No. 23-323

IN THE

Supreme Court of the United States

JOSEPH GAMBOA,
Petitioner,

vs.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court take up the issue of whether a Rule 60(b) motion raising a claim of attorney abandonment can be used to raise new claims where no circuit has answered that question affirmatively?

2. Should this Court take up the issue of whether a Rule 60(b) motion raising a claim of attorney abandonment can be used to raise new claims where the district court already determined that Gamboa was not abandoned?

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BRIEF IN OPPOSITION

Federal habeas petitioners may move for relief from judgment under Federal Rule of Civil Procedure 60(b), so long as they do not seek to revisit the merits of their case. As a general rule, a Rule 60(b) attack on the conduct of federal habeas counsel is construed as an improper attempt to relitigate the merits of a habeas petition. Gamboa seeks certiorari review to carve out an exception to this rule permitting Rule 60(b) relief where federal habeas counsel allegedly abandoned the federal petitioner.

Gamboa fails to point to any split in authority on the matter, as the only two circuits to take up the issue have decided against his proposed new rule. And even if this Court did create the exception Gamboa seeks, Gamboa could not avail himself of the exception because the district court already concluded he was not abandoned by federal counsel. For these reasons, his petition should be denied.

STATEMENT OF THE CASE

I. THE FACTS OF THE CRIME

The Texas Court of Criminal Appeals (CCA) summarized the facts of the crime as follows:

> On the night of June 23, 2005, Ramiro "Ram" Ayala, the owner of a San Antonio bar named Taco Land, was working alongside employees Denise Koger and Douglas Morgan. Shortly after the bar opened, between 10:00 and 11:00 in the evening, [Gamboa] and Jose Najera

entered the bar. Neither man was known to the employer or his staff. Patrons Paul Mata and Ashley Casas arrived at around 11:30 p.m. They purchased a couple of beers and began a game of pool. Shortly afterwards, [Gamboa] approached Paul, introduced himself as "Rick," and asked to play pool. After Paul and Ashley finished their game, [Gamboa] and Paul began to play. Another patron, Anita Exon, left around midnight and remembered seeing two Hispanic males who remained at the bar.

At some point during the pool game, [Gamboa] approached Ram and began to argue. [Gamboa] then put a gun to Ram's stomach and shot him. Paul and Ashley hid in a nearby closet. Douglas and Denise hid behind the bar, only to be confronted later by [Gamboa]. [Gamboa] told Douglas to open the cash register, but he was unable to do so. [Gamboa] then shot him and had Denise open the cash register. After she retrieved the money, [Gamboa] demanded any money that was not kept in the register. While Denise was complying, [Gamboa] shot her in the back and commenced kicking her in the head. He then picked up Douglas and shot him again.

> Shortly afterwards, [Gamboa] and Najera left the bar. Denise was able to telephone 911 for help while Paul attempted to render aid to Ram and assist Denise with the phone call. Ram died that same night; Douglas lived for three more weeks before succumbing to his injuries.

Pet. App. 326a–28a.

II. GAMBOA'S POSTCONVICTION PROCEEDINGS

Gamboa was convicted of capital murder and sentenced to death in March 2007. Pet. App. 327a. He appealed to the CCA, and the CCA affirmed the judgment. Pet. App. 345a. Gamboa then applied to the trial court for habeas corpus relief, Pet. App. 190a–325a, and the CCA denied his application. Pet. App. 188a–90a. He then filed a federal petition under 28 U.S.C. § 2254, ROA.148–201,[1] which was denied by the federal district court. Pet. App. 40a–119a. Once in the Fifth Circuit, Gamboa "obtained new counsel and successfully obtained a stay of proceedings" from the Fifth Circuit "so that he could file a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) in the district court." Pet. App. 4a.

Back in district court, Gamboa filed a Rule 60(b) motion, arguing that he was entitled to reopen the district court's judgment because federal counsel, John Ritenour, abandoned him during the court's initial

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[1] "ROA" refers to the record on appeal filed in the court below.

proceedings. ROA.436–90. Specifically, he contended that Ritenour, failed to investigate his case, failed to communicate with him, failed to raise non-record-based claims for relief, conducted no research into his case until shortly before filing the petition, and raised only legally foreclosed claims. ROA.436–90. Gamboa submitted several exhibits, including correspondence between Ritenour and himself, declarations by Ritenour and Gamboa, and Ritenour's time records.ROA.491–1075. The allegations raised in Gamboa's Rule 60(b) motion are the subject of his petition for a writ of certiorari.

A. FACTS DEVELOPED DURING RULE 60(B) REMAND

1. FEDERAL HABEAS COUNSEL'S INVESTIGATION

According to Gamboa's Rule 60(b) exhibits, Ritenour first wrote Gamboa on March 23, 2015, a mere four days after his March 19, 2015 appointment. ROA.606. In his letter, Ritenour told Gamboa that he planned to meet with him in less than two weeks to discuss potential claims Gamboa wished to raise in federal court. ROA.606. Ritenour visited Gamboa on March 30, 2015, as planned. ROA.609, 706. In his declaration, Gamboa stated that the visit lasted thirty minutes and that he provided Ritenour with materials (e.g., a copy of an Internet blog post written by his co-defendant's wife) to use in preparing the petition.[2]

[2] Gamboa attached a printout of this blog post to his Rule 60(b) motion. ROA.710–12.

