No. 23-7641

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN VERNON BIXBY,

Petitioner,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. 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 *Gonzelez v. Crosby*, 545 U.S. 524 (2005)?

LIST OF PARTIES

Respondents agree with Bixby that the caption reflects all the appropriate parties.

STATEMENT OF RELATED PROCEEDINGS

Respondents agree with Bixby's recitation of the Statement of Related Proceedings.

CAPITAL CASE
BRIEF IN OPPOSITION

INTRODUCTION

Petitioner Steven Vernon Bixby (hereinafter "Bixby") is under two death sentences in South Carolina for the murders of Deputy Danny Wilson and State Constable Donnie Ouzts. Bixby has completed his trial, appeal, post-conviction relief (PCR) action, PCR appeal, federal habeas action, and his federal habeas appeal. Bixby has been denied relief or denied certiorari to seek further appellate relief at each of these stages of his litigation. His petition in this Court concerns only his action seeking a second and successive habeas action under the guise of Rule 60(b) relief.

Certiorari is not warranted in this case. Bixby's argument for Rule 60(b) relief is nothing more than a challenge to the quality of his habeas attorneys' representation. The Fourth Circuit agreed with the findings of the District Court and correctly ruled that Bixby's supposed Rule 60(b) motion constituted an unauthorized and successive habeas petition under 28 U.S.C. § 2254. Bixby's motion constituted a clear violation of 28 U.S.C. § 2244(b) which demanded dismissal pursuant to both statute and *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641 (2005). There are no errors to correct.

CITATIONS TO OPINIONS BELOW

The Fourth Circuit Court of Appeals' August 16, 2022, published Opinion affirming the holding of the district court and denying federal habeas relief is available at *Bixby v. Stirling*, 90 F.4th 140 (4th Cir. 2024), and is provided in the

petition appendix at 1a. The District Court of South Carolina's July 22, 2022 order denying habeas relief is unreported but available at 2022 WL 2905509 (D.S.C. July 22, 2022), and provided in the petition appendix at 36a.

JURISDICTIONAL STATEMENT

The petition was filed within the time granted in this Court's order extending the standard 90 days. Bixby claims jurisdiction is invoked under 28 U.S.C. § 1254(1). (Pet. 1).

STATUTORY PROVISIONS INVOLVED

Respondents contend that the relevant statutory provisions are found in 28 U.S.C. § 2254(d) and (i) and 28 U.S.C. § 2244(b), along with the provisions found in Rule 60(b)(6) of the Federal Rules of Civil Procedure.

28 U.S.C. § 2254(d) and (i):

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> . . .
>
> (i) The 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.

28 U.S.C. § 2244(a)-(b):

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
>
> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Federal Rule of Civil Procedure 60(b)(6)

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (6) any other reason that justifies relief.

STATEMENT OF THE CASE

Trial and Direct Appeal

Bixby is a South Carolina inmate under a sentence of death. His conviction and sentence followed a seven day trial in February 2007, wherein he was represented by a team of four attorneys specifically qualified for capital litigation under S.C. Code Ann. § 16-3-26: defense counsel E. Charles Grose, Esq., William Nettles, Esq., Tara Schutlz, Esq., and Mark MacDougall, Esq. Bixby sought a direct appeal of his conviction and sentence to the South Carolina Supreme Court, wherein he was represented by Robert Dudek, Deputy Chief Appellate Defender of the South Carolina Office of Appellate Defense, and Appellate Defender LaNelle DuRant. Counsel raised thirteen (13) separate issues on appeal. The South Carolina Supreme Court affirmed his conviction and sentence in *State v. Bixby*, Opinion No. 26871 (S.C. Sup. Ct. filed August 16, 2010), reported at 388 S.C. 528, 698 S.E.2d 572. He next petitioned the United States Supreme Court for certiorari on February 17, 2011, but was denied on April 25, 2011.

Post-Conviction Relief

Also on April 25, 2011, Appellant filed his first PCR application. John Mills, Esq. and Dan Westbrook, Esq., were appointed as specially qualified capital PCR counsel under S.C. Code Ann. § 17-27-160. Following a year and a half of investigation and preparation, on November 24, 2012, counsel filed a Fifth Amended Application for Post-Conviction Relief on Bixby's behalf raising twelve (12) grounds for relief. A five day long evidentiary hearing was conducted on December 10-13, 2012, and March

21, 2013, wherein PCR counsel Mills and Westbrook represented Appellant. The hearing included in-court testimony on Bixby's behalf from trial counsel Nettles and Grose, as well as Wendell Rhodes, Judy Copland, Ruben Gur, Ph.D., Kendig, PhD., and Shawn Agharkar, M.D. The State in turn called Richard Frierson, M.D. and Marla Domino, Ph.D., to present testimony regarding Bixby's mental health allegations, with subsequent testimony from Dr. Donna Schwartz-Watts and Dr. Helen Mayberg offered on behalf of the State during the March 21, 2013, hearing date. In rebuttal, Dr. Gur was called by PCR counsel during the March 21, 2013, hearing date. Following post-hearing briefs, Judge Knox McMahon denied relief by Order of Dismissal on January 9, 2015.

