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

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Texas cannot conceal that this case squarely meets the traditional criteria for this Court's review. Texas does not dispute that *Gonzalez v. Crosby*, 545 U.S. 524 (2005), leaves open the question whether attorney abandonment permits reopening a judgment under Rule 60(b). It does not deny that, as the American Bar Association notes as *amicus*, this is a "recurrent issue." ABA *Amicus* Br. 3. Indeed, it arises so frequently that just while this petition was pending, the Fourth Circuit acknowledged that *Gonzalez* may "carve[] out potential room for claims of attorney abandonment to present a claim attacking the integrity of the federal habeas proceedings." *Bixby v. Stirling*, 86 F.4th 1059, 1072 & n.8 (2023). Texas does not deny that it is an "important legal issue[]." Opp. 24. Far from it: Texas acknowledges that attorney abandonment is a "significant" issue, and the law in this area is "murky." Opp. 15. As *amici* the ABA, former federal and state prosecutors, and preeminent habeas scholars all attest, this case presents an exceptionally important question that strikes at the most basic premises of our adversarial legal system. *See* ABA *Amicus* Br. 11-13; Former Prosecutors *Amicus* Br. 2; Habeas Scholars *Amicus* Br. 5, 12. Nor does Texas deny that this case, in which petitioner faces the death penalty though he very much disputes factual guilt, presents a compelling case for the issue's resolution.

Texas presents just two flimsy arguments to oppose review. First, it contends (Opp. 19-25) there is no actual split. That is wrong: three circuits have held that Rule 60(b) may be used to reopen habeas proceedings because of attorney abandonment. Only the Fifth Circuit takes the view that Rule 60(b) is unavailable in those circumstances. *Compare In re Edwards*, 865 F.3d 197 (5th Cir. 2017),

with Ramirez v. United States, 799 F.3d 845 (7th Cir. 2015); *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012); *Harris v. United States*, 367 F.3d 74 (2d Cir. 2004). Texas tries to distinguish each of the unfavorable cases on its facts, saying the other circuits would not have permitted habeas petitioners to introduce new arguments (Opp. 19-25). But that is not how the Second, Seventh, and Ninth Circuit cases were written, or how they have been interpreted; relief has been granted in those circuits on indistinguishable facts. *See, e.g., Brooks v. Yates*, 818 F.3d 532, 534-36 (9th Cir. 2016) (per curiam). Had petitioner's case arisen in the Second, Seventh, or Ninth Circuits, attorney abandonment would have been a basis for Rule 60(b) relief.

Texas is likewise wrong that the district court's alternative holding that counsel's conduct did not constitute abandonment makes this case a poor vehicle to review the question presented. Opp. 13, 25-32. The Fifth Circuit never addressed that issue because of its absolute rule that 60(b) cannot be used for such claims. Far from making this case a poor vehicle, that makes it a perfect vehicle for resolving the question presented. Texas has identified no procedural flaws or unclear facts that would prevent resolution of the question presented. This Court has repeatedly recognized that a possible alternative basis for affirmance is not a vehicle problem, and such issues can be addressed on remand after this Court determines whether the *Edwards* rule is correct. Moreover, if the facts of this case, *see* Pet. 8-17—facts Texas does not dispute, *see* Opp. 3-12—do not constitute abandonment, it is hard to imagine what would. Even the Fifth Circuit called the facts "[t]roubling." Pet. App. 17a. They are more than that; habeas counsel's conduct was appalling. In a case where petitioner's life is at stake, counsel did not lift a finger to present the case-specific issues petitioner had preserved, and instead cut-and-

pasted a prior client's brief—even asking for relief *in the wrong client's name*, Pet. App. 185a—and then conceded all claims were meritless under circuit law.

ARGUMENT

I. This Case Involves A Square Conflict Over An Exceptionally Important Question

As the petition explained (Pet. 21-26), the circuits are split on whether an abandoned habeas petitioner may ever use the Rule 60(b) remedy. Since the petition's filing, the Fourth Circuit has signaled—in line with the Second, Seventh, and Ninth Circuits, and contrary to the decision below—that a Rule 60(b) motion alleging "actual" abandonment in federal habeas proceedings could constitute a "defect" that would permit Rule 60(b) relief.

