in the integrity of habeas proceedings." Pet. App. 19a-20a (citing *Gonzalez*, 545 U.S. at 532 n.5).

Likewise, Fifth Circuit law has made clear that Rule 60(b) can be used to reopen habeas proceedings where the petitioner's attorney suffered from a conflict of interest because that conflict "result[s] in a defect in the integrity of the proceedings" rather than the "court's resolution of the claim of the merits." *Clark v. Davis*, 850 F.3d 770, 780 (5th Cir. 2017); *see also* Pet. App. 21a-23a. Once again, though, the *Edwards* rule creates an arbitrary distinction without a difference. Both conflict of interest and counsel abandonment "prevent[] the district court from ever considering the petitioner's claims on the merits." Pet. App. 23a (citing *Clark*, 850 F.3d at 779). Regardless of whether counsel has a conflict of interest or abandoned his client, the wholly inadequate representation is the same.

As former prosecutors interested in the integrity of the convictions we secured, and public confidence in the integrity of the judicial system we served, we fundamentally disagree with a rule that arbitrarily extends or withholds Rule 60(b) relief depending on the precise way in which a petitioner's counsel failed him. When a petitioner's counsel deprived that petitioner of

his or her "one fair opportunity" for federal habeas review, Rule 60(b) must stand safeguard to guarantee that right.

III. This Court's Guidance Is Urgently Needed On This Issue Of National Importance.

This Court's review of the Fifth Circuit's *Edwards* rule is needed for three key reasons: *Edwards* undermines respect for the criminal justice system; *Edwards* breaks from this Court's precedents; and *Edwards* contradicts the holdings in other circuits.

1. The *Edwards* Rule Undermines Confidence In The Judicial System

As former prosecutors, we believe that litigating habeas petitions on their merits is essential to ensure the integrity of convictions. A robust system of habeas review ensures that we, as prosecutors, and the public at large, can be confident in the fairness of the convictions we have spent our careers securing. The Fifth Circuit's *Edwards* rule undermines that confidence. Mr. Gamboa never received *any* meaningful federal habeas review of his conviction. Ritenour's sham petition—a thin, generic, and duplicative copy-and-paste job with no supporting evidence—is the very opposite of a "fair opportunity" at review. *Banister*, 140 S. Ct. at 1702.

And when the failings of counsel deprive petitioners of their chance at federal review, Rule 60(b) must

stand as the safeguard. We can think of no better demonstration of the need for Rule 60(b) relief in instances where habeas counsel abandons a client than that of Mr. Gamboa. Without Rule 60(b), Mr. Gamboa will be penalized because Ritenour—his "attorney"—abandoned his cause from the very get-go.

We cannot ask the public to trust a system where petitioner's rights are so casually discarded based on the failings of lawyers who never represented their "clients" in the first place. Indeed, permitting Ritenour's "representation" to stand *encourages* attorney misconduct by attorneys profiting off cheap copy-and-paste habeas petitions. *See* Harriet Ryan, *His Ads Call Him 'California's Top-Ranked Habeas Attorney.' Where's the Evidence?*, L.A. TIMES, https://www.latimes.com/california/story/2023-04-21/his-ads-call-him-californias-top-ranked-habeas-attorney-wheres-the-evidence (last visited Oct. 26, 2023) ("Rather than thoroughly investigate his case to turn up exonerating evidence, [counsel] produced a thin court petition that contained unsubstantiated claims and was quickly rejected by a court . . . 'It is especially egregious to think of an innocent guy getting screwed over.' "). The *Edwards* rule, in practice, endorses such misconduct by depriving petitioners of any path to relief after they have been victimized by lawyers like Ritenour here. And we cannot ask the public to trust a system where convictions are left standing because of *procedural* senselessness rather than because a federal court denied the habeas petition on the merits.

Reversing the Fifth Circuit's misguided *Edwards* rule thus presents a powerful vehicle to reaffirm habeas counsel's obligations in habeas proceedings. In *amici*'s view, Mr. Gamboa's appointed habeas counsel abandoned him in every sense of the word. Such abandonment resulted in a sham petition that so inaccurately reflected Mr. Gamboa's claims it constitutes a fraud on the court. Appointed counsel failed to communicate with his client, made meritless and generic arguments in the petition, used the name of another individual in the petition, and ultimately failed to represent his client's best interests by telling petitioner that he thought petitioner was guilty of murder.

The *Edwards* rule should not be used to shield Ritenour's misconduct. As this Court has stated, "the writ of habeas corpus plays a vital role in protecting constitutional rights." *Holland*, 560 U.S. at 649 (quotation source and marks omitted). "[I]t is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." *Lonchar v. Thomas*, 517 U.S. 314, 330 (1996). Before the criminal justice system executes Mr. Gamboa, it should at least provide him with a fair opportunity to present his federal habeas claims with the assistance of an attorney that has not abandoned him.

2. The *Edwards* Rule Is Wrong On The Merits

As set forth above, the Fifth Circuit's *Edwards* rule cannot be reconciled with this Court's precedent.

It is foreclosed by this Court's guarantee of "one fair opportunity to seek federal habeas relief from his conviction." *Banister*, 140 S. Ct. at 1702. It is inconsistent with this Court's articulation of the role of Rule 60(b) in the habeas context in *Gonzalez*, 545 U.S. 524. And it cannot be reconciled with the Court's clear instruction in *Maples* that "a client cannot be charged with the acts or omissions of an attorney who has abandoned him." 565 U.S. at 283.

3. This Court's Review Is Needed To Resolve A Substantial Split Amongst The Circuits

Finally, this case requires this Court's resolution of the circuit split on this important issue of whether attorney abandonment constitutes a defect in the habeas proceedings such that petitioner may reopen the judgment under Rule 60(b). As it stands, the Second, Seventh, and Ninth Circuits all hold that abandonment by habeas counsel provides a basis to reopen a judgment under Rule 60(b). *See*, *e.g.*, *Harris*, 367 F.3d at 81-82; *Mackey*, 682 F.3d at 1253; *Ramirez*, 799 F.3d at 849. The Fifth Circuit is the *only* circuit to depart from this rule. This, alone, justifies this Court's review, as a petitioner abandoned by counsel in the Fifth Circuit should not be treated any differently from a similarly situated petitioner in any other circuit.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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