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

BRIEF OF HABEAS SCHOLARS AS *AMICI CURIAE* SUPPORTING PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether a Rule 60(b) motion alleging attorney abandonment must always be recharacterized as a second or successive habeas petition under *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

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INTEREST OF AMICI CURIAE

Amici curiae, listed in the Appendix, are law professors and legal scholars who study federal postconviction law and civil procedure. Amici curiae have no personal interest in the outcome of this case. They all share an interest in seeing habeas law applied in a way that ensures the just and timely adjudication of claims while preserving the intended operation of the Federal Rules of Civil Procedure and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA").[1]

SUMMARY OF ARGUMENT

A Rule 60(b) motion is not a successive habeas petition when the motion attacks a defect in the integrity of the federal habeas proceeding. Attorney abandonment is just such a defect, with pervasive impact on the integrity of federal habeas proceedings. Joseph Gamboa's Petition for Writ of Certiorari should be granted.

ARGUMENT

Persons seeking habeas corpus relief often make post-judgment motions. In some circumstances, those

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1. In accordance with Supreme Court Rule 37.6, Amici state that no counsel for a party authored this brief in any part, and that no person or entity, other than Amici and their counsel, made a monetary contribution to fund its preparation and submission. Pursuant to Supreme Court Rule 37.2, Amici provided counsel of record for all parties timely notice of the intent to file this brief and no counsel of record for any party communicated any objection to this filing.

motions have posed characterization questions for federal courts, such as the question posed by Joseph Gamboa's Petition: When does a motion under Federal Rule of Civil Procedure 60(b) qualify as a successive habeas petition under 28 U.S.C. § 2244(b)?

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court made clear that a Rule 60(b) motion is not a successive habeas petition when the motion attacks a "defect in the integrity" of the federal habeas proceeding. In keeping with *Gonzalez* and its progeny, a post-judgment motion alleges a defect in the integrity of a habeas proceeding when it attacks a flaw that prevented the district court from addressing or reliably adjudicating the substantive merits of some claim. Amici submit this brief to explain why attorney abandonment is such a defect. In cases where habeas claimants allege attorney abandonment, a district court might still, of course, ultimately deny post-judgment relief under Rule 60(b) after considering the facts and circumstances of the motion. However, the district court should analyze a claimant's entitlement to such relief under Rule 60(b) of the Federal Rules of Civil Procedure, not under 28 U.S.C. § 2244(b).

I. ATTORNEY ABANDONMENT UNDERMINES THE INTEGRITY OF FEDERAL HABEAS PROCEEDINGS.

Congress has mandated the appointment of "one or more" federally funded attorneys with relevant experience to represent any "defendant who is or becomes financially unable to obtain adequate representation" in death penalty cases, including federal habeas proceedings. 18 U.S.C. § 3599(a)(1), (2); *see also Martel v. Clair*, 565 U.S. 648, 659 (2012) (capital habeas petitioners "receive counsel as a

matter of right, not an exercise of the court's discretion"). Congress enacted this statutory right first in 1988. *See* Anti–Drug Abuse Act, Pub. L. 100-690, 102 Stat. 4181, 4393–94 (1988). Through AEDPA in 1996, and again in 2006, Congress recodified the right to counsel for indigent defendants in capital habeas proceedings. AEDPA, 110 Stat. at 1318; USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 192, 231-32 (2006).

In enacting the right to counsel multiple times, Congress has recognized the essential role that counsel plays in ensuring the reliability of capital habeas judgments. Indeed, Congress went further, authorizing additional counsel for death-sentenced prisoners based on "the seriousness of the possible penalty" and "the unique and complex nature of the litigation." 18 U.S.C. § 3599(d). District courts must "ensure that [a] defendant's statutory right to counsel was satisfied throughout the litigation," including all available postconviction proceedings, such that the court must "appoint new counsel if the first lawyer developed a conflict with or abandoned the client." *Martel*, 565 U.S. at 661; *see* 35 U.S.C. § 3599(e).