Texas strains to argue that there is no split (Opp. 20-25), disregarding the categorical reasoning the Seventh and Ninth Circuits employed and arguing they never applied their broad rules where a petitioner sought to "add[] new claims" (Opp. 20-22). It argues (Opp. 22-25) that the Second Circuit's rule is no longer good law because it was announced pre-*Gonzalez*. And it argues the Fourth Circuit in *Bixby* joined the split on *Edwards'* side (Opp. 18-19). Those arguments all fail.

Seventh and Ninth Circuits. Texas's argument that there is no split (Opp. 19-22) depends on reading the Seventh and Ninth Circuit decisions much more narrowly than those courts do, to limit them to Rule 60(b) motions that do not seek to "add[] new claims," Opp. 20. Nothing in those broad rulings suggests that they would apply any differently here.

In *Ramirez v. United States*, 799 F.3d 845 (2015), the Seventh Circuit recognized that attorney abandonment is one of the "rare circumstances" under *Gonzalez* that constitutes a defect in the integrity of the habeas proceedings permitting Rule 60(b) relief. *Id.* at 850, 854.

That case involved a missed deadline, but its broad reasoning nowhere suggested that attorney abandonment would be any less of a "defect" to habeas proceedings if, rather than preventing the filing of an appeal of denied claims, abandonment prevented a petitioner from having his actual claims (even if they were "additional claims") presented to the habeas court. *See id.* at 849-51, 854.

Texas's efforts to explain away the Ninth Circuit's rulings strain beyond the breaking point. In *Mackey v. Hoffman*, 682 F.3d 1247 (2012), the Ninth Circuit held that Rule 60(b)(6) relief is available when a federal habeas petitioner is abandoned by her counsel. 682 F.3d at 1253. *Mackey*, like *Ramirez*, involved a missed deadline, *id.* at 1248-50, but the Ninth Circuit did not limit its rule to such circumstances. Instead, 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," relief is warranted under Rule 60(b). *Id.* at 1253.

Texas's narrow reading of *Mackey* cannot be reconciled with the Ninth Circuit's own application of its categorical rule. In *Brooks v. Yates*, the Ninth Circuit held that an attorney's failure to argue for equitable tolling of his late-filed habeas petition amounted to attorney abandonment. 818 F.3d 532, 534-35 (2016). On remand, *see* No. 1:11-cv-01315 (E.D. Cal.), the district court granted Rule 60(b) relief and equitable tolling for the attorney's out-of-time petition, ECF 57, 60, and permitted the filing of an amended petition raising petitioner's actual claims, ECF 64—undeniably "additional claims" for relief.

Second Circuit. Texas is likewise wrong that because the Second Circuit's decision in *Harris v. United States*, 367 F.3d 74 (2004), predated *Gonzalez*, it is no longer good law. Opp. 22-23.

Gonzalez did not abrogate that rule; it *affirmed* that Rule 60(b) relief remains available for exceptional cases

like this. *Gonzalez* emphasized that a defect in the integrity of habeas proceedings permits reopening, stating: "[w]e note that an attack based on the movant's … habeas counsel's omissions, *see*, *e.g.*, *supra*, [*Harris* discussion], *ordinarily* does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." 545 U.S. at 532 & n.5 (emphasis added). "Ordinarily" is doing exactly what it looks like: drawing a line between ineffective assistance and abandonment. Texas argues that *Gonzalez* tacitly modified the *Harris* rule (Opp. 23), but Texas overlooks that the Court went out of its way specifically to preserve the very distinction between ineffectiveness and abandonment that *Harris* drew, *see Gonzalez*, 545 U.S. at 532 & n.5.

Furthermore, if *Gonzalez* overruled *Harris*, no one got the memo. The Second Circuit routinely applies the case post-*Gonzalez*.[1] As Judge Dennis's concurrence below recognized, nothing in *Harris*'s analysis was undermined by *Gonzalez*. Pet. App. 20a-21a. *Harris* states the rule categorically: "To 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*." 367 F.3d at 77. Nothing in that broad statement would bar Rule 60(b) relief where remedying abandonment would require consideration of a petitioner's actual claims (what Texas calls "additional claims"). If this Court meant to overrule *Harris*, it must say so clearly—in this case.

