CAPITAL CASE
23 –

IN THE SUPREME COURT OF THE UNITED STATES

Steven Vernon Bixby,
Applicant-Petitioner
v.

Bryan Stirling, Commissioner, South Carolina Department of Corrections; and Lydell Chestnut, Deputy Warden, Broad River Correctional Institution,

Respondents

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

PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTION PRESENTED

When the district court received Petitioner's habeas corpus case, attorneys experienced in habeas and death penalty matters offered to accept appointment. The district court instead appointed counsel who later conceded they lacked experience in capital habeas cases.

Appointed counsel proceeded to functionally abandon Petitioner. They failed to raise two claims from the direct appeal that only lost in state court by a narrow 3-2 margin. They copied-and-pasted 61 of the 76 pages of the petition straight from the direct appeal opinion and state post-conviction briefing. They raised claims without including any original legal work. And counsel made no arguments under 28 U.S.C. § 2254, the key legal standard in federal habeas.

The magistrate and district judge recognized counsel's failures. For example, the district judge said it was "difficult to find any original work product generated by federal habeas counsel" and observed that "counsel seem to expect the Court to make Petitioner's arguments for them." But instead of exercising discretion to supervise or replace counsel, the district court used counsel's failures against Petitioner as reasons to deny relief.

New counsel later asked the district court, under Fed. R. Civ. P. 60(b), to reopen the judgment in light of a procedural defect: the functional abandonment by prior counsel and the district court's failure to correct it. The district court, and then a panel of the Fourth Circuit, held this was not a proper Rule 60(b) motion and dismissed it for lack of jurisdiction.

The question presented is:

Whether there is any remedy under Rule 60(b) for functional abandonment by counsel in a federal habeas proceeding, or whether there is no remedy for extreme failures by appointed counsel such that Rule 60(b) motions in this context must always be dismissed as successive habeas petitions under *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

LIST OF PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

This petition arises from a habeas corpus proceeding in which Steven Bixby was the petitioner before the U.S. District Court for the District of South Carolina, and before the U.S. Court of Appeals for the Fourth Circuit. The Respondents are Bryan P. Stirling, Commissioner of the South Carolina Department of Corrections, and Lydell Chestnut, Deputy Warden, Broad River Correctional Institution. There are no additional parties to this litigation.

State v. Bixby, No. 04-GS-01-321, 322, Court of General Sessions, Abbeville County, South Carolina. Judgment entered February 21, 2007.

State v. Bixby, No. 4768, South Carolina Supreme Court. Conviction and sentence affirmed on August 16, 2010. Rehearing denied on September 23, 2010.

Bixby v. South Carolina, No. 10-9114, United States Supreme Court. Petition for writ of certiorari denied on April 25, 2011.

Bixby v. State, No. 2011-CP-01-110, Court of Common Pleas of Abbeville County, South Carolina. Post-conviction relief denied on January 13, 2015.

Bixby v. State, No. 2015-000821, South Carolina Supreme Court. Petition for writ of certiorari denied on March 7, 2017.

Bixby v. South Carolina, No. 17-5598, United States Supreme Court. Petition for writ of certiorari denied on October 16, 2017.

Bixby v. Stirling, No. 4:17-cv-00954-BHH, U.S. District Court for the District of South Carolina. Order denying habeas petition on March 31, 2020.

Bixby v. Stirling, No. 4:17-cv-00954-BHH, U.S. District Court for the District of South Carolina. Order denying Motion for Relief Pursuant to Rule 60(b) on July 22, 2022.

Bixby v. Stirling, No. 21-5, U.S. Court of Appeals for the Fourth Circuit. Opinion and order denying habeas relief on April 29, 2022, and panel rehearing denied on August 31, 2022.

Bixby v. Stirling, No. 22-6690, United States Supreme Court. Petition for writ of certiorari denied on May 15, 2023.

Bixby v. Stirling, No. 22-4, U.S. Court of Appeals for the Fourth Circuit. Opinion and order issued on January 5, 2024, vacating and remanding to the district court with instructions to dismiss the Rule 60(b) motion. Panel rehearing denied on January 5, 2024.

Bixby v. Stirling, No. 4:17-cv-00954-BHH, U.S. District Court for the District of South Carolina. Order dismissing Motion for Relief Pursuant to Rule 60(b) for lack of subject matter jurisdiction entered on April 10, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven Vernon Bixby respectfully petitions this Court for a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The amended opinion and order of the Fourth Circuit is reported at *Bixby v. Stirling*, 90 F.4th 140 (4th Cir. 2024), and is attached at App. 1a. The district court order denying the Rule 60(b) motion is unpublished but is available at *Bixby v. Stirling*, No. 4:17-cv-00954-BHH, Docket Entry 185 (D.S.C. July 22, 2022), and is attached at App. 36a.

STATEMENT OF JURISDICTION

The Fourth Circuit issued an opinion on November 27, 2023, affirming the district court determination that it lacked jurisdiction to hear Mr. Bixby's Rule 60(b) motion. A timely petition for panel rehearing and rehearing en banc was filed. The en banc rehearing petition was denied on December 28, 2023. App. 46a. On January 5, 2024, the panel denied rehearing. App. 45a. On the same date, the panel issued an amended opinion; the sole change was the addition of footnote 9. App. 1a. On April 10, 2024, the district court entered an order dismissing Mr. Bixby's Rule 60(b) motion for lack of subject matter jurisdiction. App. 34a. Mr. Bixby invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is 18 U.S.C. § 3599(a)(2), which provides in relevant part that "in any post conviction proceeding under section 2254 . . . seeking to vacate or set aside a death sentence, any [indigent] defendant . . . shall be entitled to the appointment of one or more attorneys . . . ." The relevant rule is Fed. R. Civ. P. 60(b), which allows a district court "on

motion and just terms . . . [to] relieve a party . . . from a final judgment" for "any other reason that justifies relief."

STATEMENT OF THE CASE

This petition implicates the fair administration of justice in federal habeas cases. It asks, do prisoners who are functionally abandoned when their attorneys file frivolous or egregiously incompetent pleadings in federal habeas have any recourse to address this procedural defect through a Rule 60(b) motion to reopen the judgment?

The Court recently gave this question serious consideration when reviewing another capital certiorari petition in *Gamboa v. Lumpkin*, No. 23-323. The Court held the *Gamboa* petition for nearly six months and re-conferenced it ten times before denying it on May 13, 2024. The arrival of this case at the Court so soon after *Gamboa* shows that the injustice there was not an anomalous occurrence, but rather a broader problem in federal habeas cases—capital ones, no less—that this Court should address.

Through decisions like *Maples v. Thomas*, 565 U.S. 266 (2012), and *Holland v. Florida*, 560 U.S. 631 (2010), the Court has already established a path for district courts to consider correcting counsel-related malfunctions that occur prior to the deadline for filing the habeas petition. To date, the Court has not provided district courts with guidance on how to address such malfunctions that occur after pleadings are filed. As explained in the *Gamboa* petition, and addressed below as well, circuit precedent is unclear and in conflict on the question whether functional abandonment by habeas counsel can be addressed in a Rule 60(b) motion. *Gamboa* and now *Bixby* show that this is an urgent issue. In the absence of intervention, petitioners like Mr. Bixby will continue to face execution without any recourse for correcting serious failures in their habeas representation.

The Court should also grant review because the current state of affairs undermines the adversarial structure of our court system. As occurred in this case, when habeas attorneys expect courts to make petitioners' arguments for them, district judges are put in the position of having to comb the record themselves, imagine what arguments a petitioner might have made, and evaluate whether relief might be available for those theoretical arguments. This overburdens district judges' resources. It improperly expands judges' role into that of an inquisitorial tribunal rather than the more limited adversarial framework that characterizes American justice. And it undermines the court system's legitimacy and fairness when judges have to cover for the egregious failures of counsel. The Court should take this case to clarify the proper role that Rule 60(b) motions can play in correcting these problems.

A. Functional abandonment by habeas counsel.

When Mr. Bixby initiated federal habeas proceedings, he identified and requested the appointment of two highly qualified attorneys, one of whom had specialized in capital defense and habeas litigation for decades. JA84-89.[1] Instead, the magistrate appointed two different lawyers who, shortly after appointment, filed a motion for more time because "they did not currently specialize in federal death penalty habeas corpus cases of this type." JA91-93; JA1194-1199.

Two months after counsel's appointment, Mr. Bixby filed a pro se pleading asking for the "assistance of counsel" and expressing concern that his attorneys were not qualified or devoting sufficient attention to his case. Mr. Bixby noted his counsel "have not even attempted to contact me since the first contact by letter June 22nd 2017 . . . . Almost [two] months after they

[1] JA citations reference the Joint Appendix filed in the Fourth Circuit in case no. 22-4.

supposedly were appointed (against my knowledge) to my case." JA1156. Mr. Bixby asked, "If these lawyers don't know me [and] don't care to know me (which is absolutely apparent), How can they assist me?" *Id.* Despite these concerns raised early on, the magistrate denied the motion without further inquiry. JA1206-1208.

The concerns about inattention that Mr. Bixby highlighted, and the inexperience that counsel themselves admitted to, were borne out by the pleadings that habeas counsel filed. The attorneys failed to assert any of the federal constitutional claims that were raised on direct review, including two claims for sentencing-phase relief that drew dissents from two South Carolina justices. *See State v. Bixby*, 388 S.C. 528 (2010). Instead, they submitted a 76-page "full petition" that was essentially a petition in name only. Sixty-one of the 76 pages were copied directly from the South Carolina Supreme Court's direct appeal opinion and Mr. Bixby's state post-conviction review (PCR) application. JA1246-1320. Their regurgitation of the state PCR claims failed to include any original argument or authority, or to even acknowledge the PCR court's rulings on those claims. JA1317-1320. The "petition" raised only one entirely new and frivolous argument – that trial counsel failed to protect Bixby's rights under the Americans with Disabilities Act – but offered nothing to support this nonsensical, three-sentence-long claim. JA1320.

Most critically, at no point in any of their briefing did habeas counsel address the central issue facing the district court: whether the state courts' adjudication of Mr. Bixby's claims was contrary to or an unreasonable application of U.S. Supreme Court precedent, based upon unreasonable fact-findings, or otherwise fell within 28 U.S.C. § 2254's limitations on relief. While the "full" petition's first sentence stated that it was "filed pursuant to 28 U.S.C. §2254," habeas counsel did not cite the federal habeas statute a single time. JA1246.

In issuing his report and recommendation, the magistrate was not shy about expressing his view that counsel provided no semblance of adequate capital representation to Mr. Bixby:

> [R]ather than draft original arguments under the appropriate § 2254 standard, Bixby's counsel adopted by reference the arguments of PCR counsel on this matter . . . . [These] arguments necessarily fail to specifically address the primary issue with which this Court is concerned — that is, whether the state court's ruling on this issue is the result of unreasonable factual findings or an unreasonable application of federal law [per § 2254(d).]

JA1492.

Despite being on notice that Mr. Bixby's attorneys failed to perform some of the most rudimentary duties of counsel—addressing the key legal issue in the case and presenting their own original legal work—the district court took no corrective measures. The district court could have easily exercised discretion to appoint new attorneys to ensure Mr. Bixby received meaningful, competent representation. At the very least, the judge could have ordered counsel to file new briefing. Instead, the district court used the unusual failings of counsel—for which Mr. Bixby bore no blame—as a reason to deny relief.