PCR counsel Mills and Westbrook continued their representation of Bixby and appealed the decision of the PCR Court, raising twelve claims for review. On March 7, 2017, the South Carolina Supreme Court denied the Petition for Writ of Certiorari. PCR counsel sought to petition the United State Supreme Court for certiorari but was denied by Order dated October 16, 2017.

Petition for Writ of Habeas Corpus

Bixby next sought federal habeas corpus relief. Pursuant to 18 U.S.C. § 3599, attorneys Miller William Shealy, Jr., and William H. Monckton, VI, were appointed by the Magistrate Court. Both attorneys were appointed from the CJA Death Penalty Panel Attorney List. Attorneys Shealy and Monckton therein assumed the representation of Bixby in his federal habeas action. Following the habeas counsels' filing of Bixby's Petition (J.A. 1238), along with a supporting memorandum, a

Response in Opposition, Objections to the Report and Recommendation, and a Rule 59 Motion to Alter or Amend Judgment, the District Court accepted the Magistrate's Report and Recommendation in a 185-page opinion and denied the Petition for Federal Habeas Corpus Relief. (J.A. 1699, J.A. 1774, J.A. 1777).

Following the denial of relief by the District Court, Bixby chose to pursue two different avenues of relief: 1) an appeal to the Fourth Circuit of the District Court's denial of relief, and 2) a supposed Rule 60(b) Motion for relief from judgment, which is the matter now before this Court. (*Infra*)

On appeal, and upon consideration of Bixby's preliminary briefing, the Fourth Circuit Court of Appeals denied a certificate of appealability, and on April 29, 2022, issued its Judgment denying and dismissing the appeal. *Bixby v. Stirling*, No. 21-5, 2022 WL 4494130 (4th Cir. Apr. 29, 2022), reh'g denied (Aug. 31, 2022), cert. denied, 143 S. Ct. 2468, 216 L. Ed. 2d 436 (2023); (USCA4 Appeal: 21-5, Doc 53; Doc 54-2). Panel Rehearing and Rehearing *En Banc* were denied. The Mandate was then issued on September 27, 2022. (J.A. 1916).

Bixby petitioned this Court for a grant of certiorari on January 31, 2023. Respondent filed a Brief in Opposition to the Petition on April 5, 2023, and this Court denied certiorari on May 15, 2023. *Bixby v. Stirling*, 143 S. Ct. 2468, 216 L. Ed. 2d 436 (2023).

The Rule 60(b) Motion and Correlative Motions

On February 28, 2022, Bixby filed for relief from judgment with the District Court under Rule 60(b)(6) and 60(b)(1),[1] claiming the "functional abandonment" of Bixby by counsel and seeking to challenge the District Court's rulings on the merits of his claims for federal habeas relief, while also raising additional new claims for relief in the form of state court direct appeal claims and unidentified "*Martinez* claims". (J.A. 1823). Moreover, the arguments set forth in the Rule 60(b) motion are the same as the underlying arguments of abandonment of counsel and 18 U.S.C § 3599 compliance that were denied a certificate of appealability by the Fourth Circuit on April 29, 2022, and denied certiorari by this Court. (USCA4: 21-5; No. 22-6690).

On April 14, 2022, Respondents filed their Response in Opposition to the Rule 60(b) Motion, arguing that Bixby was seeking a successive habeas action under the guise of Rule 60(b) and that he had not adhered to the requirements for a successive habeas petition set forth under 28 U.S.C. § 2244(b). (J.A. 1853). Bixby filed his Reply on May 5, 2022. (J.A. 1877).

On July 22, 2022, the South Carolina District Court filed its Opinion and Order *denying* Bixby's request for Rule 60(b) relief and denied a certificate of appealability to the Fourth Circuit Court of Appeals. (J.A. 1903). In reliance upon *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005), the District Court concluded that Appellant's action was indeed a successive habeas petition couched in the language of a Rule 60(b) motion that sought to raise new claims without satisfying the requirements of §

[1] On appeal to the Fourth Circuit Court of Appeals, Bixby did not raise Rule 60(b)(1) as a basis for relief. The Court of Appeals therefore deemed the issue abandoned. (22-4; Doc 56, at 8).

2244(b), and further sought to readdress the rulings on the merits of prior claims with the aid of new counsel. (J.A. 1903). On August 19, 2022, Appellant filed a Notice of Appeal to challenge the ruling of the District Court. (J.A. 1913).