ROA.698. Ritenour stated in his declaration that the visit with Gamboa lasted forty-five minutes and that they discussed issues Gamboa wished to raise in the petition. ROA.706–07.

Around the same time, Ritenour began contacting Gamboa's former attorneys. ROA.610, 705. He spoke with Gamboa's trial counsel, appellate counsel, and state habeas counsel.[3] ROA.608, 610. But only Gamboa's state habeas counsel had an in-depth recollection of Gamboa's case. ROA.706. Gamboa's state habeas counsel, Richard Langlois, indicated that Gamboa's prior state habeas counsel, Jay Brandon, stated that Gamboa was innocent and that Gamboa's co-defendant's brother may have been involved in the capital murders. ROA.608. Mr. Langlois stated that he was unable to locate additional witnesses to bolster that claim. ROA.608. Ritenour also began the process of coordinating with an investigator and second-chair attorney in case they became necessary. ROA.706.

Over the next three months, Ritenour reviewed the record from Gamboa's trial, conducted research, and reviewed the criminal history of Gamboa's co-defendant, Jose Najera. ROA.611–12, 707. In June 2015, Ritenour coordinated with state-habeas counsel Langlois to obtain a copy of his state habeas file, ROA.610, but Langlois needed "time to put it together and make a copy for his records." ROA.706. Langlois turned over the file

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[3] Jay Brandon initially represented Gamboa during the state habeas proceedings. Mr. Brandon was replaced by Richard Langlois when Mr. Brandon accepted employment at the Bexar County District Attorney's Office.

in August 2015, ROA.609, and Ritenour spent several days in September 2015 reviewing that file. ROA.609–10. Ritenour then spent the following three months working on the petition. ROA.609.

In his declaration, Ritenour explained that after reviewing the trial, direct appeal, and state habeas records, he concluded that prior counsel had raised all potential non-frivolous issues he had identified. ROA.707. Ritenour stated that he was aware of the procedural and legal barriers to relitigating the issues that had been raised in state court. ROA.707 (citing *Cullen v. Pinholster*, 563 U.S. 170 (2011)). As a result, Ritenour "made a judgment call to spend time trying to find a way to get any new evidence or issues before the federal court, rather than try to develop information and then work the issue of how to present it." ROA.707. Ritenour "was unable to find any such avenues." ROA.707.

Ritenour also made a "judgment call not to involve a second attorney, or to engage an investigator or other expert" because he "could find no non-frivolous way to raise issues [that] potentially requir[ed] evidentiary support." ROA.708. Ritenour was aware of the standards applicable to representation of capital defendants in federal habeas proceedings that recommend forming a "team" including two attorneys, investigators, and experts, but he "reached what [he] believed to be a rational judgment that such a team would be both unnecessary and fruitless in this case." ROA.708.

Ritenour stated that he spoke with Mr. Langlois on several occasions and was aware that Mr. Langlois had attempted to raise in state court a claim alleging that the State withheld exculpatory evidence. ROA.708. Ritenour's judgment was that the claim "was not a viable issue" and so he "did not pursue it in federal court." ROA.708. He also concluded that neither of Gamboa's state habeas counsel had been deficient and, consequently, the equitable exception to procedural default would not be available. ROA.708–09 (citing *Martinez v. Ryan*, 566 U.S. 1 (2012)).

2. FEDERAL HABEAS COUNSEL FILES GAMBOA'S PETITION

In February 2016, Ritenour filed a petition on Gamboa's behalf raising seven claims for relief: that Gamboa's jury instructions were infirm for (1) failing to require the State to disprove the existence of mitigating circumstances, (2) failing to define various terms (such as "probability and "future dangerousness"), (3) failing to provide the jury guidance in weighing aggravating and mitigating factors, (4) limiting the definition of mitigating evidence to that which lessens the defendant's moral blameworthiness, (5) allowing for unlimited discretion, (6) failing to place a burden of proof on the State in proving the existence of aggravating factors, and (7) failing to instruct the jury as to the effect of a single holdout vote. Pet. App. 139a–87a. Ritenour then visited Gamboa a week after filing the petition ROA.609. According to Gamboa's declaration, Gamboa expressed "anger" during this visit at Ritenour's decision not to investigate claims involving his guilt or the penalty phase of trial. ROA.700.

The Director filed an Answer in response two months later. ROA.247–300. Ritenour filed a reply a month after the Director's Answer, in which he conceded that the claims he raised were foreclosed by precedent, but ultimately preserved the claims for further review.[4] Pet. App. 137a–38a. Ritenour wrote to Gamboa to transmit a copy of the Reply to the Director's Answer and to inform him that he was "forced to conclude, reluctantly," that the claims raised were foreclosed. ROA.1068.

Regarding the legally foreclosed claims, Ritenour explained in his declaration that he was taught that those issues "should always be included in the federal habeas petition, even if rejected in state court, in order to preserve them for possible future review in the event of a change in law or precedent." ROA.707–08. Such claims should be raised, Ritenour stated, despite the fact that circuit precedent foreclosed them. ROA.707–08. Ritenour did not consult Gamboa concerning the claims he raised in the petition. ROA.708.