The district court did not mince words about counsel's extreme failures, nor about the reasons why counsel's conduct meant that Mr. Bixby should be denied relief from his death sentence. None of these findings have ever been disputed during Mr. Bixby's habeas litigation:

> The Petition never mentions — let alone discusses the application of — the standard to be applied by federal courts reviewing habeas petitions filed pursuant to 28 U.S.C. § 2254, and never references any putative error(s) in the PCR court's findings of fact or conclusions of law.

JA1708-1709.

> Indeed . . . it is difficult to find any original work product generated by federal habeas counsel in the prosecution of Petitioner's preserved claims.

JA1709.

> Federal habeas counsel seem to expect the Court to both make Petitioner's arguments for them, and then admit to having committed unspecified error by not intuiting the manner of critique that counsel wished to have applied to the PCR proceedings in the first instance.

JA1714.

Prior counsel misunderstood the nature of the habeas litigation so fundamentally that, in their objections to the magistrate's recommended decision, they actually objected to the fact that the magistrate failed to address direct appeal claims that were never even raised in the habeas petition. The district court correctly observed that this argument "exceed[ed] the scope" of the petition, as "[n]one of the claims that Petitioner cites in the objection are currently at issue before the Court." JA1711.

The district court went on to dismiss counsel's arguments as "largely nonresponsive to the magistrate judge's reasoning and conclusions," JA1716, "compound," JA1719, "sophistry," JA1721, "inapt," JA1723, referencing defenses Respondent did not raise, JA1731, "conclusory" and not "point[ing] the Court to any specific error in the Report," JA1732, and "difficult to understand." JA1736.

The district court could have seen these "nonresponsive" and "difficult to understand" arguments that counsel submitted and taken steps to address the problem. It did not. In the wake of Mr. Bixby's attorneys essentially abandoning their duties as counsel, the district court denied relief. JA1741.

B. Rule 60(b) litigation.

Mr. Bixby filed a timely notice of appeal. JA1821-22. A few days after the case was docketed in the Fourth Circuit, a motion was filed to substitute district court counsel with new

attorneys. The Fourth Circuit granted the motion, which ultimately led to the involvement of undersigned counsel. *See Bixby v. Stirling*, No. 21-5, Doc. 7, 8 (motion to replace district court counsel, and order granting substitution). Subsequently, and proceeding with new counsel, on March 1, 2022, Mr. Bixby filed with the district court the Rule 60(b) motion that is the subject of this petition. JA1823. The district court denied the Rule 60(b) motion and Mr. Bixby appealed. JA1903, 1913.[2]

Following full briefing and oral argument, a panel of the Fourth Circuit issued a published opinion affirming the district court's determination that it lacked jurisdiction to consider the Rule 60(b) motion because, in substance, the motion was actually an unauthorized successive habeas petition. The Fourth Circuit panel began its analysis with this Court's foundational decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). In *Gonzalez*, the panel explained, the Court held that motions to reopen a habeas judgment under Rule 60(b) may only be considered if they challenge a "defect in the integrity of the federal habeas proceedings," and steer clear of the statutory limits on successive petitions. Those limits, *Gonzalez* explains, are implicated when a Rule 60(b) motion attacks a prior habeas resolution on the merits. *See* App. 13a-14a.

However, the Fourth Circuit panel acknowledged that *Gonzalez* appears to have carved a narrow path for Rule 60(b) motions to address habeas counsel's omissions. *Gonzalez* stated that such matters "ordinarily do[ ] not go to the integrity of the proceedings . . . ." App. 22a. *See also*

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[2] The appeal of the district court's denial of Mr. Bixby's underlying habeas claims proceeded separately. Upon review of the claims that were undeveloped, and merely cut-and-pasted by prior federal habeas counsel, the Fourth Circuit denied a certificate of appealability and dismissed the appeal. No. 21-4, Doc. 53. This Court denied a petition for a writ of certiorari. *Bixby v. Stirling*, No. 22-6690.

App. 25a (acknowledging "the narrow exception implied by *Gonzalez*'s use of the word 'ordinarily' . . . to attack the integrity of the proceedings in such a way as to be a true Rule 60(b) motion."). The Fourth Circuit thus read *Gonzalez* as establishing a mechanism for Rule 60(b) to address "federal habeas counsel's conduct." At the same time, the panel was careful to say that any such rule remained "limited, undefined, and [a] theoretical caveat" that has not been interpreted by other courts of appeals. App. 23a.

Finally, the Fourth Circuit declined to decide whether "actual abandonment could be a proper basis for Rule 60(b) relief," instead concluding that was "not what Bixby alleges." In the Fourth Circuit's view, Mr. Bixby's arguments did not reflect abandonment, but went "to the *quality* rather than the non-existence of representation during his initial § 2254 proceeding." App. 24a-25a (emphasis in original). The panel believed this attack on the quality of representation veered too close to the *Gonzalez* prohibition on Rule 60(b) being used to obtain "a second look at the merits of his § 2254 petition . . . ." App. 25a. At the same time, the Fourth Circuit recognized the representation Mr. Bixby received in capital habeas matter involved "inept[itude]" by his attorneys. *Id.*

REASONS FOR GRANTING THE PETITION

This is a recurring issue of concern within the federal courts: The fact that this case comes so close on the heels of *Gamboa* shows that the problem presented, while certainly far from common, is also not an idiosyncratic one-off.

One reason for this recurrence is that prisoners are not typically in a position to understand when their representation has gone awry, and to then notify district courts in time and in a manner that prompts judges to address the problem. As the *Gamboa* petition explained, "Incarcerated federal-habeas prisoners have limited means to oversee their counsel's

performance and ensure that their interests are genuinely represented." Because of the myriad constraints prisoners face, "an attorney's abandonment of a client can be difficult for the client to detect and rectify until it is too late—unless the judgment can be reopened." *Gamboa* Petition, at p. 29. Federal habeas law is an area of "complexity," and "unquestionably is difficult even for a trained lawyer to master." *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994) (citations omitted). It is simply not reasonable to expect habeas prisoners to meaningfully monitor their attorneys' conduct to ensure that minimum functions of the representation are occurring.

It is also likely that the issue raised here and in *Gamboa* will recur because some district court appointment processes are not sufficient to assure the provision of minimally-adequate representation. In this case, two highly-qualified attorneys offered to represent Mr. Bixby. One had recently been a federal district court clerk in South Carolina. The other had decades of experience in death penalty and habeas representation. The latter attorney, who was based in North Carolina, offered to waive all travel-related fees. JA87-89. But instead of appointing these attorneys, and without offering any explanation other than the general assertion that Mr. Bixby was not entitled to his counsel of choice, JA91-93, the district court appointed two different lawyers who promptly admitted their own inexperience in an extension motion. JA1198 ("while both counsel practice extensively in the area of criminal law in state and federal court, neither currently specialize in federal death penalty habeas corpus cases of this type.").

It was not necessarily surprising that this would occur. The amicus brief of habeas and legal ethics professors, filed in support of Mr. Bixby in the Fourth Circuit, explained that the list of death penalty attorneys maintained by the District of South Carolina was not monitored sufficiently: "over the 20 years preceding the appointment of counsel in this case, the Clerk's Office simply accepted applications and added names to the list based on lawyers' own

representations that they were able to handle these very challenging cases." Fourth Circuit, No. 22-4, Doc. 33, p. 23.[3]

The problem with Mr. Bixby's representation was compounded when it became obvious during the course of district court proceedings, yet the district court failed to take any corrective measures. The magistrate issued a recommended decision that called attention to the fact that counsel had not submitted any "original arguments" and failed "to specifically address the primary issue with which this Court is concerned" under § 2254. JA1492. Yet the magistrate took no steps other than recommending a denial of relief. And despite this red flag, the district court likewise took no steps to address the matter even though the magistrate's recommendation spelled out the problem in plain terms.

To be sure, this snowballing litany of missteps, as in *Gamboa*, does not represent the vast majority of district court habeas proceedings. Many courts surely do maintain appointment lists that effectively identify qualified counsel. Many courts surely would use their discretionary authority to ensure a petitioner is properly represented when pleadings are filed that show even the most rudimentary legal work is not getting done. But that did not occur here. And conditions exist that make it reasonably likely this will happen again. The Court should grant review to clarify that a legal mechanism is indeed available for correcting—or at the very least, substantively reviewing—these types of egregious malfunctions in habeas proceedings.

The law in this area is conflicting and unclear: As the *Gamboa* petition explained, circuit precedent is in conflict on the question whether attorney abandonment can form the basis

[3] This information was available because one of the amici, Professor David Bruck, has handled death penalty cases in South Carolina since the 1970s and is familiar with the local conditions and institutional history. Fourth Circuit, No. 22-4, Doc. 33, pp. 5-7.

for a proper Rule 60(b) motion. *See Gamboa* Petition, pp. 21-26. The Second, Seventh, and Ninth Circuits recognize that attorney abandonment, or gross neglect, permit a district court to consider whether a habeas judgment should be reopened. *See Harris v. United States*, 367 F.3d 74, 81 (2d Cir. 2004) (Rule 60(b) motion is permissible where the movant "show[s] 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."); *Ramirez v. United States*, 799 F.3d 845, 849 (7th Cir. 2015) (Rule 60(b) motion predicated on counsel's abandonment is one of the "rare circumstances" in which "Rule 60(b) may be used by a prisoner."); *Mackey v. Hoffman*, 682 F.3d 1247, 1253 (9th Cir. 2012) ("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 that has jeopardized the petitioner's appellate rights [in a federal habeas proceeding], a district court may grant relief pursuant to Rule 60(b)(6).").

In contrast, the Fifth Circuit holds that attorney abandonment is never cognizable in a Rule 60(b) motion and requires that such motions be recharacterized and dismissed as unauthorized successive habeas petitions. *See, e.g.*, *In re Edwards*, 865 F.3d 197 (5th Cir. 2017). The Fourth Circuit's decision here declined to directly address whether actual abandonment could be addressed through Rule 60(b), but held that even if it could, the functional abandonment that Mr. Bixby suffered is not cognizable.

This unclear landscape may be due at least in part to the ambiguity in this Court's opinion in *Gonzalez*. There, Justice Scalia, writing for the Court, provided examples to illustrate the difference between permissible 60(b) grounds and other matters that cannot be raised under Rule 60(b). One of those examples has particular relevance. The Court explained:

> [A]n 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.

545 U.S. at 532, n.5 (emphasis added).

The modifier "ordinarily" seems significant. Justice Scalia's majority opinion could have said that no instance of habeas counsel's omissions could ever go to the integrity of the proceedings, and thus could never be raised in a 60(b) motion. It did not. Instead, the Court specified that ordinary omissions by counsel cannot be raised in the 60(b) context. The obvious corollary is that extraordinary omissions by habeas counsel can be so raised. In the decision below, even though the Fourth Circuit panel denied relief, it recognized that *Gonzalez* could reasonably be read as supporting Mr. Bixby's position:

> Bixby's basis for seeking Rule 60(b) relief does not fall outside this "ordinar[ ]y" rule. Neither the Supreme Court nor we have had occasion to flesh out when an attack on federal habeas counsel's conduct might fall within this limited, undefined, and theoretical caveat. But no 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. And, at bottom, that's the basis on which Bixby seeks relief.