Bixby's Rule 60(b) action continued on December 14, 2022, when he filed his preliminary Brief of Appellant in the Fourth Circuit Court of Appeals.[2] (USCA4 Appeal: 22-4, Doc 19). On January 12, 2023, counsel for Legal Ethics Professors Joseph B. Warden and Daniel A. Tishman filed an Amicus Curiae Brief in Support of Petitioner-Appellant. (22-4, Doc 33). Per the instruction of the Court of Appeals, Respondents filed their Brief of Respondents on April 12, 2023. (22-4, Doc 44). On May 8, 2023, Petitioner filed his Reply. (22-4, Doc 48). Ultimately, the Fourth Circuit Court of Appeals issued its published Opinion along with the Judgment Order denying Bixby's appeal on November 27, 2023. (22-4, Doc 56; Doc 57-1). Bixby's petition for panel rehearing or rehearing *en* banc was denied. (22-4, Doc 58; Doc 64; Doc 67). The Mandate was then issued on January 16, 2024. (22-4; Doc 68).

Counsel for Bixby filed his Petition Writ of Certiorari to the Fourth Circuit Court of Appeals on June 3, 2024. Respondents' Brief in Opposition now follows.

ARGUMENT

I. The Fourth Circuit Court of Appeals' Ruling Was Proper.

Certiorari should be denied. The Fourth Circuit properly concluded that Bixby's action is not a Rule 60(b) motion for relief from judgment to cure some defect in the integrity of the habeas proceeding, it is an unauthorized and improper

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[2] The Joint Appendix in this matter is that same as the Joint Appendix used for Bixby's appeal of denial of habeas relief. (USCA4 Appeal: 22-4, Doc 20-1 through 4).

successive habeas action subject to the statutory requirements of § 2244(b) and controlling precedent from this Court dictates that the action be dismissed.

Initial § 2254 counsel filed Bixby's Petition for Writ of Habeas Corpus Relief and *all* necessary responsive pleadings at *each* stage of his federal habeas action. The Petition then received AEDPA review on his numerous presented claims, and to the extent that procedural bars did not otherwise apply, he was denied relief *on the merits* of those claims in an extensive and thorough Order from the District Court. Bixby then sought to appeal the District Court's decision to the Fourth Circuit Court of Appeals, and then subsequently to this Court in a petition for writ certiorari. Despite arguing the same underlying disputes of unqualified counsel and "functional abandonment" in both his Fourth Circuit Court of Appeals Brief, and in his Petition for Writ of Certiorari to this Court, Bixby received no relief. Nevertheless, by way of a Rule 60(b) motion, Bixby has continued to argue § 2254 counsel's *quality* of representation as a basis to claim "functional abandonment," such that he argues he should be permitted an opportunity to further investigate his case, resubmit his previous claims for a second consideration upon the merits, present previously unraised claims to the District Court for consideration on the merits, and do all of the foregoing with the aid of better or more persuasive advocacy. The District Court concluded that it lacked jurisdiction to rule upon the motion because Bixby's Rule 60(b) motion was tantamount to an unauthorized second and successive habeas action under 28 U.S.C. § 2244(b) and *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641 (2005). The Fourth Circuit correctly upheld the District Court's findings, and

correctly vacated and remanded the action so that the District Court could issue an Order *"dismissing"* the Rule 60(b) motion as opposed to *"denying relief,"* given the District Court's lack of jurisdiction to rule on the motion. The Fourth Circuit Court of Appeals' decision represents an accurate assessment of the facts of the case and well-reasoned application of settled law. As such, there is no meritorious argument for a grant of certiorari in this matter.

The only issue before this Court is whether the Fourth Circuit court of appeals correctly concluded that the District Court did not "err in holding that it lacked jurisdiction over Mr. Bixby's motion for relief pursuant to Rule 60(b)(6) on the ground that the motion was in substance a successive habeas petition." [3] (22-4: Doc 19, at 8). The clear and resounding answer to this question is yes; the Fourth Circuit Court of Appeals was correct to uphold the findings of the District Court.

The Fourth Circuit properly relied upon the controlling authority set forth in *Gonzalez v. Crosby*, wherein this Court articulated that "a motion that seeks to add a new ground for relief" or a claim that "attacks the federal court's previous resolution of a claim on the merits" are both successive habeas actions even when couched in the language of a Rule 60(b) motion. *Id.*, 545 U.S. 524, 531-32, 125 S. Ct. 2641, 2647-48, 162 L. Ed. 2d 480 (2005). This Court clearly demonstrated that the application of

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[3] To the extent that Bixby seeks a grant of certiorari for legal issues that are stretched, broadened, or entirely separate from the singular issue he presented to the Fourth Circuit Court of Appeals, such claims are not preserved for review by this Court. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Bixby deviates from this stated issue on appeal to the Fourth Circuit and attempts to characterize his appeal, not as a matter of whether the Fourth Circuit erred, but as a theoretical discussion of extending Rule 60(b) to encompass "functional abandonment" regardless of its conflict with AEDPA statutory limitations. Any such arguments are not preserved for review.