Clients abandoned by counsel, especially in capital cases, are denied meaningful access to federal habeas corpus.[2] To make a viable case for federal habeas corpus

2. The facts relevant to Joseph Gamboa's attorney abandonment claim are not in dispute here. His court-appointed counsel filed a federal habeas petition containing seven claims, cut and pasted from another, already-denied habeas petition, presenting generic, legally-foreclosed challenges to the Texas death penalty scheme. In response to the State's Answer, counsel then filed an untimely Reply conceding that all claims were foreclosed by long-established precedent. *See Gamboa v. Davis*, 782 Fed. Appx. 297, 298-99 (5th Cir. 2019).

relief, counsel must perform a prompt and thorough factual investigation, engaging with the trial and state postconviction records and, in some circumstances, facts outside the four corners of the state court record. *McFarland v. Scott*, 512 U.S. 849, 855 (1994); *see also Trevino v. Thaler*, 569 U.S. 413, 423–25 (2013); *Martinez v. Ryan*, 566 U.S. 1, 11–12 (2012). Counsel must conduct legal research to support cognizable claims, and then draft a petition setting forth the facts and the clearly established federal law supporting those claims. Counsel must also analyze and explain why the state court's resolution of the claims was objectively unreasonable under 28 U.S.C. § 2254(d)(1) and/or (2), and prejudicial; or, if the claims were not presented to the state courts, why there is potentially "cause and prejudice" excusing the procedural default. *See generally Brown v. Davenport*, 596 U.S. 118 (2022); *Shinn v. Ramirez*, 596 U.S. 366 (2022); *Harrington v. Richter*, 562 U.S. 86 (2011); *Williams v. Taylor*, 529 U.S. 362 (2000).

Navigating the complex web of federal habeas practice and procedure is virtually always beyond the capabilities of a pro se death row inmate. *See McFarland*, 512 U.S. at 855–56 ("The complexity of our jurisprudence in this area ... makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.") (citations omitted). Even meritorious claims can fail due to an inability to satisfy the high demands on petitioners set forth above. Indeed, an abandoned habeas petitioner such as Joseph Gamboa is often worse off than a petitioner who never had an attorney at all, as an abandoned petitioner continues to act in reasonable reliance on an attorney who no longer acts on his behalf. *See Maples v. Thomas*,

565 U.S. 266, 288–89 (2012). For example, an abandoned client may lose precious time during the AEDPA one-year limitations period based on his reasonable expectation that an attorney is investigating his case while he remains incarcerated. *See Holland v. Florida*, 560 U.S. 631, 636 (2010). Or, as here, an abandoned client may be unaware that counsel filed and then conceded unviable, boilerplate habeas claims, reasonably expecting that his attorney had developed and presented claims based on and relevant to the facts of his case. *Gamboa*, 782 Fed. Appx. at 298–99.

Attorney abandonment therefore undermines a statutory right and creates a risk to the system: If the merits of an abandoned habeas petitioner's claims are never actually presented to the reviewing court, the petitioner is not provided the "one fair opportunity" to seek relief that is core to the habeas process itself. *Banister v. Davis*, 140 S. Ct. 1698, 1702 (2020). "By providing indigent capital defendants with a mandatory right to qualified legal counsel in these proceedings, Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland*, 512 U.S. at 859; *see also Harbison v. Bell,* 556 U.S. 180, 194 (2009) ("[I]t is entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.").

Granting the Petition for Writ of Certiorari and clarifying that attorney abandonment is a defect in the integrity of habeas proceedings would be consistent with AEDPA and contribute to the efficacy and efficiency of

federal habeas proceedings as a truth-seeking process. As shown by Joseph Gamboa's case, the issue with attorney abandonment is not the quality or effectiveness of an attorney's presentation of a petitioner's claims; the issue is that the merits of a petitioner's claims were never presented or adjudicated at all.

II. ATTORNEY ABANDONMENT SEVERS THE PRINCIPAL-AGENT RELATIONSHIP.

In application, abandonment is a narrow category of attorney misconduct. Simple attorney inadvertence or negligence is insufficient—a petitioner must "bear the risk" for such errors. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see* Restatement (Second) of Agency § 242 (1958) (principal liable for harms "within the scope" of the agent's employment). In contrast, attorney abandonment requires conduct so egregious that it effectively severs the principal-agent relationship—"under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him." *Maples*, 565 U.S. at 283; *see* Restatement (Second) of Agency § 112 (1958) ("Unless otherwise agreed, the authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal.").

Wherever this Court ultimately draws the line, an attorney who failed to bring his independent legal judgment to bear in the identification, selection, and pleading of claims based on the individual facts of his client's case has abandoned his client. An attorney abandons his client when he ceases to act, through express abdication or persistent

neglect, as the client's agent "in any meaningful sense of that word." *Maples*, 565 U.S. at 282 (quoting *Holland,* 560 U.S. at 659 (Alito, J. concurring)). In those circumstances, the attorney's actions have effectively deprived the client of legal representation and denied him opportunity to be heard. *See, e.g.*, *Harris v. United States,* 367 F.3d 74, 77 (2d Cir. 2004); *Mackey v. Hoffman,* 682 F.3d 1247, 1253 (9th Cir. 2012).

This Court has already provided guidance for district courts to use in determining when post-judgment motions identify attorney abandonment. For example, in *Holland*, this Court held that federal habeas counsel's "failure to satisfy professional standards of care" constitutes an "extraordinary circumstance" warranting equitable tolling of AEDPA's one-year statutory limitations period. *Holland*, 560 U.S. at 649; *see* 28 U.S.C. § 2244(d). The Court rejected an "overly rigid *per se* approach" in favor of a fact dependent approach rooted in traditional equitable principles. *Holland*, 560 U.S. at 653. The Court further explained that while "a 'garden variety claim' of attorney negligence" is insufficient, equitable tolling is warranted where counsel's "failures seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Id.* at 652–53; *see id.* at 660 (Alito, J. concurring) (faulting circuit court for failing to "consider petitioner's abandonment argument"). As the Court noted in *Maples*, Justice Alito's concurrence "homed in on the essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client"—counsel's "near-total failure to communicate with" or "respond to" petitioner. *Maples*, 565 U.S. at 282 (citing *Holland*, 560 U.S. at 659 (Alito, J. concurring)).

In *Maples*, this Court recognized that attorney abandonment may constitute sufficient cause to excuse procedural default in federal habeas proceedings. *Maples*, 565 U.S. at 271; *see also Walker v. Martin*, 562 U.S. 307, 316 (2011) (procedural default bars claims in federal habeas proceedings "absent showings of 'cause' and 'prejudice'"). The Court concluded that "no just system would lay the default at Maples' death-cell door." *Maples*, 565 U.S. at 271. The Court explained that, while "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause'" based on well-established agency principles, those same principles compelled a finding of cause in cases of attorney abandonment. *Id.* at 280–81 (citing *Coleman*, 501 U.S. at 753). "Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative." *Id.* at 281.

While many post-judgment allegations of attorney error or omission may be successive petitions under 28 U.S.C. § 2244(b), true attorney abandonment is an egregious and extraordinary circumstance that constitutes a defect in the integrity of habeas proceedings. *See* 18 U.S.C. § 3599(a)(2); *Martel,* 565 U.S. at 659 (18 U.S.C. § 3599 and related provisions "reflec[t] a determination that quality legal representation is necessary in all capital proceedings to foster fundamental fairness in the imposition of the death penalty.") (internal quotation marks omitted); *Maples*, 565 U.S. at 289 (abandonment is an "extraordinary circumstance[e] quite beyond [petitioner's] control").

III. CONSISTENT WITH *GONZALEZ*, POST-JUDGMENT MOTIONS ALLEGING ATTORNEY ABANDONMENT SHOULD BE CONSIDERED UNDER RULE 60(b).

Like other parties in federal court, habeas petitioners often file post-judgment motions under Rules 59 or 60 of the Federal Rules of Civil Procedure seeking to alter, amend, or obtain relief from judgment. That is because federal habeas proceedings are governed by the Federal Rules of Civil Procedure "to the extent that they are not inconsistent with" AEDPA or other statutory provisions. Rules Governing Section 2254 Cases (Habeas Rule 12); *see also* Fed. R. Civ. P. 81(a)(4)(A) ("These rules apply to proceedings for habeas corpus … to the extent that the practice in those proceedings[] is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases …."). Rule 60(b) coexists with 28 U.S.C. § 2244(b), which restricts the ability of federal petitioners to relitigate or bring new claims in "second or successive" petitions unless the requirements of 28 U.S.C. § 2244(b)(2)(B) are present, and a court of appeals pre-authorizes a district court's consideration of those claims. *See* 28 U.S.C. § 2244(b).

In *Gonzalez*, this Court recognized that Rule 60(b) of the Federal Rules of Civil Procedure "has an unquestionably valid role to play in habeas cases" and set forth a framework for district courts to use in analyzing whether post-judgment motions seeking relief from judgment are Rule 60(b) motions or "second or successive" habeas petitions under § 2244(b). *Gonzalez*, 545 U.S. at 534. Under *Gonzalez*, district courts analyze a post-judgment motion under Rule 60(b) "when [it] attacks,

not 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." *Id.* at 532; *id.* at 532 n.4 (observing that a claimant does not challenge a claim on the merits "when he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar").

The distinction in *Gonzalez* is between Rule 60(b) motions that are "merits-based," and therefore a successive petition, and those that are "integrity-based," and therefore judicially cognizable. *Banister*, 140 S. Ct. at 1709 n.7; *see also id.* at 1718 (Alito, J. dissenting) (A Rule 60(b) motion "challeng[ing] 'a nonmerits aspect of the first federal habeas proceeding'" is "not the equivalent of a habeas claim. It does not assert a federal basis for relief from the state-court judgment; rather, it seeks to cure a 'defect' in the federal habeas proceeding itself."). Under this framework, a post-judgment allegation of attorney abandonment is an integrity-based challenge properly considered under Rule 60(b) because it does not attack the merits of the district court's judgment; instead, it attacks a flaw that prevented the district court from reliably adjudicating—or addressing at all—the merits of the petitioner's claim. *See* Sec. I., *supra*. Authorizing district courts in the Fifth Circuit to hear post-judgment allegations of attorney abandonment such as the one made by Joseph Gamboa would be consistent with this Court's precedent, and the holdings of other circuit courts. *See Gamboa*, 782 Fed. Appx. at 301 (Dennis, J. concurring) ("a Rule 60(b) motion alleging abandonment by counsel can, at least in some instances, attack a defect in the integrity of the habeas proceedings").

Gonzalez itself confirmed that a Rule 60(b) motion should be used consistent with its role in federal proceedings to address procedural errors and fundamental flaws, such as a fraud on the federal habeas court, *see Gonzalez*, 545 U.S. at 532 n.5 (citing *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001)); a "mistakenly entered" default judgment, *id.* at 534 (citing *Klapprott v. United States*, 335 U.S. 601, 615 (1949)); or lack of subject matter jurisdiction, *id.* (citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998)). *Gonzalez* also established that a Rule 60(b) motion could be used to challenge judgments based on other defects, such as timeliness, procedural default, and exhaustion. *Id.* at 532 n.4 ; *see Banister*, 140 S.Ct. at 1709 n.7; *Gonzalez*, 545 U.S. at 541 (Stevens, J., dissenting) ("When a habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment.").

Applying *Gonzalez*, circuit courts have used Rule 60(b) to address fundamental flaws that undermined the integrity of habeas proceedings, including: the denial of funding to investigate claims, *see Crutsinger v. Davis*, 929 F.3d 259, 265–66 (5th Cir. 2019); failure to consider the merits of a claim of ineffective assistance of postconviction counsel, *see Barnett v. Roper*, 904 F.3d 623, 633 (8th Cir. 2018); and, allegations of prosecutorial misconduct, *see In re Pickard*, 681 F.3d 1201, 1205–06 (10th Cir. 2012). The nature of the relief sought by the motion is key—an integrity-based challenge does not seek habeas relief itself, but rather the opportunity to present the merits of habeas claims. "The movant in a true Rule 60(b) motion is simply asserting that he did not get a fair shot in the original [habeas] proceeding because its integrity

was marred by a flaw that must be repaired in further proceedings." *Id.* at 1206; *see Rodriguez*, 252 F.3d at 198 ("A motion under Rule 60(b) and a petition for habeas have different objectives.").

Further, while *Gonzalez* observed that a Rule 60(b) motion based on "habeas counsel's omissions ordinarily does not go to the integrity of the proceedings," *Gonzalez*, 545 U.S. at 532 n.5; *see id.* at 531 (a claim omitted through "excusable neglect" not properly brought under Rule 60(b)), it also suggests that not all such allegations should be treated as successive petitions. *Gonzalez* drew a line between allegations of the merely inadequate—the "ordinary" and "excusable"—and the extraordinary and egregious. *Id.* at 532 n.5. Allegations of extraordinary and egregious attorney misconduct are not successive petitions under 28 U.S.C. § 2244(b), but rather may be properly raised in a Rule 60(b) motion as defects in the integrity of federal habeas proceedings. *Id.* at 532. Abandonment of a client during federal habeas proceedings is just such an "extraordinary circumstance[s]." *Maples*, 565 U.S. at 289; *see* 18 U.S.C. § 3599(a)(2); *Martel*, 565 U.S. at 661.

Indeed, multiple circuit courts are in accord that attorney abandonment strikes at the integrity of the federal habeas proceeding by eliminating a district court's ability to reliably adjudicate the substantive merits of a petitioner's claims, and is therefore cognizable as a Rule 60(b) motion. The Second Circuit has recognized that "[t]o obtain relief under Rule 60(b)(6), a habeas petitioner must show that his lawyer abandoned the case and prevented the client from being heard, either through counsel or pro se." *Harris*, 367 F.3d at 77. The Seventh Circuit recognized attorney abandonment as

one of the "rare circumstances" that warrants Rule 60(b) relief, particularly where "[n]o one—not a court, not his lawyer—informed [petitioner] about an alternative path to relief after his postconviction lawyer abandoned him and left him with only a jurisdictionally-out-of-time appeal." *Ramirez v. United States*, 799 F.3d 845, 856 (7th Cir. 2015). And, in *Mackey*, the Ninth Circuit explained that "when a federal habeas petitioner has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense," thereby jeopardizing the petitioner's appellate rights, "a district court may grant relief pursuant to Rule 60(b)(6)." *Mackey*, 682 F.3d at 1253 (citing, *inter alia*, *Maples*, 565 U.S. at 283). That is, whether by act or omission, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland,* 560 U.S. at 659 (Alito, J. concurring); *see Maples*, 565 U.S. at 280-83.

CONCLUSION

Joseph Gamboa's Petition for Writ of Certiorari presents this Court with an opportunity to clarify that a claim of attorney abandonment is an integrity-based challenge, properly addressed under Rule 60(b). The Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — LIST OF *AMICI CURIAE*

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1. Institutions are listed for affiliation purposes only. All signatories are participating in their individual capacity, not as representatives of their institutions.

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