App. 23a; *see also* App. 25a (acknowledging there is a "narrow exception implied by *Gonzalez*'s use of the word "ordinarily"). Thus, review is needed because the Court's ambiguous precedent is producing conflicting circuit decisions, and judges in the Fourth Circuit are implicitly seeking guidance from this Court.

In another example of the consequences of the ambiguity in *Gonzalez*, the Fourth Circuit's opinion rests on a newly-created distinction that lacks support in the law. The panel appears to have agreed with Mr. Bixby on his argument that he could properly reopen the habeas judgment for reconsideration of claims previously raised in the petition (as opposed to potential

new claims that counsel might identify). In *Gonzalez*, the panel noted, the Court identified fraud on the habeas court as a circumstance where a new proceeding might be needed to revisit previously-decided claims in the absence of fraud. App. 21a. Similarly, the panel reaffirmed its decision in *Cavalieri v. Virginia*, No. 20-6287, 2022 WL 1153247 (4th Cir. Apr. 19, 2022), where the procedural defect of missing pages in a habeas petition led the Fourth Circuit to grant a Rule 60(b) motion and remand for reconsideration of the full petition, including claims that were already decided on the merits. App. 22a; *Cavalieri*, 2022 WL 1153247, at *1 (noting that Cavalieri's claims were either procedurally defaulted by the district court, or dismissed as meritless); *Id.* at *3 (remanding with instructions to grant Cavalieri's Rule 60(b) motion and permit him to refile his § 2254 petition, which included claims previously dismissed as meritless).

Thus, the panel essentially recognized that Mr. Bixby was correct in his position that Rule 60(b) motions in habeas cases can appropriately lead to merits reconsideration of prior claims, so long as a cognizable procedural defect is alleged. But instead of following this line of reasoning to its logical conclusion, and granting relief, the panel instead took a subtle turn that lacks support in the law. The panel reasoned that Mr. Bixby was unlike the fraud example in *Gonzalez*, and unlike *Cavalieri*, because he sought more than mere reconsideration of previously-raised and decided claims: he sought to "bolster[ ] arguments" in support of those claims. App. 21a-22a.

Here we have the reason why the panel's opinion conflicts with both statute and precedent, and lacks coherence. There is no law that prevents such bolstering. The relevant statute, 28 U.S.C. § 2244(b), says nothing of limits on second or successive *arguments* in support of *claims*. It limits only the filing of "*claim[s]* presented in a second or successive habeas corpus

application." *Gonzalez* too speaks only of the concern that Rule 60(b) motions in habeas cases might be used to bring new claims. 545 U.S. at 531 ("Using Rule 60(b) to present new *claims* for relief from a state court's judgment of conviction . . . circumvents AEDPA's requirement that a new claim be dismissed" unless it meets the criteria in § 2244(b)) (emphasis added). Similarly, *Gonzalez* forbids "presenting new evidence in support of a claim already litigated" or recasting prior claims "based on a purported change in the substantive law." *Id.* at 531-32. However, there is nothing in *Gonzalez*, and nothing in the AEDPA, to prevent Mr. Bixby from bolstering his previously raised and decided habeas claims with additional legal arguments for relief under § 2254(d).

This Court should grant to review to ensure consistency on this important issue, not only between the circuits, but to bring coherence to this area of law so that intra-circuit decisions are reached based on clear, logical rules that lend themselves to efficient application. The Fourth Circuit's decision illustrates how that is not currently the case.

Current law distorts the nature of habeas proceedings and the proper role of the habeas judge: The district court's response to the failures of Mr. Bixby's counsel illustrates why this Court's intervention is necessary. As already explained, both the magistrate and district judges were well aware the representation had gone badly awry. Both judges made fact findings documenting the problems. But neither judge acted to correct them. Instead, the judges attempted to step into the role of counsel for Mr. Bixby. The magistrate noted that the attorneys failed to "draft original arguments under the appropriate § 2254 standard," and the magistrate responded by "attempt[ing] to apply the § 2254 standards to those arguments and the portions of the PCR order addressing them." The magistrate explained he would "give Petitioner's arguments all due consideration" in light of "the magnitude and import of this matter." JA1492-93; *see also* App.

7a (Fourth Circuit explaining, "Despite [its] concerns" about counsel's "conglomeration of others' writings" and "fail[ure] to discuss how to apply § 2254(d)'s standards to the issues raised . . . . the district court engaged in an extensive, § 2254-centered analysis of the claims Bixby had raised, issuing a thorough decision before denying relief.").

The district court's response was not consistent with the manner in which our court system is meant to function. One of the "first principles" of our system is its adversarial nature, which "relies on a neutral and passive decision maker to adjudicate disputes after they have been aired by the adversaries in a contested proceeding." This is a "procedural system . . . involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker." The "principle of party presentation" is "basic to our adversary system" and "is designed around the premise that parties . . . [and not judges] are responsible for advancing the facts and arguments entitling them to relief." This framework has deep historical roots for good reason: it is designed to ensure "truth and accuracy," "fundamental fairness," and "[judicial] impartiality and its appearance." *See United States v. Campbell*, 26 F.4th 860, 893-96 (11th Cir. 2022) (dissenting opinion of Judges Newsom, Jordan, Wilson, Rosenbaum, and Pryor) (tracing the historic and policy roots of the adversarial system; internal citations omitted).

The legal scholars who filed an amicus brief in the Fourth Circuit agreed that the district court was not in a position to take on the functions that Mr. Bixby's attorneys were supposed to perform:

> The adversary system of justice cannot operate as the Constitution envisions and requires if judicial decisions are rendered in the absence of adversarial presentations.
>
> . . .
>
> A decision rendered by a judge who has consciously decided to dispense with an adversarial presentation by one of the parties is

> structurally unsound. In attacking such a decision, Mr. Bixby is not attacking the performance of habeas counsel. He is attacking the integrity of the process that led to the habeas decision—and quite rightly so.

Fourth Circuit, No. 22-4, Doc. 33, pp. 17, 24.

The district court wanted to do the right thing where minimally-adequate lawyering for a death-sentenced client was so obviously absent. But the court lacked guidance. This Court should grant review to ensure that district courts understand the appropriate avenues for addressing malfunctions in the provision of habeas counsel. District courts must intervene more assertively when the most basic aspects of representation are clearly absent. And when that intervention fails to occur, district courts may properly consider when the circumstances are extraordinary enough to warrant granting a Rule 60(b) motion to reopen the judgment. Were the Court to make clear that Rule 60(b) is an appropriate remedy for correcting either complete or functional abandonment by counsel, it is more likely that district courts will take assertive steps to assure the problem never gets that far in the first place.

In the absence of this clarification in law, petitioners like Mr. Bixby will continue to face imprisonment, and even death, pursuant to federal habeas proceedings that are completely undermined by extraordinary attorney misconduct. This not only harms prisoners, it also damages the appearance of fairness and justice that is so central to the legal system this Court helps safeguard.

CONCLUSION

Petitioner Steven Bixby requests this Court grant the petition for a writ of certiorari.

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APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4

STEVEN VERNON BIXBY,

Petitioner – Appellant,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden, Broad River Correctional Institution,

Respondents – Appellees.

LEGAL ETHICS PROFESSORS,

Amici Supporting Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence. Bruce H. Hendricks, District Judge. (4:17-cv-00954-BHH)

Argued: September 22, 2023 Decided: November 27, 2023
Amended: January 5, 2024

Before DIAZ, Chief Circuit Judge, and AGEE and HARRIS, Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Agee wrote the opinion in which Chief Judge Diaz and Judge Harris joined.

ARGUED: David Weiss, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. William Joseph Maye, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** John G. Baker, Federal Public Defender, Gretchen L. Swift, Assistant Federal Public Defender, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina; Joshua Snow Kendrick, KENDRICK & LEONARD, P.C., Greenville, South Carolina, for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Melody J. Brown, Senior Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. Joseph B. Warden, Wilmington, Delaware, Daniel A. Tishman, FISH & RICHARDSON P.C., Washington, D.C., for Amici Curiae.

AGEE, Circuit Judge:

After the district court denied Steven Vernon Bixby's initial 28 U.S.C. § 2254 petition, he obtained new counsel and filed a motion to reopen that judgment under Federal Rule of Civil Procedure 60(b). He argued that exceptional circumstances warranted this relief because his original § 2254 counsel had, in effect, abandoned him by submitting a § 2254 petition that omitted several potentially meritorious issues and inadequately presented the issues that had been raised. He asked the court to reopen the judgment and allow him to file additional briefing and new claims.

The district court concluded that Bixby's motion was not a true Rule 60(b) motion. Rather, Bixby was attempting to use Rule 60(b) to circumvent the statutory limits placed on second or successive § 2254 petitions. Recognizing that it would lack jurisdiction to consider a second § 2254 petition, the district court denied Bixby's motion without considering its merits.

Bixby now appeals, and for the reasons set out below, we agree with the district court's conclusion that it lacked jurisdiction to consider Bixby's Rule 60(b) motion because he effectively sought to file a second or successive § 2254 petition, something that a district court cannot authorize. Because we also conclude that the district court should have dismissed Bixby's motion rather than deny it, we vacate the district court's order and remand with instructions to dismiss.

I.

A.

Amidst a dispute involving the state of South Carolina's claim to a right of way across the Bixby family property, Bixby and his father shot and killed two law enforcement officers. *State v. Bixby*, 698 S.E.2d 572, 535–39 (S.C. 2010).

After Bixby and his parents learned of the state's plan to expand a road across their property, they resisted construction efforts and responded with threats of violence. *Id.* at 536. So state officials scheduled a meeting with the Bixbys to discuss the construction plans, which they asked law enforcement to mediate. *Id.* at 536–37. The day before the meeting, Bixby told others that he and his family had been planning an armed altercation for some time, that "[t]omorrow" they intended to shoot "anybody [who] comes in the yard," and that "if the shooting starts I won't come out alive." *Id.* at 577.

The next day, when law enforcement approached the Bixby home, Bixby and his father shot and killed two officers. In the hours that followed, Bixby and his father engaged in an armed stand-off with additional law enforcement officers, but surrendered late in the evening after law enforcement "returned fire and shot tear gas into the home." *Id.* at 578.

For his role in these events, Bixby was indicted in South Carolina state court on multiple counts, and the State sought the death penalty for the two murders. *Id.* at 578. A

jury found Bixby guilty on all counts and recommended a sentence of death for each murder. *Id.* The trial judge agreed and sentenced Bixby to death. *Id.*[1]

On direct appeal, the Supreme Court of South Carolina affirmed the convictions and imposition of the death penalty. *Id.* at 578–89. Two of the five justices dissented on two issues implicating constitutional concerns related to sentencing. *Id.* at 589–91 (Pleicones, J., dissenting). The dissenting justices would have vacated the death sentences and remanded for a new sentencing proceeding. *Id.*

Bixby later filed a timely state petition for post-conviction relief (PCR), which the PCR court denied. The Supreme Court of South Carolina denied certiorari.

B.