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[1] *See, e.g.*, *Daniel v. T&M Prot. Res., LLC*, 844 F. App'x 433, 436 (2d Cir. 2021) (relying on the *Harris* standard); *Murph v. United States*, No. 13-CV-2594, 2020 WL 5577731, at *5 (E.D.N.Y. Sept. 17, 2020) (same); *United States v. Ferranti*, No. 95-CR-119, 2022 WL 1239954, at *2 (E.D.N.Y. Apr. 27, 2022) (same). Courts have cited *Harris* 641 times since *Gonzalez* was decided, according to Westlaw.

Fourth Circuit. *Bixby v. Stirling*, 86 F.4th 1059 (4th Cir. 2023) *supports* review. In *Bixby*, the habeas petitioner sought to reopen his habeas proceedings under Rule 60(b) on the grounds that his habeas counsel abandoned him by "omitt[ing] claims with potential merit and submit[ing] largely copied-and-pasted material without addressing the key legal issues under AEDPA's framework." 86 F.4th at 1067. There is no question these claims arise frequently.

Denying Rule 60(b) relief, the Fourth Circuit explained that the problem with Bixby's argument was that he had not sufficiently alleged "actual" abandonment by habeas counsel. *See* 86 F.4th at 1072-73. The court did not address the issue before this Court: whether "actual abandonment could be a proper basis for Rule 60(b) relief." *Id.* at 1072. Rather, the Fourth Circuit raised a sub-issue this Court could address in this case or reserve for remand: whether abandonment could ever include arguments that "counsel could have presented [his habeas] claims better and differently, and that counsel could have pursued additional claims too." *Id.* "Bixby's arguments go to the *quality* rather than the non-existence of representation during his initial § 2254 proceeding. And that makes all the difference under *Gonzalez*." *Id.*

Bixby thus involves an issue that this Court need not address, but *could* address in this case—what level of attorney misconduct rises to the level of attorney abandonment. *See* 86 F.4th at 1072-73 & n.8. *Bixby* leaves open whether "actual abandonment," could or would permit a Rule 60(b) motion. In that respect, *Bixby* critically differs from *Edwards* because, as the panel here explained, Pet. App. 15a-17a, and as Texas concedes, Opp. 17-18, attorney abandonment is never a basis for a Rule 60(b) motion under the *Edwards* rule. *Bixby* supports petitioner because it recognizes that *Gonzalez*

leaves room for Rule 60(b) motions where, as in this case, there is attorney abandonment.

Finally, even if this case presented no circuit conflict, certiorari would still be warranted because the issue is legally and practically significant. This Court often grants certiorari in capital cases that raise important questions affecting the fair administration of the death penalty even without a circuit conflict. *See, e.g.*, *Cruz v. Arizona*, 598 U.S. 17, 25 (2023); *Ramirez v. Collier*, 595 U.S. 411 (2022); *Andrus v. Texas*, 140 S. Ct. 1875 (2020); *Madison v. Alabama*, 139 S. Ct. 718 (2019); *Moore v. Texas*, 139 S. Ct. 666 (2019); *Buck v. Davis*, 580 U.S. 100, 115 (2017).

II. The Question Presented Is Important and Warrants Review in This Case

Texas does not dispute that this is a recurring issue of nationwide importance. Nor does it dispute that the *Edwards* rule has prevented the consideration of federal habeas petitions of multiple capital defendants who ultimately were executed. Nor does Texas dispute that under *Edwards*, petitioner's attorney placed him in a worse position than if he had had no attorney at all.

Amici agree this is an issue of national importance that warrants this Court's review. The ABA explains that "[w]ithout this Court's intervention, the integrity of federal habeas proceedings will suffer," "undermin[ing] 'public confidence in the administration of justice.'" ABA *Amicus* Br. 16 (citation omitted). Four former federal and state prosecutors agree that "this case presents questions of national importance." Former Prosecutors *Amicus* Br. 4. As they explain, denying access to Rule 60(b) in cases of abandonment contravenes the Court's precedents and undermines "confidence in the fairness of our criminal justice system." *Id.* at 4. Many of the Nation's foremost habeas scholars also agree. As they explain in their *amicus* brief, reversing the *Edwards* rule is necessary to "preserv[e] the intended operation of [AEDPA]" and

honor Congress's recognition of "the essential role that counsel plays in ensuring the reliability of capital habeas judgments." Habeas Scholars *Amicus* Br. 1, 3.