3. GAMBOA SEEKS NEW COUNSEL

Ritenour visited Gamboa again on June 30, 2016. ROA.608. Five days later, Ritenour wrote to Gamboa to inform him that he was working with attorneys who had

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[4] Ritenour moved for an out of time extension of twenty-four days to file his reply. ROA.301–04. Gamboa claims that the district court never ruled on the motion. Pet. at 13. But the district court did grant the motion. ROA.309 ("Petitioner's request for additional time to file his response to respondent's answer will be granted.").

proposed to substitute as Gamboa's counsel. ROA.1075. In his declaration, Ritenour recalled that he met with proposed substitute counsel on July 1, 2016, and was asked to confess that he had performed deficiently in preparing the petition. ROA.709. Ritenour stated that he "could not in good cons[cience] do that." ROA.608, 709.

On July 5, 2016, about six weeks after Ritenour filed the reply, Gamboa filed a pro se motion to dismiss counsel. ROA.1070–71. Citing "poor communication" and Ritenour's decision to not raise "requested errors" in the petition, Gamboa claimed an "irreparable and antagonistic relationship" between himself and Ritenour, and that he had "lost faith in counsel and no longer trust[s] counsel's advice[.]" ROA.1070–71. The district court noted that Gamboa had "not alleged any specific facts showing an actual or potential conflict of interest" between himself and Ritenour, had not "identified with specificity any irreconcilable conflict," nor had he identified any non-frivolous claims that should have been included in the petition. Pet. App. 120a–25a. The court ultimately struck the pro se motion for failing to include certificates of conference and service, and alternatively denied it on the merits. Pet. App. 120a–25a.

On August 4, 2016, shortly after striking Gamboa's pro se motion, the district court entered an order denying Gamboa's claims and entered final judgment denying relief. Pet. App. 40a–119a.

On September 1, 2016, Ritenour spoke again with proposed substitute counsel, Dick Burr. ROA.608. Burr asked that Ritenour file a notice of appeal of the district court's judgment and denial of Gamboa's pro se motion to dismiss counsel. ROA.608. Ritenour considered doing so, but then "recalled that [Gamboa] accused [him], among other things, of malpractice" in Gamboa's pro se motion to dismiss counsel. ROA.608; *see also* ROA.1070 (pro se motion to dismiss, in which Gamboa stated that he "strongly feels John Ritenour has played a role of malpractice herein"). Ritenour then followed up with Burr and indicated to Burr that he "would not do anything [ ]that either confessed or implied malpractice" because he did not believe he performed deficiently. ROA.608. On that call, Burr also accused Ritenour of suffering from a conflict of interest, but Ritenour denied the allegation. ROA.608. Ritenour ultimately agreed to withdraw but expressed concern that Gamboa timely file a notice of appeal. ROA.608. Burr indicated that he would ensure that a pro se notice of appeal was filed. ROA.608.

On September 6, 2016, Ritenour moved to withdraw as counsel, attaching a September 2, 2016, pro se declaration from Gamboa that he wished to obtain new pro bono counsel on appeal. ROA.386–90. The district court denied the motion to withdraw, but construed Gamboa's declaration as a timely filed notice of appeal. Pet. App. 35a–39a. Once in the Fifth Circuit, Ritenour was permitted to withdraw, and Gamboa was appointed substitute counsel to pursue his Rule 60(b) motion in district court. Pet. App. 4a.

B. ORDER DISMISSING GAMBOA'S RULE 60(B) MOTION, AND SUBSEQUENT APPELLATE PROCEEDINGS

Based on the evidence presented, the district court dismissed the Rule 60(b) motion as a successive habeas petition over which it lacked jurisdiction. Pet. App. 24a–34a. The district court alternatively denied the motion for failing to demonstrate extraordinary circumstances. Pet. App. 24a–34a.

On appeal, Gamboa moved for a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(2), challenging the district court's denial of his Rule 60(b) motion. Pet. App. 10a. The Fifth Circuit denied Gamboa a COA on the issue, finding that "reasonable jurists would not debate the district court's holding that [Gamboa's] Rule 60(b) motion was an unauthorized successive petition" under Fifth Circuit precedent.[5] Pet. App. 17a.

Gamboa also directly appealed the district court's denial of his July 2016 pro se motion to dismiss counsel. Pet. App. 1a. On March 16, 2023, the Fifth Circuit dismissed Gamboa's direct appeal as moot. Pet. App. 9a. The court of appeals reasoned that Gamboa sought substitution of new counsel at the time his pro se motion was denied—*before* judgment was entered denying him

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[5] Judge Dennis concurred in judgment, finding that circuit precedent foreclosed Gamboa's COA application, but that the court of appeals should revisit that precedent. Pet. App. 18a–23a. However, when Gamboa sought rehearing specifically for this purpose, the panel denied the petition without requesting that the court be polled for rehearing en banc. Pet. App. 126a.

relief. Pet. App. 7a. But, because Gamboa's claims for relief did not meet the COA standard, the court found it was without jurisdiction to vacate the judgment denying relief. Pet. App. 8a. Thus, the court reasoned that regardless of the merits of Gamboa's appeal regarding new counsel, it could not grant Gamboa the relief requested because, in the absence of a COA, it could not vacate the judgment denying relief, rendering the appeal moot. Pet. App. 7a–9a.

Gamboa then petitioned the Fifth Circuit for en banc rehearing. Pet. App. 126a. On April 25, 2023, the panel denied the petition. Pet. App. 126a. Gamboa now seeks certiorari review of the Fifth Circuit's 2019 order denying him a COA on the denial of his Rule 60(b) motion. Respondent opposes.