Bixby, through counsel, filed documents indicating an intent to file a federal petition for writ of habeas corpus under § 2254 and requested that counsel be appointed to represent him during those proceedings. A magistrate judge granted Bixby's request for appointed counsel, selecting two attorneys from the District of South Carolina's Criminal Justice Act Death Penalty Panel Attorney List, Miller Williams Shealy, Jr., and William H. Monckton, VI (collectively "initial § 2254 counsel"). They prepared a § 2254 petition setting out twenty-nine enumerated claims, all but one of which had been raised in the state PCR proceedings. Although the petition was seventy-six pages in length, the first ten pages reflected responses to the form § 2254 petition provided to pro se petitioners and recounted

[1] Charges were also brought against Bixby's parents relating to these events. His father was found incompetent to stand trial and he died in prison. His mother was convicted of being an accessory before the fact to murder and criminal conspiracy. She was sentenced to life imprisonment and has also since died.

basic case information and procedural history. The next sixty-one pages were copied and pasted from the state-court decision and PCR filings, which recounted the factual and procedural narrative as well as background information related to the investigation and Bixby's social history. The final substantive pages raised issues that had been brought and rejected in the state PCR proceedings. Instead of providing any analysis or argument about these issues, though, the petition simply "incorporate[d] by reference" the arguments relating to those issues that had been presented in the state PCR filings. J.A. 1320. The initial § 2254 petition also identified one new issue for the district court's consideration: whether trial counsel had provided ineffective assistance based on a purported failure to protect Bixby's rights under the Americans with Disabilities Act (ADA). With the district court's permission, initial § 2254 counsel filed a supplemental eight-page memorandum laying out arguments in greater detail supporting that issue. Later, in response to the State's 116-page memorandum supporting summary judgment as to all claims, initial § 2254 counsel filed a nine-page memorandum asserting that the petition had established adequate grounds for a hearing, particularly as to the ADA-related claim.

A magistrate judge prepared a report and recommendation (the MR&R) on the § 2254 petition. Before addressing the merits of the summary judgment motion, the magistrate judge observed that the § 2254 petition had failed to frame the issues in the light necessary to obtain relief under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). This Act requires that federal courts review claims by state prisoners to determine "whether the state court's ruling on [the issues] is the result of unreasonable factual findings or an unreasonable application of federal law." *Bixby v. Stirling*, No. 4:17-

cv-00954-BHH-TER, 2019 WL 8918824, at *17 (D.S.C. Jan. 11, 2019) (citing § 2254(d)). Because state prisoners can only obtain relief upon such a showing, the magistrate judge undertook that analysis for each of Bixby's claims and recommended granting summary judgment to the State and denying relief on all claims.

In response to the MR&R, Bixby's initial § 2254 counsel filed a seventeen-page set of objections.

The district court adopted the MR&R, granted summary judgment to the State, and denied habeas relief. But the district court also chastised Bixby's initial § 2254 counsel, observing that the § 2254 "[p]etition is largely a conglomeration of" "others' writing[s]" and failed to discuss how to apply § 2254(d)'s standards to the issues raised. *Bixby v. Stirling*, No. 4:17-cv-954-BHH, 2021 WL 783660, at *5 (D.S.C. Mar. 1, 2021). Despite these concerns, however, the district court engaged in an extensive, § 2254-centered analysis of the claims Bixby had raised, issuing a thorough decision before denying relief.

Bixby then filed a Rule 59(e) motion for reconsideration, which the district court denied in part and granted in part. The limited grant related solely to the district court's failure to rule on whether a certificate of appealability (COA) should be issued, as required by 28 U.S.C. § 2253. The district court then amended its order to deny Bixby a COA as to any claim.

Bixby appealed the denial of his initial § 2254 petition and new counsel was appointed to represent him before this Court. But we denied Bixby a COA and dismissed his appeal. *Bixby v. Stirling*, No. 21-5, 2022 WL 4494130 (4th Cir. Apr. 29, 2022), *cert. denied*, 143 S. Ct. 2468 (2023) (mem.).

C.

While Bixby's appeal from the denial of his § 2254 petition was pending before this Court, the new counsel who had been appointed to represent him in that appeal moved to be appointed to represent him "for any remaining actions required in the district court and any subsequent and available post-conviction process." Motion for Appointment of Counsel at 2, *Bixby*, No. 4:17-cv-00954-BHH, ECF No. 153. The district court granted the motion "for the limited purpose of filing in this Court a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure." Text Order, *Bixby*, No. 4:17-cv-00954-BHH, ECF No. 155.

Thereafter, Bixby's newly appointed § 2254 counsel (current counsel in this case) filed a Rule 60(b) motion in the district court seeking relief from the final judgment denying his § 2554 petition. Bixby argued that he did not receive "meaningful, ethical representation," J.A. 1826, from his initial § 2254 counsel and thus satisfied Rule 60(b)(6)'s "any other reason justifying relief" standard, J.A. 1834.[2] Specifically, he contended that the initial § 2254 counsel had essentially abandoned him by filing a defective § 2254 petition that failed to raise potentially meritorious direct appeal claims or make other arguments to obtain relief under § 2554(d). Bixby asked the court to grant relief

[2] Bixby's Rule 60(b) motion also requested the district court grant relief pursuant to Rule 60(b)(1)'s "excusable neglect" standard. On appeal, Bixby has not raised a Rule 60(b)(1) claim. Thus, he abandoned the issue. *See A Helping Hand, LLC v. Baltimore Cnty.*, 515 F.3d 356, 369 (4th Cir. 2008).

so that the new § 2254 counsel could investigate and then provide new briefing to raise "additional claims as may be appropriate." J.A. 1851.[3]

The district court denied Bixby's motion. Looking to the text of Rule 60(b)(6), § 2254(d), and Supreme Court and out-of-circuit cases analyzing the interplay between the two provisions, the court concluded that Bixby's motion was not a true Rule 60(b) motion. Because "[t]he motion repeatedly indicate[d] an intent to raise new grounds for habeas relief," the district court concluded it was a § 2254 petition "couched" in the language of Rule 60(b) so as to get around the statutory limits on second and successive § 2254 petitions. *Bixby v. Stirling*, No. 4:17-cv-954-BHH, 2022 WL 2905509, at *3 (D.S.C. July 22, 2022). In the court's view, "where the [Rule 60(b)] motion premises a right to relief on habeas counsel's substandard performance in advocating the § 2254 standard, it clearly implicates, albeit indirectly, the Court's prior adjudication of [Bixby]'s habeas claims on the merits and seeks a second determination of those claims, along with the new claims, after better advocacy." *Id.* It concluded that although labeled as a Rule 60(b) motion, Bixby's motion "is in substance an unauthorized successive habeas petition over which [the district court] lack[ed] jurisdiction" given that only this Court has the power to authorize second or successive § 2254 petitions. *Id.* at *3–4. The district court then denied Bixby's Rule 60(b) motion and denied a COA. *Id.* at *4.

[3] The motion did not specify what claims would be added, but alluded to adding claims related to the two issues that had divided the South Carolina Supreme Court in his direct appeal as well as unknown claims under *Martinez v. Ryan*, 566 U.S. 1 (2012).

Bixby noted a timely appeal, asking this Court to grant a COA from the district court's denial of his Rule 60(b) motion. We issued a briefing order and calendared the case for oral argument.

II.

The dispositive issue in this appeal is whether the district court erred in concluding that it lacked jurisdiction to consider Bixby's Rule 60(b) motion because he sought to present an unauthorized second § 2254 petition. We review de novo whether the district court properly construed Bixby's Rule 60(b) motion as an unauthorized second habeas petition. *See United States v. McRae*, 793 F.3d 392, 397 (4th Cir. 2015). But before turning to Bixby's specific arguments, we discuss the relevant legal context that forms the backdrop for this case.

A.

AEDPA establishes strict requirements for state and federal prisoners seeking a federal writ of habeas corpus. State prisoners' claims that they are being held "in custody in violation of the Constitution or laws or treaties of the United States" must be brought under 28 U.S.C. § 2254. § 2254(a).

Applicants may file one timely § 2254 petition without seeking prior authorization, but after having done so, they are barred from bringing additional claims in a "second or successive habeas corpus application under section 2254" unless the claims meet certain substantive requirements and the petitioner has first obtained a COA from the appropriate

court of appeals. § 2244.[4] The rules for obtaining authorization are also rigid, and largely irrelevant to our review. Of note, however, in addition to requiring petitioners to obtain authorization from the appropriate court of appeals before filing a second or successive § 2254 petition in district court, § 2244 also makes clear that district courts must ("shall") dismiss any second or successive § 2254 petition or claim that the court of appeals has not authorized. § 2244(b).

B.

While AEDPA specifically governs a prisoner's habeas petition, Rule 60 of the Federal Rules of Civil Procedure governs civil actions of all kinds, permitting relief from a district court's judgment or order under certain circumstances. Subsection (b) of that rule delineates five specified grounds for relief ranging from mistake to fraud. *See* Fed. R. Civ. P. 60(b)(1)–(5). A sixth catch-all provision permits district courts to grant relief for "any other reason that justifies" it. Fed. R. Civ. P. 60(b)(6). Although Rule 60(b)(6) "provides the court with a grand reservoir of equitable power to do justice in a particular case," *Reid v. Angelone*, 369 F.3d 363, 374 (4th Cir. 2004) (cleaned up), the Supreme Court has cautioned that it requires "extraordinary circumstances [to] justify reopening" a judgment, *Kemp v. United States*, 142 S. Ct. 1856, 1861 (2022) (cleaned up). Thus, despite Rule 60(b)(6)'s "open-ended language," the Supreme Court has "firmly reined in" the

[4] The substantive limits on a second or successive § 2254 petition are not at issue in this case, nor has Bixby asserted that the claims he seeks to add would satisfy these requirements.

provision's scope by requiring extraordinary circumstances to invoke it. *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016).

C.

Sometimes petitioners attempt to use Rule 60(b) as a means to present new claims or arguments in favor of habeas relief that were not presented in their initial federal habeas petition. And some petitioners can satisfy Rule 60(b)'s criteria for when a judgment can be reopened even though they cannot satisfy § 2244's restrictions on when a second or successive habeas petition can be filed. Courts have grappled over this tension between Rule 60(b) and § 2244.

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court considered the interplay between AEDPA's limits on second or successive federal habeas petitions and Rule 60(b) relief. It cautioned that Rule 60(b)(6) motions could not be used as a vehicle for "'circumvent[ing] the requirement[s]' for securing relief under AEDPA." *Moses*, 815 F.3d at 168 (second alteration in original) (quoting *Gonzalez*, 545 U.S. at 532). The Supreme Court therefore recognized that as between AEDPA and Rule 60(b), the balance weighs heavily in favor of AEDPA finality. *Richardson v. Thomas*, 930 F.3d 587, 595 (4th Cir. 2019) ("The *Gonzalez* analysis of the interplay between § 2244(b) and Rule 60(b) . . . reflects the unquestionable primacy of § 2244(b).").[5] For this reason, the Supreme Court

[5] That's no surprise, in part, because statutes take priority over the federal rules. *Gonzalez*, 545 U.S. at 529 ("Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules. 28 U.S.C. § 2254 Rule 11; *see* Fed. R. Civ. P. 81(a)(2)." (alteration in original) (footnote omitted)).

noted that Rule 60(b)(6)'s requisite "extraordinary circumstances" would "rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535. So, although the Supreme Court recognized that Rule 60(b) motions can be brought in habeas cases, it warned that a court could only grant such motions when doing so would not be inconsistent with AEDPA. *Id.* at 530–35.

Throughout *Gonzalez*, the Supreme Court remained alert to the expectation that artfully worded Rule 60(b) motions would require courts to look behind both the title and the text to the motion's objective to determine whether it aimed to end-run AEDPA. For that reason, the Court instructed that a district court's first task when presented with a Rule 60(b) motion in a habeas case must be to consider whether the filing "is in substance a successive habeas petition and [thus] should be treated accordingly." *Id.* at 531.