Rule 60(b) in habeas cases arises under circumstances that *prevented* a ruling *upon the merits*, such as mistaken default judgments, a lack of subject-matter jurisdiction, and dismissals pursuant to statute of limitations; any "Rule 60(b) motion that seeks to revisit the federal court's *denial on the merits* of a claim for relief should be treated as a successive habeas petition." *Id.*, 545 U.S. at 534-35, 125 S. Ct. at 2649 (emphasis added). That is precisely the stated purpose behind Bixby's Rule 60(b)(6) motion: with the aid of new counsel, he seeks to obtain a second bite at the apple for unraised claims and claims previously denied on the merits by the District Court.

As the Fourth Circuit found, Bixby's case undeniably presents a petition that was "denied on the merits" and not a petition wherein "a previous ruling [ ] *precluded* merits determination. . ." *Bixby v. Stirling*, 90 F.4th 140, 148 (4th Cir. 2024) (emphasis added). In conjunction, the Fourth Circuit was further aware that Bixby was seeking to "file additional briefing and new claims", specifically two direct appeal claims that Bixby believed meritorious, along with potential *Martinez* claims, and the existing claims that Bixby argued were not persuasively presented to the District Court. (22-4; Doc 56, at 3; 14). The Fourth Circuit did not have to look far to discern Bixby's ultimate intentions, as he explicitly stated that if granted Rule 60(b) relief, he would, with the assistance of new habeas counsel, "investigate, file, and brief additional claims." (J.A. 1851).

Such an intent satisfies the essential inquiry that *Gonzalez* demands and identifies Bixby's Rule 60(b) motion as being tantamount to an unauthorized and successive habeas action. From there, the Fourth Circuit's determination of a lack of

jurisdiction was a simple matter of reading the express language of the statute. Section 2244(b)(1) instructs that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244. The express requirement of dismissal, read in conjunction with the similar demand for dismissal under subsection (b)(2), and the express requirement for Court of Appeals authorization *before a District Court can consider the application* under (3)(A), demonstrates that District Court lacked jurisdiction to decide Bixby's successive habeas petition. The Fourth Circuit's ruling was correct.

While this case presents circumstances that fit squarely into the improper Rule 60(b) category warned of by this Court, the Fourth Circuit took care to thoughtfully address Bixby's various arguments, including his reliance upon *Harris v. United States*, 367 F.3d 74 (2d Cir. 2004). Therein, the Court of Appeals noted that the Second Circuit's decision was handed down before this Court had the opportunity to render its ruling in *Gonzalez*, and that this Court explicitly identified *Harris* as being one such case where a Rule 60(b) motion was in fact an improper successive habeas petition. *Bixby*, at 153 (citing *Gonzalez*, 545 U.S. at 531, 125 S.Ct. 2641). It likewise addressed Bixby's reliance upon the "ordinarily" language of *Gonzalez* and noted that Bixby's argument would not suffice to meet the theoretical caveat that Bixby suggests exists. In light of this Court finding *Harris* to be an improper successive habeas action *despite the concession of ineffectiveness from Harris's attorney*, and its consideration

of 28 U.S.C. § 2254(i), the Fourth Circuit's finding is again well supported by controlling authority. *Id.*, at 157, n.6.

The Fourth Circuit summarized the touchstone of *Gonzalez* perfectly: "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." *Id.* at 151. Bixby's attempts to emphasize the poor quality of his initial § 2254 counsels' performance, regardless of the nomenclature that Petitioner ascribes to it, "cannot be untethered from his core objective" of raising new claims and relitigating old ones in the hopes of a better result. Habeas counsel filed all necessary pleadings for Bixby, after which he received a merits ruling from the federal court that thoroughly examined the state court's adjudication of federal law. His petition was rightfully denied. He then had the benefit of an appeal of that decision and a petition for certiorari upon the denial of appellate relief, and in both filings he raised the same underlying arguments that he relies upon as justification for Rule 60(b) relief. Each of those efforts was without merit, and here, controlling precedent and statutory guidance demonstrate the impropriety of his Rule 60(b) motion. Certiorari is not warranted.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 2, 2024

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CERTIFICATE OF SERVICE

The undersigned attorney, W. Joseph Maye, a member of this Court, hereby certifies that a true copy of the Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned case has been served upon counsel for Petitioner by depositing one copy of the same in the United States Mail, postage prepaid, addressed as follows:

David Weiss, Esq.
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This 2nd day of August, 2024.

W. JOSEPH MAYE,
Assistant Attorney General