Amici further agree that petitioner's interpretation of the interplay between Rule 60(b) and AEDPA is clearly correct. *See* ABA *Amicus* Br. 9-13; Former Prosecutors *Amicus* Br. 9-13; Habeas Scholars *Amicus* Br. 11-14. This Court held in *Gonzalez* that Rule 60(b) is available where the motion attacks a "defect in the integrity" of the habeas proceeding. 545 U.S. at 532. It is difficult to fathom a defect more serious than an attorney who purports to represent the habeas petitioner but in fact does not. Such an attorney defrauds two victims: his own client and the court in which he appears. Such a lawyer "is not only a hazard to clients, but also a menace to the profession and to the courts." *Brooks v. Yates*, 818 F.3d 532, 536 (9th Cir. 2016) (Kozinski, J., concurring). It would be strange indeed if Congress—which cared so much about adequate habeas representation in state capital cases that it established special funding for it—eliminated access to Rule 60(b) as a means to remedy such egregious failures in habeas representation.

Even Texas appears to agree that the Fifth Circuit's rule is "nonsensical" because it makes a habeas petitioner better off if his attorney files nothing. *See* Opp. 31-32; *see also* Pet. 3, 28. According to Texas, a client has not been abandoned so long as his attorney files *anything* with a habeas court—even a sham habeas petition. Opp. 31-32. That is not how this Court, or other courts, have understood abandonment. *See Maples v. Thomas*, 565 U.S. 266, 281-83 (2012) (abandonment occurs when an attorney vitiates the principal-agent relationship without notice); *Brooks*, 818 F.3d at 534-35; *id.* at 536 (Kozinski, J., concurring) (attorney's unilateral decision not to respond to show cause order or notify client of it, thereby

forfeiting his client's case, on grounds "he couldn't contest [it]," was abandonment).

Texas's vehicle argument is meritless. Texas argues (Opp. 25-32) that this case is a bad vehicle because the district court held there was no abandonment here and because, according to Texas, that holding was correct. *First*, that is immaterial. Texas identifies no antecedent legal or factual issues that would prevent resolution of the question presented. This Court "routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason," Cert. Reply Br. at 2, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15); *accord* Cert. Reply Br. at 9, *United States v. Taylor*, 142 S. Ct. 2015 (2022) (No. 20-1459), including in cases where the district court ruled for the respondent on the alternative ground, *see, e.g.*, *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023); *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298 (2021); *Mont v. United States*, 139 S. Ct. 1826 (2019). The Fifth Circuit did not reach the abandonment issue below. The Court could decide this case without resolving the abandonment question.

Second, Texas is flatly wrong about abandonment. Ritenour abandoned Mr. Gamboa. Even if he did not engage in conscious misconduct, his "neglect [was] so gross that it is inexcusable" and "vitiat[es] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney." *Brooks*, 818 F.3d at 535 (alteration in original). Texas's attempts to rehabilitate Ritenour, pointing to not-even-halfhearted efforts early during the representation (Opp. 4-8), are unpersuasive and fall flat.

Whatever Ritenour did, none of his less-than-halfhearted early efforts negate his abandonment of his client when it mattered most: when it came time to

prepare his one major filing, Mr. Gamboa's habeas petition. Ritenour failed to communicate, to investigate, to research, or to devote any time or attention to Mr. Gamboa's capital habeas case. But even putting those failings aside, Ritenour's supposed "strategic decision" to copy-paste another client's petition regardless of its application—including copying the other client's name—represents an unequivocal abandonment of Mr. Gamboa. *See* Habeas Scholars *Amicus* Br. 6-8. Ritenour's later concession that the copy-pasted claims were meritless only underscores that he was not acting as Mr. Gamboa's agent when he copy-pasted the petition.

In the United States, life should not be so cheap that a man may be executed because his court-appointed attorney abandoned him. The Court should grant review and reverse the *Edwards* rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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