To aid in this process, the Supreme Court provided multiple examples of when a filing labeled as a "Rule 60(b) motion" would substantively be a "habeas corpus application" or "at least similar enough that failing to subject it to the same requirements would be 'inconsistent with'" AEDPA. *Id.* The Court observed that some Rule 60(b) motions may attack the district court's prior reasoning or attempt to add "one or more 'claims.'" *Id.* at 530–31. Or they might indirectly attempt to do the same by asserting that due to an attorney or party's "excusable neglect," the initial "habeas petition had omitted a claim of constitutional error, and seek leave to present that claim." *Id.* at 531. Likewise, Rule 60(b) movants may argue that a post-judgment change in law warrants relief so as to present that newly available claim. *Id.* In each of these scenarios, the Supreme Court recognized that the motions sounded substantively in habeas because they "attack[ed] the federal court's previous resolution of a claim *on the merits*, since alleging that the court

erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* at 532 (footnote omitted). The Supreme Court instructed that filings of this ilk cannot proceed under the mantle of a Rule 60(b) motion and instead must be subjected to AEDPA's requirements. *Id.*

The Supreme Court contrasted disguised habeas petitions from "true" Rule 60(b) motions in the habeas context. A "true" Rule 60(b) motion would not attack the resolution of a prior § 2254 petition on the merits. Instead, a "true" Rule 60(b) motion would challenge "some defect in the integrity of the federal habeas proceedings." *Id.* at 532. As examples, the Court cited a motion that asserts that "a previous ruling which precluded a merits determination was in error" such as a district court's denial of habeas relief for "failure to exhaust, procedural default, or statute-of-limitations bar," *id.* at 532 n.4, or "fraud," *id.* at 532 n.5. It observed that "true" Rule 60(b) motions would not "assert, or reassert, claims of error in the movant's state conviction," and that a motion "challeng[ing] only the District Court's failure to reach the merits" could be considered without running afoul of AEDPA. *Id.* at 538. In further parsing this distinction, the Supreme Court observed 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." *Id.* at 532 n.5 (internal citation omitted).

D.

1.

With these governing principles firmly in mind, we turn to Bixby's argument that the district court erred in concluding that it lacked jurisdiction to consider his Rule 60(b) motion because the motion sought to reargue and add claims for § 2254 relief. Bixby contends that the district court should not have focused so extensively on whether his Rule 60(b) motion sought a "re-do" of his initial habeas petition because *all* Rule 60(b) motions seek to reopen and reconsider the court's judgment in some form. He further avers that whatever rules customarily forbid Rule 60(b) relief based on a federal habeas counsel's conduct do not preclude relief here because of the extent and nature of his initial § 2254 counsel's errors. As support for this argument, Bixby emphasizes that *Gonzalez* merely cautioned that "ordinarily" claims based on attorney deficiencies would not attack the integrity of the initial habeas proceedings, thus leaving the door open for particularly egregious mistakes to do so, and thus present a "true" Rule 60(b) motion. *Cf. Gonzalez*, 545 U.S. at 531 n.5. He also points to out-of-circuit cases recognizing that Rule 60(b) relief remains available when federal habeas counsel abandons a client.

Bixby maintains that his case falls within *Gonzalez*'s "ordinarily" caveat and this out-of-circuit precedent 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. Thus, he argues that his initial § 2254 counsel's failings constitute a procedural defect in the original proceedings because they prevented the district court from reaching the merits of a claim for relief. As such, he maintains that his

motion is a "true" Rule 60(b) motion attacking the integrity of the federal habeas proceeding, that the district court thus had jurisdiction to consider his Rule 60(b) motion, and that this Court should vacate the district court's order and remand for the district court to decide whether his Rule 60(b) motion should be granted on the merits of whether it presents "extraordinary circumstances" warranting relief from the initial judgment denying his § 2254 petition.

2.

Under *Gonzalez*, the type of attorney-error argument Bixby makes in his Rule 60(b) motion "ordinarily" would be treated as a second or successive habeas petition over which the district court lacked jurisdiction. As a threshold observation, the district court's judgment denying the initial § 2254 petition resolved each of Bixby's claims on the merits, thus making it all the more likely that any Rule 60(b) motion seeking to revisit that judgment would be in tension with AEDPA's limits on second or successive habeas petitions. *See Gonzalez*, 545 U.S. at 533 (observing that "[i]f neither the motion itself *nor the federal judgment from which it seeks relief* substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules" (emphasis added)); *Franqui v. Florida*, 638 F.3d 1368, 1371 (11th Cir. 2011) (understanding *Gonzalez* to establish that "[w]hen . . . a federal habeas court has already reached and resolved the merits of a habeas petitioner's earlier asserted claims, we look at a [Rule] 60(b) motion challenging that decision with particular skepticism").

The substance of Bixby's Rule 60(b) motion confirms that he "seeks to revisit the federal court's denial *on the merits* of a claim for relief," something that *Gonzalez* repeatedly states "should be treated as a successive habeas petition." 545 U.S. at 534. As *Gonzalez* recognized, "[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts" and "[t]he same is true" of a Rule 60(b) motion that attempts to raise new arguments in support of prior claims. *Id.* at 531 (citation omitted). In both circumstances, the movant wants a district court that has already denied relief on the merits to take another look at whether to grant relief on the merits. Bixby's Rule 60(b) motion, which ultimately seeks that very reconsideration, falls squarely within *Gonzalez*'s heartland as a motion that is subjected to AEDPA's restrictions.

This is so even though Bixby's Rule 60(b) motion does not directly present new arguments or claims in favor of § 2254 relief. The Supreme Court's concern about circumventing AEDPA is no less present when a petitioner uses Rule 60(b) as the means for future filings that would circumvent AEDPA than when the motion itself does so. The end result is the same, and impermissible in either case. *Gonzalez* observed how claims "couched in the language of a true Rule 60(b) motion" nonetheless sought the district court's permission to consider new arguments or claims in support of federal habeas relief. *Id.* The inconsistency with AEDPA is the core problem, and the "couch[ing]" to create distance between the Rule 60(b) motion's grounds and how it runs afoul of § 2244's limits is merely an effort to obfuscate that inconsistency. *See id.* at 531–32. Other circuit courts

applying *Gonzalez* have recognized the same: "Potential inconsistency with AEDPA looms even where . . . a Rule 60(b) motion does not itself raise new claims for habeas relief, but rather seeks permission to do so in further proceedings." *Franqui*, 638 F.3d at 1371. Under either scenario, "*Gonzalez* tells us that, even though such a motion may not directly assert errors in the petitioner's underlying conviction, it still must be treated as a second or successive petition." *Id.* at 1371–72; *accord Edwards v. Davis*, 865 F.3d 197, 204–05 (5th Cir. 2017) (per curiam) (holding that a Rule 60(b) motion, which claimed that federal habeas counsel abandoned his client by failing to bring additional claims in a § 2254 petition that was denied on the merits, was not a true Rule 60(b) motion because it sought "to re-open the proceedings for the purpose of adding new claims," which "is the definition of a successive claim"); *Post v. Bradshaw*, 422 F.3d 419, 424 (6th Cir. 2005) ("It makes no difference that the motion itself . . . purports to raise a defect in the integrity of the habeas proceedings, namely his [federal habeas] counsel's failure—after obtaining leave to pursue discovery—actually to undertake that discovery; all that matters is that [petitioner] is 'seek[ing] vindication of' or 'advanc[ing]' a claim by taking steps that lead inexorably to a merits-based attack on the prior dismissal of his habeas petition." (alterations in original)).[6]

[6] It seems likely that Bixby's proposed Rule 60(b) motion runs afoul of AEDPA in another way as well. AEDPA states that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." § 2254(i); *see also* 28 U.S.C. § 2261(e) (prohibiting the same in the case of prisoners in state custody subject to a capital sentence who have been appointed counsel during their federal habeas petitions). Thus, "a freestanding claim of ineffective assistance of [federal or] state habeas counsel . . . is not a (Continued)

3.

None of Bixby's arguments to the contrary are convincing. At the outset, he argues that this Court should not even reach the question of whether his Rule 60(b) motion is cognizable, and instead should hold only that the district court erred in concluding that it lacked jurisdiction to consider a claim of attorney abandonment. That argument fails because it assumes that the question of the district court's jurisdiction to consider Bixby's Rule 60(b) motion can be untethered from ascertaining whether his particular argument is properly characterized as a "true" Rule 60(b) motion or an unauthorized second or successive federal habeas petition. Because *Gonzalez* instructs that a district court must "first" assure itself of jurisdiction, 545 U.S. at 530, and it does so by assessing the substance of the petitioner's motion, that inquiry necessarily rests on the specific nature of Bixby's arguments. In short, whether Bixby's Rule 60(b) motion is cognizable as such is part and parcel of determining whether the district court correctly determined it lacked jurisdiction over his motion. *See Richardson*, 930 F.3d at 597 ("[U]ntil the district court determines

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permissible avenue of relief in a federal habeas petition." *Samples v. Ballard*, 860 F.3d 266, 275 (4th Cir. 2017) (citation omitted). Although Bixby does not present a freestanding claim that he is entitled to § 2254 relief on the basis of his initial § 2254 counsel's performance, he *does* argue that he is entitled to "*other relief in*" his § 2254 proceedings (i.e., grant of a Rule 60(b) motion to reopen the judgment denying his § 2254 petition) on that basis. And where AEDPA's limits on available forms of "relief" conflicts with Rule 60(b), *Gonzalez* reiterates that AEDPA controls. This provision bolsters our conclusion that Bixby's Rule 60(b) motion does not present a "true" Rule 60(b) motion. *See Post*, 422 F.3d at 422–24 (citing § 2254(i) and *Gonzalez*'s primacy-of-AEDPA holding as a basis for concluding that "AEDPA denies the federal courts the power to entertain" a petitioner's Rule 60(b) motion predicated on the ineffectiveness or incompetence of federal habeas counsel). Because we dispose of Bixby's claims under other AEDPA provisions, we need not further consider this potential independent bar.

whether the Rule 60(b) motion filed by the habeas petitioner is in actuality a disguised § 2244 motion [i.e., a request for authorization to bring a second or successive § 2254 petition], it cannot determine whether it has jurisdiction to . . . decide whether the motion satisfies Rule 60(b)'s requirements of timeliness and extraordinary circumstances.").

Bixby also argues that it's wrong to consider that his motion would cause the district court to reexamine its initial judgment because *every* Rule 60(b) motion ultimately seeks to "reopen" or "reconsider" an earlier judgment. That may be. But however Rule 60(b) operates as a general matter, *Gonzalez* unquestionably restricts the circumstances in which it can be invoked in the habeas context to those motions attacking "some defect in the integrity of the federal habeas proceedings." 545 U.S. at 532. The examples the Court provided overwhelmingly involved circumstances where the district court did not reach a merits determination on the original § 2254 petition and instead relied on some procedural defect or alternative basis for denying relief. *See id.* at 533 & n.6. For example, the Supreme Court pointed to Rule 60(b) motions seeking to "relieve parties from the effect of a default judgment mistakenly entered against them" or "to obtain vacatur of a judgment that is void for lack of subject-matter jurisdiction." *Id.* at 534. Similarly, the Court observed that the Rule 60(b) motion at issue before it "allege[d] that the federal courts misapplied the federal statute of limitations," a determination that had precluded merits adjudication of the § 2254 petition. *Id.* at 533. In each of these examples, although the Rule 60(b) motion sought to reopen a judgment, the basis for doing so was unrelated to the substantive claims in the original habeas petition as both the original judgment and the Rule 60(b) motion addressed other matters. A true Rule 60(b) motion in the habeas context will not ask for a second

adjudication on the initial claims or a first adjudication of new substantive claims, but rather will ask the court to remove barriers that had earlier precluded an adjudication on the merits of the initial claims. *See id.* at 534.