REASONS TO DENY THE PETITION

In *Gonzalez v. Crosby*, this Court held that a Rule 60(b) motion filed by a habeas petitioner that seeks to add new claims is, in effect, an impermissible successive habeas petition. 545 U.S. 524, 538 (2005). In *In re Edwards*, the Fifth Circuit held that, even where the Rule 60(b) motion alleges attorney abandonment, the motion is still a successive petition where the remedy sought is the reopening of judgment so that the petitioner can raise new claims. 865 F.3d 197, 204–05 (5th Cir. 2017). The Fifth Circuit denied Gamboa a COA on the district court's denial of his Rule 60(b) motion, finding his claim of abandonment was successive under *Edwards*. Pet. App. 10a–17a.

Gamboa seeks certiorari review of this decision. In support, he argues that the *Edwards* rule has created a circuit split in which some circuits permit claims of habeas-counsel abandonment under Rule 60(b) and some do not. Pet. at 21–26.

Gamboa's petition should be denied. First, under closer scrutiny, Gamboa fails to identify any circuit split. The question presented here is whether a Rule 60(b) motion alleging abandonment is successive *where the movant seeks to add new claims for relief*. Yet, the circuit cases cited by Gamboa do not address such a question. Instead, the movants in those cases raised a claim of abandonment to reinstate their right to appeal the denial of habeas relief. Such motions clearly do not seek to add new claims, and thus do not conflict with the Fifth Circuit's rule.

Second, even if this Court were inclined to carve out this exception to *Gonzalez*, Gamboa's case is a poor vehicle to do so. As the district court alternatively held, Gamboa fails to show he was abandoned by his federal habeas counsel. Gamboa's claim, in truth, is that Ritenour should have performed better and raised claims that Gamboa wanted him to raise, even against his professional judgment. Gamboa's position calls for a drastic rewriting of this Court's abandonment jurisprudence—extending abandonment to situations in which a petitioner merely takes issue with the quality of federal counsel's work.

I. THE GENERAL RULE: ALLEGATIONS OF DEFICIENT PERFORMANCE AGAINST HABEAS COUNSEL ARE SUCCESSIVE IN NATURE.

In *Gonzalez*, this Court held that a Rule 60(b) Motion was permissible in a § 2254 proceeding. 545 U.S. at 538. That rule, however, has limits. A Rule 60(b) motion must attack a defect in the integrity of the federal habeas proceedings, as opposed to seeking to "assert, or reassert, claims of error in the movant's state conviction." *Id.* One that instead tries to raise new claims, or relitigate previously raised claims, is in effect an impermissible successive petition. *Id.* at 531–32. This Court summarized the most glaring examples of these successive petitions in disguise:

> In some instances, a Rule 60(b) motion will contain one or more "claims." For example, it might straightforwardly assert that owing to "excusable neglect," . . . the movant's habeas petition had omitted a claim of constitutional error, and seek leave to present that claim. . . . Similarly, a motion might seek leave to present "newly discovered evidence," . . . in support of a claim previously denied. . . . Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," . . . from the previous denial of a claim. . . . Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a

> successive habeas petition and should be treated accordingly[.]
>
> . . . .
>
> We think those holdings are correct. A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a "habeas corpus application," at least similar enough that failing to subject it to the same requirements would be "inconsistent with" the statute.

Id. (internal citations omitted).

While identifying such disguised successive petitions can be difficult, this Court provided guidance as to what constitutes a successive petition: "A motion that seeks to add a new ground for relief . . . will of course qualify." *Id*. at 532. As does an attack on "the federal court's previous resolution of a claim *on the merits*." *Id*. A Rule 60(b) motion is not successive 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*.

The distinction between these two types of attacks can be murky, but it is significant. Attacks on rulings that precluded a merits determination, such as a "a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar" would not be successive. *Id*. at 532 n.4. Similarly, a claim decided on the merits could be reopened based on an attack on the integrity of the proceedings that is

unrelated to the "substance of the federal court's resolution of a claim on the merits." *Id*. Fraud on the court is such an example. *Id*. at 532 n.5. An attack on habeas counsel's omissions, however, is not. As this Court explained, "an attack based on the movant's own conduct, or his habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Id*.

The courts of appeals have taken heed of *Gonzalez*'s admonition that a Rule 60(b) motion premised on habeas counsel's omissions constitutes a successive petition. In *Franqui v. Florida*, for example, the Eleventh Circuit found a Rule 60(b) motion to be successive where Franqui complained that his federal counsel omitted a claim counsel had promised to raise in his petition. 638 F.3d 1368, 1372 (11th Cir. 2011). Much like Gamboa, Franqui made the argument that he was only attacking his attorney's "misconduct and did not assert claims of error in his state conviction." *Id*. The Eleventh Circuit was unconvinced:

> Petitioner's 60(b) motion is careful to characterize its attack as targeting the omission in the habeas proceeding of his *Bruton* claim, rather than challenging Petitioner's state conviction on the merits. But in guarding the respective roles of both AEDPA and Rule 60(b), we cannot ignore the basic objective of this motion: it advances an additional claim for habeas relief. The real problem the motion aims at

> is Petitioner's continued confinement, and the objective it seeks is an additional shot at release by asserting a new claim to be considered on its merits.