In *Gonzalez*, the Supreme Court speculated as a theoretical matter that Rule 60(b) may be available in the habeas context in a very rare set of undefined circumstances when the district court had previously reached a merits determination. For example, the Supreme Court recognized fraud as a potential defect in the integrity of the federal habeas proceedings. *Id.* at 532 n.5. Specifically, it discussed a scenario where a witness puts forth a fraudulent basis for refusing to appear at the federal habeas proceeding, and the district court enters an initial judgment on the merits then presented to it. So, granting the Rule 60(b) motion upon a showing of fraud would result in a new, but permissible, merits determination, but it would not implicate § 2244's limits on second or successive habeas petitions. First, the motion itself would relate to a "nonmerits aspect of the first habeas proceeding" and, second, the relief sought would be "confine[d] . . . to [reopening] the first federal habeas petition" for a new merits determination absent the fraud rather than altering the substantive claims that the district court was asked to consider as part of its review. *See id.* at 534.

Fatally for Bixby, this necessary consistency with AEDPA does not exist here, where Bixby alleges that sub-par representation in his initial § 2254 habeas petition poses a cognizable flaw in the integrity of the federal habeas proceeding. 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.[7] *Gonzalez* recognized that Rule 60(b) motions like Bixby's, which ultimately are based on "habeas counsel's omissions" in the original § 2254 proceedings, "ordinarily do[] not go to the integrity of the proceedings, but in effect ask[] for a second chance to have the merits determined favorably." *Id.* at 532 n.5 (citation omitted); *see also Coleman v. Stephens*, 768 F.3d 367, 371–72 (5th Cir. 2014) (per curiam) (distinguishing a Rule 60(b) motion argument that counsel was ineffective in failing to find and present evidence to support

[7] Our holding in *Cavalieri v. Virginia*, No. 20-6287, 2022 WL 1153247 (4th Cir. Apr. 19, 2022) (per curiam), highlights the difference *Gonzalez* deems essential. There, federal habeas counsel submitted a § 2254 petition that—"for reasons that remain[ed] unknown"—was missing more than half its pages when filed on the district court's docket. *Id.* at *1. The district court dismissed the petition, and Cavalieri moved under Rule 60(b) to reopen, arguing "that the district court erred by not addressing all the arguments in his § 2254 petition" on the merits, observing "that some of the pages appeared to have been misplaced by the court because he had mailed in a complete petition," and attaching "to his motion a complete copy of his § 2254 petition." *Id.* Although the district court denied the motion, we reversed and "remand[ed] with instructions to grant the motion and permit Cavalieri to refile his § 2254 petition with the missing pages." *Id.* at *3.

In holding that Rule 60(b) relief should have been granted, we observed that the motion was a "true Rule 60(b) motion" because it challenged a "defect in the integrity of the federal habeas proceedings" that had precluded the district court from deciding the § 2254 petition on the merits. *Id.* at *1–2 (citation omitted). Important to our conclusion was the reflection in the record that the § 2254 petition Cavalieri wanted the district court to consider on the merits in the first instance was "the same petition" he'd originally filed—"the only substantive difference being the addition of the missing pages." *Id.* at *1; *see id.* at *3 (noting that the record made clear "that the complete version of the § 2254 petition is a copy of the same document (with the missing pages included) and not a new petition that Cavalieri drafted in an attempt to present more claims").

claims in an initial habeas petition (which would "sound[] in substance" and thus not be a true Rule 60(b) motion) from an argument that "the court or prosecution prevented [counsel] from presenting such evidence" (which might present a procedural claim cognizable in a Rule 60(b) motion)).

Bixby's basis for seeking Rule 60(b) relief does not fall outside this "ordinar[]y" rule. Neither the Supreme Court nor we have had occasion to flesh out when an attack on federal habeas counsel's conduct might fall within this limited, undefined, and theoretical caveat. But no 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. And, at bottom, that's the basis on which Bixby seeks relief.

Bixby relies heavily on the Second Circuit's decision in *Harris v. United States*, 367 F.3d 74 (2d Cir. 2004), 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 *Harris*, federal habeas counsel had filed a § 2255 motion and obtained an unfavorable merits determination. The petition omitted several claims that the petitioner argued had potential merit, including two sentencing issues that the sentencing judge had conceded were "debatable" and "would probably be grounds for appeal." *Id.* at 78. In addition, initial federal habeas counsel submitted a declaration as part of the Rule 60(b) motion in which he "confess[ed] his ineffectiveness" in handling the initial § 2255 proceeding. *Id.* at 82. Although recognizing that complete abandonment by counsel could serve as a proper basis for relief under Rule 60(b) without running afoul of AEDPA's limits

on second or successive habeas petitions—and, again, without the benefit of *Gonzalez*—the Second Circuit nonetheless affirmed the denial of Rule 60(b) relief. *Id.* In its view, "nothing in the record or in [counsel's] declaration suggests that his performance approached a level of deficiency that could remotely be deemed 'abandonment' and therefore an 'extraordinary circumstance'" under Rule 60(b)(6). *Id.*

Whatever broader principle *Harris* may have stood for before *Gonzalez*, in *Gonzalez*, the Supreme Court cited *Harris* as an example of a case in which the petitioner brought a Rule 60(b) motion that, "although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly," 545 U.S. at 531, because it "s[ought] to add a new ground for relief," *id.* at 532. *Harris,* therefore, offers Bixby no refuge in light of *Gonzalez*.[8]

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

[8] The Eleventh Circuit has cited *Harris* favorably as a theoretical basis for permitting an attorney-abandonment-based Rule 60(b) motion post-*Gonzalez*, but it has not to date concluded that any claim asserting abandonment has actually shown abandonment. For example, in *Franqui*, the court rejected a petitioner's argument that he presented a true Rule 60(b) motion by arguing that initial federal habeas counsel had repeatedly promised to include a certain claim in the initial habeas petition but had not only failed to do so, but also failed to inform his client about that omission in subsequent conversations about the petition. 638 F.3d at 1372. In so holding, the Eleventh Circuit observed, "*Gonzalez* does not allow us to take so broad a view [as petitioner asserts] of what constitutes a defect in the integrity of federal habeas proceedings" and "[w]e do not consider Petitioner's allegations to be out of the ordinary" given that he does not allege "that the actual omission of the . . . claim was, in fact, intentional." *Id. Franqui* thus supports our conclusion that even if *Gonzalez* carves out potential room for claims of attorney abandonment to present a claim attacking the integrity of the federal habeas proceedings, "abandonment" is strictly understood as something other than an attack on the quality of representation. Omitted claims and poor arguments are not enough. *See id.*

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. And that makes all the difference under *Gonzalez*.

To recap, Bixby asks us to hold that his claim falls within the narrow exception implied by *Gonzalez*'s use of the word "ordinarily" in which inept briefing by counsel would be the basis to attack the integrity of the proceedings in such a way as to be a true Rule 60(b) motion. We decline this invitation, however, because Bixby's motion relies on Rule 60(b) to do something he could not do under AEDPA—challenge the *quality* of his initial § 2254 counsel's representation to get a district court to take a second look at merits of his § 2254 petition, which he also seeks to modify. Given the direct conflict between AEDPA and Rule 60(b) principles governing that question, *Gonzalez* instructs that AEDPA prevails. Therefore, the district court correctly determined it lacked jurisdiction to consider

Bixby's Rule 60(b) motion, which it properly construed to be an unauthorized second or successive § 2254 petition.[9]

III.

A.

Having determined that the district court correctly recognized that Bixby did not bring a true Rule 60(b) motion and that his motion was properly subjected to AEDPA's limits on a second or successive habeas petition, we turn to the question of the proper

[9] Bixby argues that initial § 2254 counsel's poor performance culminated in the district court's failing to intervene and "us[ing] the initial petition "against" him to deny habeas relief. Opening Br. 40. To the extent this argument is the narrative conclusion to the consequences of initial § 2254 counsel's alleged abandonment of Bixby, it no more demonstrates the district court's jurisdiction over the Rule 60(b) motion than his attorney-abandonment argument did.

In his reply brief, Bixby posits for the first time that this argument was not just part of his argument about why his initial § 2254 counsel's alleged abandonment constituted a "true" Rule 60(b) motion over which the district court had jurisdiction. Instead, he now claims that the district court's failure to intervene or take corrective action despite being aware of initial § 2254 counsel's performance was a separate, additional procedural defect that satisfied Rule 60(b) and permitted the court to exercise jurisdiction over his motion. The record belies this assertion. Bixby's Rule 60(b) motion and related filings in the district court raised numerous arguments supporting why *initial § 2254 counsel's performance* served as the catalyst for reopening his § 2254 proceedings, but they did not contend that he was separately entitled to Rule 60(b) relief based on how the district court responded to initial § 2254 counsel's performance. Simply put, the issue of the district court's own performance was not put before the district court in the Rule 60(b) motion, so it is not properly before us on appeal either. *See In re Under Seal*, 749 F.3d 276, 287 & n.14 (4th Cir. 2014) (discussing preservation of issues in district court).

We also observe that in addition to Bixby's failure to raise this claim in the district court, Bixby did not adequately raise or develop it on appeal either. His failure to do so is yet another reason not to consider it. *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue." (cleaned up)).

disposition. Given that Bixby's motion actually sought permission to raise new and revised claims in a second or successive § 2254 petition, § 2244 and our case law reflect that the district court should have dismissed—not denied—the motion.[10]

We begin with the text of § 2244, which circumscribes which claims may be raised in a second or successive § 2254 petition and prescribes the mechanism for raising those claims. In short, before filing a second or successive § 2254 petition, a petitioner must obtain authorization to do so from the appropriate court of appeals. § 2244(b)(3). And a court of appeals can only authorize a second or successive § 2254 petition if the claims meet the statutory criteria. § 2244(b)(2). Most important for our purposes, AEDPA demands that district courts presented with an unauthorized second or successive § 2254 petition "shall . . . dismiss[]" that petition, regardless of whether the petition restates prior claims, § 2244(b)(1), or raises new claims, § 2244(b)(2). We thus know that the district court would have been required to dismiss—not deny—an unauthorized second or successive § 2254 petition.

Here, of course, Bixby did not formally file a second or successive § 2254 petition, but the district court properly determined that his Rule 60(b) motion was, in substance, just that. What's more, the court properly recognized that under the above-cited provisions of § 2244, it lacked jurisdiction to consider an unauthorized second or successive § 2254

[10] We note that not all procedural bars to proceeding under Rule 60(b) require dismissal; we are speaking solely to the issue presented here, where there's a jurisdictional bar under AEDPA to the district court's consideration of the motion on the merits. *See, e.g.*, *Moses*, 815 F.3d at 164–69 (affirming denial of a Rule 60(b) motion on the grounds that it was untimely under Rule 60(c) and that a change of law did not constitute "exceptional circumstances" warranting reopening under Rule 60(b)(6)).

petition. We have previously recognized that if a filing labeled as a Rule 60(b) motion is "tantamount to" an application for habeas corpus, then "the court must either dismiss the motion for lack of jurisdiction or transfer it to this court so that we may perform our gatekeeping function under § 2244(b)(3)." *United States v. Winestock*, 340 F.3d 200, 207 (4th Cir. 2003), *abrogated in part on other grounds by McRae*, 793 F.3d 392; *cf. Richardson*, 930 F.3d at 589, 597–98 (concluding that a Rule 60(b) motion was the "functional equivalent of a [second or successive] § 2254 petition," which meant the district court was "required to either dismiss the motion or transfer it to this court so that we could consider it under our gatekeeping function"); *Franqui*, 638 F.3d at 1370–71, 1375 (observing that the district court's denial of Rule 60(b) relief was erroneous under *Gonzalez* because he "did not qualify to seek Rule 60(b) relief" given that his motion arguing that federal habeas counsel's gross negligence or abandonment led to the omission of a viable claim was properly understood as an attempt to bring an unauthorized second or successive § 2254 petition, and vacating the judgment and remanding "with instructions to dismiss Petitioner's motion for lack of subject-matter jurisdiction").

Given the nature and scope of Bixby's motion, the district court should have dismissed the motion. Therefore, we vacate the district court's order denying relief and remand the case with instructions to dismiss for lack of subject matter jurisdiction.

B.

We conclude by addressing a matter that would ordinarily be a threshold inquiry—whether we were required to grant Bixby a COA before considering his appeal.[11] The parties disagree on this threshold determination for establishing our own jurisdiction, and we acknowledge that applying the district court's order to our existing case law encounters some ambiguity. This is so because we have held that an appeal from the denial of a Rule 60(b) motion in the habeas corpus context requires issuance of a COA. *Reid*, 369 F.3d at 369. But this Court has also held that two Supreme Court cases issued after *Reid,* combined with the difference between a denial and a dismissal, meant that a COA is not required to review a district court's order dismissing a Rule 60(b) motion for lack of jurisdiction when, under *Gonzalez*, the district court concludes the motion improperly seeks to circumvent AEDPA. *McRae*, 793 F.3d at 400.

The dilemma in applying this precedent here stems directly from the district court's correct recognition that it could not consider the Rule 60(b) motion on the merits because it lacked jurisdiction to consider what amounted to an unauthorized second or successive habeas petition combined with its incorrect choice to deny rather than dismiss the motion. Thus, while the basis for the district court's decision indicates that *McRae* should control

[11] Under § 2253(c)(1)(A), a COA is required for a habeas applicant to obtain appellate review of "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." Where it applies, the COA requirement is jurisdictional. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.").

whether a COA is required, its bottom-line disposition leaves some room for arguing that *Reid* controls.

For several reasons, we conclude that we need not issue a COA to consider Bixby's appeal. To start, except for the designation to deny the motion, the order at issue in this case is substantively unlike the order at issue in *Reid*, and nearly identical to the order at issue in *McRae*. In *Reid*, the district "court denied the purported Rule 60(b) motion on the merits, and this Court raised the jurisdictional issue sua sponte after granting a COA." *McRae*, 793 F.3d at 400 n.7. Read in context, *Reid*'s discussion of why a COA was required to consider an order denying a Rule 60(b) motion referred specifically to an order denying the motion on the merits, and the relationship that such an order has to an underlying § 2254 petition and the COA requirements. *See Reid*, 369 F.3d at 367–70. In contrast, and as was true in *McRae*, the appeal in this case challenges a different "type" of order—one that does not reach the merits of whether Rule 60(b) relief is appropriate based on the presence or absence of "extraordinary circumstances," but instead concluded both that the district court "lack[ed] jurisdiction" to do so, *Bixby*, 2022 WL 2905509, at *3, and specifically "construed [the motion] as an unauthorized successive habeas petition," *id.* at *4. *Accord McRae*, 793 F.3d at 396. The substance of the order here is on all fours with the substance of the order at issue in *McRae.* In all practical respects, the reason why a COA was required in *Reid* holds no applicability here, while the reason why a COA was not required in *McRae* seems to apply with equal force here. *See id.* at 399–40. This observation does not discount the genuine difference between a denial and a dismissal generally speaking; it only notes that in *this* case, the district court's "denial" was not what it appeared to be at first glance.

See id. ("When a district court *denies* a Rule 60(b) motion on the merits, it necessarily considers the merits of the underlying habeas petition. . . . The same cannot be said about a *dismissal* of a Rule 60(b) motion on jurisdictional grounds. No one can say right now whether McRae's habeas proceeding was with merit or without based on the district court's dismissal.").

As noted, given that the district court properly characterized the Rule 60(b) motion as an unauthorized second § 2254 petition and it correctly determined that it lacked jurisdiction as a result, it was obliged to dismiss Bixby's motion or transfer it to this Court for us to perform our gatekeeping function for requests for authorization to file a second or successive petition. *See infra* Section III.A. Had the district court followed our precedent on the disposition that necessarily followed from its conclusion that it lacked jurisdiction, this case would have squarely fallen under *McRae*'s holding that a COA is not required, and thus avoided any subsequent confusion about whether a COA was required for us to consider Bixby's appeal. *See* 793 F.3d at 400 ("[W]e need not issue a COA before determining whether the district court erred in dismissing [a] purported Rule 60(b) motion as an unauthorized successive habeas petition.").

Lastly, we observe that *McRae* followed from two Supreme Court cases—including *Gonzalez*—which had been issued after *Reid*. Just as *McRae* recognized that these two decisions narrowly abrogated *Reid* in the context of a jurisdictional dismissal of a Rule 60(b) motion, *id.* at 400 n.7, the same two decisions abrogate *Reid* in the current slightly different context as well. In *McRae*, this Court explained how the two Supreme Court cases clarified the interplay between AEDPA's COA requirement and orders deciding Rule 60(b)

motions, and that analysis would apply equally to the circumstances presented here. *See id.* at 399 ("*Gonzalez* mandates that we treat true Rule 60(b) motions differently from successive habeas petitions, and *Harbison* [*v. Bell*, 556 U.S. 180 (2009),] holds that only final orders with a sufficient nexus to the merits of a habeas petition trigger the COA requirement. In other words, *Gonzalez* reveals the importance of distinguishing between Rule 60(b) motions and successive petitions, and *Harbison* opens the door for us to ensure that the district court does so properly."); *see also id.* at 400 n.7.

We therefore conclude that it was not necessary for us to grant a COA before deciding Bixby's appeal.

IV.

For these reasons, the district court properly construed Bixby's Rule 60(b) motion to be an unauthorized second or successive § 2254 petition over which it lacked jurisdiction. Because the court should have dismissed Bixby's motion, we vacate its order and remand with instructions to dismiss for lack of subject matter jurisdiction.

VACATED AND REMANDED
WITH INSTRUCTIONS

FILED: November 27, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4
(4:17-cv-00954-BHH)

STEVEN VERNON BIXBY

Petitioner - Appellant

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden, Broad River Correctional Institution

Respondents - Appellees

LEGAL ETHICS PROFESSORS

Amici Supporting Appellant

J U D G M E N T

In accordance with the decision of this court, the district court order entered July 22, 2022, is vacated. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Steven Vernon Bixby, #6024, Petitioner, v. Bryan P. Stirling, Commissioner, South Carolina Department of Corrections; and Lydell Chestnut, Deputy Warden, Broad River Correctional Institution, Respondents.	)	Civil Action No. 4:17-cv-954-BHH **ORDER**

On January 5, 2024, the United States Court of Appeals for the Fourth Circuit issued a published opinion vacating and remanding this matter with instructions, and the mandate was issued on January 16, 2024. *See Bixby v. Stirling, et al.*, No. 22-4. (ECF Nos. 198, 199.) In its opinion, the Fourth Circuit agreed with this Court that Petitioner Steven Vernon Bixby's prior motion to reopen judgment under Federal Rule of Civil Procedure 60(b) (ECF No. 165) was not a true Rule 60(b) motion but was instead an attempt by Bixby to use Rule 60(b) to circumvent the statutory limits placed on second or successive petitions filed pursuant to 28 U.S.C. § 2254. However, the Fourth Circuit explained that this Court should have dismissed Bixby's motion rather than denied it because this Court lacked jurisdiction. Accordingly, the Fourth Circuit vacated and remanded with instructions to dismiss for lack of subject matter jurisdiction. (ECF No. 198 at 32.)

After review, and for the reasons set forth in this Court's prior order and in the Fourth Circuit's published opinion, the Court construes Bixby's Rule 60(b) motion as an

unauthorized second or successive § 2254 petition over which this Court lacks jurisdiction. Accordingly, the Court hereby **dismisses** Bixby's motion (ECF No. 165) for lack of subject matter jurisdiction.

IT IS SO ORDERED.

/s/Bruce H. Hendricks
United States District Judge

April 10, 2024
Charleston, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Steven Vernon Bixby, #6024, Petitioner, vs. Bryan P. Stirling, Commissioner, South Carolina Department of Corrections; and Lydell Chestnut, Deputy Warden, Broad River Correctional Institution, Respondents.	Civil Action No. 4:17-cv-954-BHH **Opinion and Order**

Petitioner Steven Vernon Bixby ("Petitioner"), represented by counsel and under a sentence of death, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. This action is before the Court on Petitioner's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) (ECF No. 165), Respondents Bryan P. Stirling, Commissioner, South Carolina Department of Corrections, and Lydell Chestnut's, Deputy Warden, Broad River Correctional Institution (collectively "Respondents"), opposition to the Rule 60(b) motion (ECF No. 171), Petitioner's reply (ECF No. 176), Respondents' supplemental response in opposition (ECF No. 179), and Petitioner's supplemental reply (ECF No. 183). For the reasons stated below, the Rule 60(b) motion is denied.

BACKGROUND

Petitioner was convicted by a jury in February 2007 of the murder of two law enforcement officers, conspiracy to commit murder, kidnapping, possession of a firearm or knife during the commission of a violent crime, and twelve counts of assault with intent to kill. The jury sentenced Petitioner to death for the murders. Petitioner appealed his conviction and sentence to the South Carolina Supreme Court, which affirmed his

conviction and sentence. *State v. Bixby*, 698 S.E.2d 572 (S.C. 2010). He next petitioned the United States Supreme Court for certiorari, which petition was denied on April 25, 2011. *Bixby v. South Carolina*, 563 U.S. 963 (2011). Also on April 25, 2011, Petitioner filed his first application for post-conviction relief ("PCR"), which, after a year and a half of investigation and preparation by counsel, was followed by a fifth amended application for PCR on November 24, 2012, raising twelve grounds for relief. The PCR court conducted a five day long evidentiary hearing on December 10–13, 2012 and March 21, 2013, wherein extensive testimony was offered regarding Petitioner's mental health allegations. Following post-hearing briefs, the PCR court denied relief by order of dismissal on January 9, 2015. (PCR App. Vol. XIV pp. 6584–655, ECF No. 23-7 at 112–83.) PCR counsel appealed the decision of the PCR court to the South Carolina Supreme Court, which denied the petition for writ of certiorari on March 7, 2017. PCR counsel then sought review in the United States Supreme Court, which denied the petition for writ of certiorari on October 16, 2017. *Bixby v. South Carolina*, 138 S. Ct. 361 (2017).