Id. at 1372; *accord United States v. Lee*, 792 F.3d 1021, 1022–25 (8th Cir. 2015) (holding that a Rule 60(b) motion premised on federal counsel's failure to provide evidentiary support for an ineffective-assistance-of-trial-counsel (IATC) claim raised by federal counsel was an impermissible "attempt to relitigate the merits denial of the petition"); *Brooks v. Bobby*, 660 F.3d 959, 962–63 (6th Cir. 2011) ("Brooks wants . . . to reopen his habeas proceedings so that he can litigate claims that the alleged ineffectiveness of his attorneys prevented him from fully litigating in the first habeas go-round. . . . If the successive-petition bar does not limit this theory, it limits nothing."); *United States v. Ailsworth*, 631 F. App'x 626, 628 (10th Cir. 2015) (holding that a Rule 60(b) motion raising a claim of ineffectiveness for failing to raise an additional issue was a successive petition).

II. GAMBOA FAILS TO PRESENT EVIDENCE OF A CIRCUIT SPLIT.

A. THE ONLY CIRCUITS TO ADDRESS THE QUESTION PRESENTED HERE HAVE ANSWERED IT AGAINST GAMBOA.

As discussed above, omissions by habeas counsel ordinarily do not go to the integrity of federal habeas proceedings. The question presented by Gamboa is whether a claim of counsel's *abandonment*—advanced

with the purpose of filing a new petition with new claims—is an exception to such a rule.

In *Edwards*, the Fifth Circuit held it is not. *Edwards*, 865 F.3d at 204–05. Edwards filed a Rule 60(b) motion alleging that his attorney abandoned him when he took another job that required more attention. *Id.* at 205. The Fifth Circuit recognized that Edwards ultimately sought to reopen judgment for the purpose of adding new claims for relief from his conviction, which constituted an unauthorized federal habeas petition:

> Turning to the issue of the alleged abandonment of his habeas counsel, the district court was correct that this claim is also a successive claim. The Rule 60(b) motion seeks to re-open the proceedings for the purpose of adding new claims. This is the definition of a successive claim.

Id. at 204–05. The Fifth Circuit then relied on this holding in affirming the denial of Gamboa's Rule 60(b) motion. Pet. App. 10a–17a.

Just weeks ago, the Fourth Circuit concurred in a case nearly identical to *Edwards* and *Gamboa*. *Bixby v. Stirling*, 86 F.4th 1059 (4th Cir. 2023). In a Rule 60(b) motion, Bixby alleged abandonment by his attorneys "because his initial § 2254 counsel omitted claims with potential merit and submitted largely copied-and-pasted material without addressing the key legal issues under

AEDPA's framework." *Id*. at 1067. The Fourth Circuit astutely observed that,

> Bixby's argument about the poor quality of his initial § 2254 counsel's performance cannot be untethered from his core objective of changing the contents of his first federal habeas petition (by bolstering arguments and adding new claims) and ultimately seeking a different disposition on the merits determination from that of the first habeas petition. As such, the substance of his motion squarely implicates § 2244's limits on second or successive habeas petitions in a way that *Gonzalez*'s conception of a "true" Rule 60(b) motion does not.

Id. at 1070–71. The court of appeals accordingly found the district court correctly construed Bixby's motion as "an unauthorized second or successive § 2254 petition." *Id*. at 1075.

B. GAMBOA HAS NOT CITED TO A SINGLE CIRCUIT-COURT OPINION IN CONFLICT WITH *EDWARDS* AND *BIXBY*.

Gamboa relies on three cases for the proposition that attorney abandonment may warrant Rule 60(b) relief in habeas cases: *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012), *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), and *Harris v. United States*, 367 F.3d 74 (2d Cir. 2004). But in *Mackey* and *Ramirez*, the petitioners *were not* seeking Rule 60(b) relief for the

purpose of adding new claims. They were merely trying to reinstate their right to appeal. And as for *Harris*, this Court made clear that the claim of abandonment raised in that case should have been construed as a successive petition.

1. *MACKEY* AND *RAMIREZ* DO NOT ADDRESS THE QUESTION PRESENTED.

In *Mackey*, Mackey's federal habeas counsel conceded that he ceased acting as Mackey's attorney when Mackey's parents stopped paying him for representation. 682 F.3d at 1249–50. So, when Mackey's federal petition was denied, his habeas counsel "neither notified Mackey of the entry of judgment nor filed a Notice of Appeal." *Id.* at 1249. The Ninth Circuit held that such abandonment, if found by the district court, might entitle Mackey to Rule 60(b) relief "so that [Mackey] may pursue an appeal." *Id.* at 1253. Thus, *Mackey* permits attorney abandonment to be raised in a Rule 60(b) motion for the purpose of overcoming a procedural barrier, the jurisdictional bar to an untimely appeal. The opinion does not address the issue in *Edwards*: What to make of an allegation of attorney abandonment when the remedy sought is adding new claims to a federal petition

If anything, the Ninth Circuit's precedent on Rule 60(b) motions that seek to add new claims is consistent with *Edwards*. In *Jones v. Ryan*, 733 F.3d 825 (9th Cir. 2013), Jones argued that federal habeas counsel failed to raise defaulted IATC claims due to a conflict of

interest, as federal habeas counsel represented him in state court as well. *Id.* at 835. In rejecting Jones's Rule 60(b) motion, the Ninth Circuit noted that this Court "in *Gonzalez* was careful to explain how Rule 60(b) could not be used to get a second chance to assert new claims" and that a true Rule 60(b) attack on the integrity of prior habeas proceedings "must be understood in context generally to mean the integrity of the prior proceedings *with regard to the claims that were actually asserted in that proceeding*." *Id.* at 836 (emphasis added).

Like *Mackey*, *Ramirez* also fails to answer the question presented here. Ramirez challenged his federal conviction under 28 U.S.C. § 2255. 799 F.3d at 847. The district court denied Ramirez's petition and, much like the attorney in *Mackey*, Ramirez's federal counsel "did not inform Ramirez of the court's decision; he failed to file any postjudgment motions; and he failed to file a notice of appeal." *Id.* at 849. When Ramirez filed an untimely pro se notice of appeal, the Seventh Circuit dismissed for lack of jurisdiction. *Id.* Ramirez then filed a Rule 60(b) motion seeking to vacate the district court's judgment. *Id.*

The Seventh Circuit determined the motion was not a successive petition because Ramirez was "not trying to present a new reason why he should be relieved of either his conviction or his sentence, as provided in 28 U.S.C. § 2255(a)." 799 F.3d at 850. The court concluded that Ramirez was instead "trying to reopen his existing section 2255 proceeding and overcome a *procedural barrier to its adjudication*." *Id.* (emphasis added). The Seventh Circuit's diligence in confirming that Ramirez

was not attempting to add new claims as a prerequisite to granting relief is consistent with *Edwards*. What Gamboa calls a conflict is in fact a congruent application of *Gonzalez* across multiple circuits.[6]

As such, neither *Mackey* nor *Ramirez* address the pertinent question here of whether a Rule 60(b) motion alleging abandonment is successive where the purpose of the motion is to add new claims.

2. THE LOGIC OF *HARRIS V. UNITED STATES* DOES NOT SURVIVE *GONZALEZ*.

Finally, Gamboa's reliance on *Harris* is also misplaced. Harris argued that his federal counsel's failure to press an ineffective-assistance-of-appellate-counsel claim constituted ineffectiveness, which warranted relief under Rule 60(b). 367 F.3d at 79. The Second Circuit held that plain ineffectiveness was not enough to warrant Rule 60(b) relief, holding instead that "a Rule 60(b)(6) movant must show that his lawyer agreed to prosecute a habeas petitioner's case, abandoned it, and consequently deprived the petitioner of any opportunity to be heard at all." *Id*. at 81. The court of appeals therefore found that habeas counsel's

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[6] While not relevant to the question presented, there is some dispute "as to whether a Rule 60(b) motion is an available vehicle to re-start the filing period for a notice of appeal." *White v. Jones*, 408 F. App'x 293, 295 (11th Cir. 2011). Some circuits have held it is not. *Id*. (citing *Jackson v. Crosby*, 437 F.3d 1290, 1296 (11th Cir. 2006) and *Dunn v. Cockrell*, 302 F.3d 491, 492 (5th Cir. 2002)); *Perez v. Stephens*, 745 F.3d 174, 181 (5th Cir. 2014).

performance could not "remotely be deemed 'abandonment' and therefore was not an 'extraordinary circumstance'" warranting Rule 60(b) relief. *Id*. at 82.

But *Harris* was decided prior to *Gonzalez*. Thus, the Second Circuit's discussion of abandonment did not have the benefit of this Court's clarification in *Gonzalez* that "an attack based on the movant's own conduct, or his habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5. In fact, the Second Circuit erroneously found that Harris's motion was not successive because it attacked the integrity of the proceedings. 367 F.3d at 82. In *Gonzalez*, this Court *expressly stated* that Harris's motion should have been construed as successive: "A motion that seeks to add a new ground for relief, as in *Harris*, [367 F.3d at 80–81] will of course qualify [as a successive petition]." *Gonzalez*, 545 U.S. at 532. Thus, *Harris* also fails to address the ultimate question of whether, post-*Gonzalez*, a Rule 60(b) motion that seeks to add new claims is successive even if the petitioner argues attorney abandonment. *See Bixby*, 86 F.4th at 1071 ("Bixby relies heavily on the Second Circuit's decision in [*Harris*] to argue that his claim is cognizable, but this pre-*Gonzalez* decision does not support his ability to obtain relief in a post-*Gonzalez* world.").

In short, no lower court has adopted Gamboa's position. This Court explicitly noted that "an attack based on . . . habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in

effect asks for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5. And "[n]o court of appeals has interpreted 'ordinarily' to mean that movants can use Rule 60(b) to reopen habeas proceedings based on arguments about the *quality* of federal habeas counsel's conduct when the initial federal habeas petition resulted in a merits denial." *Bixby*, 86 F.4th at 1071. The lack of authority on the issue presented makes this case a poor candidate for certiorari review. "[T]here is additional value to letting important legal issues 'percolate' throughout the judicial system, so [this Court] can have the benefit of different circuit court opinions on the same subject." *Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992). This Court has no such benefit here. There is no guidance on how Gamboa's proposed new rule would operate, or the pitfalls that may result.

For example, "AEDPA aimed to prevent serial challenges to a judgment of conviction, in the interest of reducing delay, conserving judicial resources, and promoting finality." *Banister v. Davis*, 140 S. Ct. 1698, 1707 (2020). *Gonzalez* was premised in part that Rule 60's "whole purpose is to make an exception to finality." 545 U.S. at 529. But that exception was (1) narrowed to exclude Rule 60(b) motions alleging new grounds for relief and (2) made after multiple courts of appeals had squarely addressed the issue. *Id.* at 531. This Court should decline Gamboa's request to claw back *Gonzalez*'s prohibition against raising new claims in Rule 60(b) motions—and thus threatening to undermine AEDPA's purpose of finality—without permitting full percolation of the issue in the courts

below. *See Banister*, 140 S. Ct. at 1710 (recognizing that the availability of Rule 60(b) relief "threatens serial habeas litigation; indeed, without rules suppressing abuse, a prisoner could bring such a motion endlessly").

III. THIS CASE IS A POOR VEHICLE FOR REVIEW OF THE QUESTION PRESENTED, AS GAMBOA FAILS TO SHOW HE WAS ABANDONED BY COUNSEL.

Even assuming Gamboa's issue is ready to be taken up on review, his case presents a poor vehicle to do so. The district court denied his Rule 60(b) motion in the alternative, finding that Gamboa failed to show he was abandoned by Ritenour. ROA.1228 ("Furthermore, the record reflects that, far from abandoning his client, Ritenour actively represented Petitioner throughout his federal habeas proceedings."). Therefore, to grant Gamboa relief, this Court would have to do more than simply find abandonment is an exception to *Gonzalez*'s prohibition on a Rule 60(b) motion that seeks to add new claims. It would also have to find the district court's alternative holding was error. Such a finding would require this Court drastically rewrite its abandonment jurisprudence.

A. GAMBOA'S ALLEGATIONS CANNOT BE CALLED ABANDONMENT UNDER ANY EXISTING CASE LAW.

This Court addressed the abandonment of habeas counsel in *Maples v. Thomas*, 565 U.S. 266, 283 (2012). In *Maples*, this Court took up the issue of whether a federal petitioner was abandoned during state habeas proceedings, thus excusing the procedural default of one

of his claims. *Id.* at 270–71. Maples was represented by two attorneys who left the law firm where they worked to take jobs that would preclude them from further representing him. *Id.* at 283–84. They did not move to withdraw as Maples's attorneys, *id.* at 284, nor did they inform Maples of their departure. *Id.* at 288. With no attorney acting on his behalf, Maples was unaware when his application for collateral relief was denied, and he missed his deadline to appeal the ruling, thus procedurally barring the claim in federal court. *Id.* at 288–89.

Based on these "uncommon facts," *Maples*, 565 U.S. at 280, this Court held that Maples was effectively abandoned by his attorneys and was therefore unrepresented at the time of default. *Id.* at 271. It further explained that abandonment severs "the principal-agent relationship" so that the "attorney no longer acts, or fails to act, as the client's representative." *Id.* at 281. And the attorney's "acts or omissions therefore 'cannot fairly be attributed to [the client].'" *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 731, 753 (1991)). Therefore, Maples had cause to overcome the default. *Id.* The cases cited by Gamboa—*Mackey* and *Ramirez*—contain similar instances of literal attorney disappearance that amounted to abandonment. *Mackey*, 682 F.3d at 1248–50; *Ramirez*, 799 F.3d at 849.

No such disappearing act occurred here. The record shows that Ritenour continuously and ably represented Gamboa. He missed no operative deadline. He reviewed the trial, direct appeal, and state habeas records, as well as Mr. Langlois's state habeas file.

ROA.608–13, 705–07. After reviewing the records and state habeas counsel's file, Ritenour exercised his professional judgment in determining which claims to raise in the petition. ROA.705–07. He apprised Gamboa of the status of his case and, even when approached by proposed substitute counsel who accused him of performing deficiently and laboring under a conflict of interest, sought to ensure that Gamboa's notice of appeal was timely filed. ROA.608.

B. GAMBOA'S ATTACK ON THE QUALITY OF FEDERAL COUNSEL'S PERFORMANCE IS UNWORKABLE UNDER *GONZALEZ*.

Despite Ritenour's active representation in federal proceedings, Gamboa nevertheless claims abandonment because Ritenour did not investigate or raise any case-specific claims for relief. But in doing so, he is in truth alleging deficient performance, not abandonment. The petitioner in *Bixby* attempted the same argument, and the Fourth Circuit succinctly dispatched it:

> What's more, even if we were to accept that actual abandonment could be a proper basis for Rule 60(b) relief—something that we do not decide today—that is not what Bixby alleges. Bixby's initial § 2254 counsel filed a § 2254 petition identifying numerous claims challenging the constitutionality of Bixby's continued detention. Counsel pursued the action through several pleadings and briefs and obtained a merits determination analyzing

> (and rejecting) those claims under AEDPA. While Bixby now argues that counsel could have presented these claims better and differently, and that counsel could have pursued additional claims too, none of those arguments reflect that his initial § 2254 counsel "abandoned" Bixby. ***In short, Bixby's arguments go to the quality rather than the non-existence of representation during his initial § 2254 proceeding.***

Bixby, 86 F.4th at 1072 (emphasis added); *see also Maples*, 565 U.S. at 283 (finding abandonment where attorneys ceased acting on petitioner's behalf); *Harris*, 367 F.3d at 78–79 (holding that habeas counsel's omission of certain claims did not rise to the level of abandonment.).

Much like in *Bixby*, Gamboa's allegations are attacks on the "quality" of Ritenour's petition, not the "non-existence of representation during his initial § 2254 proceeding." And such an attack on the quality of Ritenour's work is the very type of "habeas counsel[] omission" that does not go to the integrity of the proceedings. *Gonzalez*, 545 U.S. at 532 n.5. In effect, Gamboa proposes a new rule whereby the quality of federal counsel's work can be so lacking as to create an exception to this language in *Gonzalez*.

But how would such an exception work? Surely Gamboa cannot be suggesting a per se rule in which federal counsel is required to investigate and present

case-specific claims even against his professional judgment. *Cf Anders v. California*, 386 U.S. 738, 744 (1967) (permitting appellate counsel to withdraw if they find case on appeal "wholly frivolous"). Nor can he be suggesting that Ritenour was obligated to raise claims just because Gamboa asked him to. No authority compels federal habeas counsel to present a claim at his client's insistence. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.").

The alternative to such per se rules would entail measuring the quality of federal counsel's work in Rule 60(b) proceedings. And such a scheme would plainly overrule *Gonzalez*'s prohibition against raising new claims in a Rule 60(b) motion. For example, Ritenour claimed he exercised "professional judgment" in declining to raise case-specific claims, perhaps hardly surprising given that "AEDPA's standard is intentionally 'difficult to meet.'" *Woods v. Donald*, 575 U.S. 312, 316 (2015) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)).[7] The usual method of probing whether

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[7] Indeed, while Gamboa appears to maintain that the brother of his codefendant was the real shooter, Pet. at 9, the state-habeas court already entered conclusions of law that there was "no evidence that any further investigation into" the brother of Gamboa's codefendant "would have established him as a possible shooter and provided a defense for [Gamboa]." SHCR-01 at 477–78. Moreover,

this type of judgment is reasonable is to permit evidence of what further investigation would have uncovered, and whether that investigation would have uncovered a meritorious claim. *Strickland v. Washington*, 466 U.S. 668, 689, 695 (1984); *see also Martinez*, 566 U.S. at 14 (using the *Strickland* standard to find habeas counsel ineffective for failing to raise an IATC claim that "has some merit").

But, of course, such a scheme runs smack into *Gonzalez*'s prohibition against raising new claims in a Rule 60(b) motion. 545 U.S. at 531–32. Moreover, unlike fraud on the court, a Rule 60(b) motion predicated on the quality of federal counsel's work will, by definition, invoke the merit of the claims raised in the initial petition. *See Bixby*, 86 F.4th at 1070 ("Bixby's argument about the poor quality of his initial § 2254 counsel's performance cannot be untethered from his core objective of changing the contents of his first federal habeas petition (by bolstering arguments and adding new claims) and ultimately seeking a different disposition on the merits determination from that of the

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as explained by the CCA, eyewitness and physical evidence showed that Gamboa was in the bar at the time of the murders and shot Ramiro Ayala after arguing with him. Pet. App. 326a–30a. All the findings made in state court are granted heavy deference. 28 U.S.C. § 2254(e)(1). And, as Ritenour noted, prevailing on a claim adjudicated in state court would have been incredibly difficult, given the deferential standard in 28 U.S.C. § 2254(d). ROA.707. Moreover, given this Court's recent opinion in *Shinn v. Martinez Ramirez*, 596 U.S. 366, 385–87 (2022), even if new counsel discovered evidence that was not presented in state court, it would almost certainly be barred under 28 U.S.C. § 2254(e)(2).

first habeas petition."); *Gonzalez*, 545 U.S. at 532 n.5 (noting that an attack on habeas counsel's omissions "ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably.").

Thus, to reconcile Gamboa's attacks on habeas counsel's performance with *Gonzalez*, this Court would have to create a *Martinez*-like exception to *Gonzalez*, whereby a petitioner could get around the successiveness bar by alleging the ineffectiveness of initial federal counsel in a Rule 60(b) motion. Such a scheme would be anathema to AEDPA's goal of finality. *See Banister* 140 S. Ct. at 1707; *see also* 28 U.S.C. § 2254(i) (barring claims predicated on the "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings"). It would also undermine the legislatively prescribed statutory bar against successive petitions. *See* 28 U.S.C. § 2244(b).

Gamboa counters that failing to adopt such a rule would be nonsensical because abandonment leading to an unfiled petition may warrant equitable tolling under *Holland v. Florida*, 560 U.S. 631, 651–52 (2010),[8] whereas counsel who files a "*sham* petition" within the deadline deprives the petitioner of his "one fair opportunity to seek federal habeas relief from his

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[8] Speaking of *Holland*, if Gamboa obtained Rule 60(b) relief, any new claims for relief would be time-barred under § 2244(d). Gamboa's allegations fall far short of the "extraordinary circumstances" necessary to allow equitable tolling of AEDPA's limitations period. *See Holland*, 560 U.S. at 651–52.

conviction." Pet. at 28–29. But a petitioner bearing the cost of his attorney's poor performance is not a foreign concept. For example, this Court held that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007). Or "an attorney could compute the deadline correctly but forget to file the habeas petition on time, mail the petition to the wrong address, or fail to do the requisite research to determine the applicable deadline. In any case, however, counsel's error would be constructively attributable to the client." *Holland*, 560 U.S. at 657 (Alito, J., concurring). As a federal petitioner must bear the cost of his federal attorney's negligence, even if it deprives him of his "one fair opportunity" for federal habeas relief, it is "sensical" under this Court's precedent that counsel's professional decision of which claims to raise be attributable to the petitioner as well.

For these reasons, this Court should decline consideration of whether to gut *Gonzalez*'s prohibition against raising successive claims in a Rule 60(b) motion.

CONCLUSION

The Court should deny Gamboa's petition for certiorari.

Respectfully submitted,

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