Pursuant to 18 U.S.C. § 3599, attorneys Miller W. Shealy, Jr., and William H. Monckton, VI, were appointed to represent Petitioner for purposes of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 17.) Both attorneys were appointed from the District of South Carolina's CJA Death Penalty Panel Attorney List. (*Id.*) Thereafter, attorneys Shealy and Monckton (collectively "habeas counsel") assumed the representation of Petitioner in this federal habeas action. Following the filing of a § 2254 petition and supporting memorandum (ECF Nos. 72 & 72-1), a supplemental memorandum (ECF No. 80), a return and motion for summary judgment (ECF Nos. 83 & 84), a report and recommendation by the U.S. Magistrate Judge (ECF No. 94), objections

by Petitioner (ECF No. 107), and a reply to the objections by Respondents (ECF No. 116), this Court entered an Order overruling the objections, adopting the report and recommendation, granting Respondents' motion for summary judgment, and denying the § 2254 petition. (ECF No. 127.) Petitioner filed a Rule 59 motion to alter or amend judgment, which the Court granted in part, but only to extent the motion sought a determination as to whether a certificate of appealability should issue, and denied in all other respects. (ECF Nos. 131 & 143.) The Court then entered an Amended Order ruling on the report and recommendation, with the only change being the addition of a determination regarding a certificate of appealability. (*See* ECF No. 144 n.1.)

Petitioner filed a notice of appeal as to this Court's Order denying his § 2254 petition and Order denying his Rule 59 motion (ECF No. 145) and is currently appealing these matters in the United States Court of Appeals for the Fourth Circuit. In addition to his Fourth Circuit appeal, Petitioner, now represented by different counsel, is pursuing Rule 60(b) relief in this Court asserting that habeas counsel was grossly negligent and functionally abandoned him during the pendency of his § 2254 petition, constituting a failure to ensure the statutory right to counsel under 18 U.S.C. § 3599, and resulting in habeas counsel's failure to raise direct appeal claims and claims pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). (ECF No. 165.) This matter is ripe for review and the Court now issues the following ruling.

DISCUSSION

The threshold question the Court must consider is whether Petitioner's Rule 60(b) motion constitutes an attempt to file a successive habeas petition without satisfying the requirements of 28 U.S.C. § 2244. In *Gonzalez v. Crosby*, the U.S. Supreme Court stated,

"Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction-even claims couched in the language of a true Rule 60(b) motion-circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." 545 U.S. 524, 531 (2005) (citing 28 U.S.C. § 2244(b)(2)). The *Gonzalez* court explained:

> In most cases, determining whether a Rule 60(b) motion advances one or more "claims" will be relatively simple. A motion that seeks to add a new ground for relief . . . will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim *on the merits*,[4] since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant, under the substantive provisions of the statutes, is entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion 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.[5]
>
> > n.4. The term "on the merits" has multiple usages. We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim. He is not doing so 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.
> >
> > n.5. Fraud on the federal habeas court is one example of such a defect. We note 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.

Id. at 532 (citations omitted) (emphasis in original).

The instant Rule 60(b) motion asserts that habeas counsel committed gross negligence and abandoned Petitioner when they failed to address the key legal issue before the Court under § 2254(d), failed to raise substantial direct appeal claims that drew a dissent from two South Carolina Supreme Court justices, and failed to investigate or file

any *Martinez* claims. (ECF No. 165 at 12–23.) Petitioner argues that these errors of omission amount to "extraordinary circumstances" that justify reopening a final judgment under Rule 60(b)(6). (*See id.* at 12–13 (citing *Gonzalez*, 545 U.S. at 533).) Moreover, he asserts that the quality legal representation envisioned by Congress for capital cases, as embodied in the statutory right to counsel in 18 U.S.C. § 3599, "essentially did not occur." (*Id.* at 17.) "Instead," Petitioner contends his attorneys "submitted pleadings wholly lacking in original thought or argument, and wholly failing to address the key legal issues the Court faced under § 2254" (*id.*), "are the only South Carolina federal habeas lawyers in the AEDPA era who failed to raise meritorious federal constitutional claims" from direct appeal (*id.* at 20), and "simply made no effort to [determine the existence of possible *Martinez* claims], even though, as the Supreme Court underscored, *Martinez* claims protect the bedrock right to a fair trial" (*id.* at 21–22). The motion further asserts that Rule 60(b)(1) relief is warranted because habeas counsel's errors of omission resulted in the default of his federal habeas claims, constituting excusable neglect. (*Id.* at 23–26.) Petitioner admits that "what occurred here was not strictly a default judgment," but contends that it was "certainly its functional equivalent" given that habeas counsel failed to plead "his *Martinez* claims and preserved direct appeal claims" and failed to defend his other claims by "failing to advance any argument that [he] could satisfy the preconditions for federal habeas relief set forth in § 2254(d)." (*Id.* at 24.)

The Court finds that Petitioner's instant Rule 60(b) motion is in substance an unauthorized successive habeas petition over which this Court lacks jurisdiction. The motion repeatedly indicates an intent to raise new grounds for habeas relief, including claims from Petitioner's direct appeal that were not raised in his § 2254 petition and

unspecified *Martinez* claims that presumably have yet to be discovered. (*See* ECF No. 165 *passim*.) The fact that this intent to raise new claims is couched in the form of allegations regarding habeas counsel's "gross negligence" and "abandonment" of Petitioner does not alter the fundamental nature of the motion, which seeks an opportunity not to cure a lack of integrity in the proceedings, but to replead the § 2254 petition in a manner that rectifies habeas counsel's alleged omissions. *See Gonzalez*, 545 U.S. at 532 n.5 (noting that a Rule 60(b) motion 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"). Moreover, where the motion premises a right to relief on habeas counsel's substandard performance in advocating the § 2254 standard, it clearly implicates, albeit indirectly, the Court's prior adjudication of Petitioner's habeas claims on the merits and seeks a second determination of those claims, along with the new claims, after better advocacy. *See id.* at n.4 (noting that a Rule 60(b) movant makes a veiled habeas claim when the assertions in his motion challenge a district court's previous ruling "on the merits;" that is, a determination that "there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)").

The Fifth Circuit addressed nearly identical circumstances and arguments in *Gamboa v. Davis*, 782 F. App'x 297 (5th Cir. 2019), where the U.S. District Court for the Western District of Texas ruled that Gamboa's Rule 60(b) motion for relief from judgment in his § 2254 action was an impermissible successive habeas petition and the Circuit Court was asked to determine whether a certificate of appealability should issue. In that case, following the affirmance of his Texas state conviction for capital murder and death

sentence, the petitioner was appointed federal habeas counsel pursuant to 18 U.S.C. § 3599. *Id.* at 298. After several extensions of time were granted, Gamboa's habeas counsel filed a "fifty-five page habeas petition alleging seven claims for relief that attacked the constitutionality of the Texas capital sentencing scheme," followed by a "two-paragraph reply, admitting that, '[a]fter considerable review and reflection,' each claim in Gamboa's habeas petition was foreclosed by precedent." *Id.* at 298–99. Gamboa's Rule 60(b) motion alleged abandonment by his habeas counsel during the habeas proceedings, "culminating in [counsel's] filing of a petition with seven generic claims . . . that were copied and pasted from another client's petition." *Id.* at 300. Gamboa argued that his counsel's alleged abandonment, "depriv[ed] him of the quality legal representation guaranteed in his federal habeas proceedings under § 3599, and that the proceedings should therefore be reopened to cure that defect." *Id.* at 299.

The district court rejected Gamboa's assertion that he did not seek to advance new claims, but only wished to litigate his entitlement to adequate representation under § 3599, stating, "Should [Gamboa] succeed on the current motion for relief from judgment, the only result would be that [he], at some point in the future, would be given the opportunity to present claims (through new counsel) that were not presented in his original federal habeas proceedings because of [counsel's] alleged abandonment." *Gamboa v. Davis*, No. CV SA-15-CA-113-OG, 2017 WL 11368194, at *2 (W.D. Tex. Oct. 6, 2017). In construing Gamboa's Rule 60(b) motion as a successive habeas petition, the district court found that the "motion itself indicates an intent to eventually raise new claims," namely, those potential and preserved claims that Gamboa's counsel failed to investigate and present, which failure allegedly constituted abandonment. *Id.* The district court stated:

> Although Petitioner does not specifically announce his intention to raise these claims once he is "restored" to the position he was in before federal relief was denied, it is clear he is using his abandonment allegation as a means to re-open the proceedings for the ultimate purpose of eventually raising and litigating new claims. That is the very definition of a successive petition.

Id.

The Fifth Circuit noted that Gamboa argued on appeal that his counsel's actions "exceeded ordinary attorney omissions and amounted to 'wholesale abandonment,' depriving him of his statutory right to counsel under § 3599." 782 F. App'x at 301. However, the Fifth Circuit was not persuaded by this argument and upheld the district court's denial of the motion, concluding, "Troubling though Gamboa's allegations of attorney abandonment may be, reasonable jurists would not debate the district court's holding that his Rule 60(b) motion was an unauthorized successive habeas petition[.]" *Id.*

The Court finds the reasoning and analysis of the district court and the Fifth Circuit in *Gamboa* to be persuasive. It reinforces the determination that, under a *Gonzalez* analysis, the instant Rule 60(b) motion is an attempt to file a successive habeas petition without prior authorization from the Fourth Circuit. Given this conclusion, it would be extraneous for the Court to weigh in on the question, implicit in Petitioner's Rule 60(b) motion, whether there is some threshold degree of competence or effectiveness that habeas counsel must attain in order to satisfy the statutory right to counsel under 18 U.S.C. § 3599, and whether Petitioner's habeas counsel satisfied that standard in this case. While it is no secret that the undersigned was troubled by habeas counsel's performance in the underlying § 2254 proceedings, it is not this Court's prerogative to establish a new test for effectiveness in capital habeas cases by way of "gross negligence" and "functional abandonment" theories. The fact remains that habeas

counsel filed a timely § 2254 petition raising numerous grounds for relief, timely filed a response in opposition to Respondents' motion for summary judgment, and filed objections to the Magistrate Judge's report and recommendation, all of which were resolved when this Court, where appropriate under law, ruled upon Petitioner's habeas claims on the merits.

CONCLUSION

For the reasons stated above, Petitioner's motion for relief from judgment pursuant to Rule 60(b) is construed as an unauthorized successive habeas petition and is DENIED.

CERTIFICATE OF APPEALABILITY

The governing law provides that:

> (c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A petitioner satisfies this standard by demonstrating that reasonable jurists would find this Court's assessment of his constitutional claims to be debatable or wrong and that any dispositive procedural ruling by this Court is likewise debatable. *See Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met. Therefore, a certificate of appealability is denied.

IT IS SO ORDERED.

/s/ Bruce Howe Hendricks
United States District Judge

July 22, 2022
Charleston, South Carolina

FILED: January 5, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4
(4:17-cv-00954-BHH)

STEVEN VERNON BIXBY

Petitioner - Appellant

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden, Broad River Correctional Institution

Respondents - Appellees

LEGAL ETHICS PROFESSORS

Amici Supporting Appellant

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Diaz, Judge Agee, and Judge Harris.

For the Court

/s/ Nwamaka Anowi, Clerk

FILED: December 28, 2023

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O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk