No. 18-6992

# IN THE SUPREME COURT OF THE UNITED STATES

BRANDON BERNARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## I. SUMMARY OF ARGUMENT IN REPLY

Contrary to several other Courts of Appeals, the Fifth Circuit has effectively read *Gonzalez v. Crosby*, 545 U.S. 524 (2005), out of existence by applying an analysis that as a practical matter turns any Rule 60(b) motion challenging a procedural irregularity into a prohibited "second or successive" habeas petition. This Court should grant review here to bring uniformity to the lower courts' interpretation of *Gonzalez*, and thereby prevent the injustices that will occur should the Fifth Circuit's mistaken approach go uncorrected.

The Judicial Council of the Fifth Circuit found that former United States District Judge Walter S. Smith Jr., engaged in unethical (and possibly criminal) conduct that bookended the interval in which he presided over Petitioner's capital trial and collateral review. Nevertheless, the Government maintains that Petitioner suffered no prejudice from Smith's unfitness, such that Rule 60(b) cannot avail him, and that the Fifth Circuit properly denied a COA. Those contentions, however, rest on speculative assumptions demonstrably at odds with the record, and at a minimum demonstrate that further factual development is necessary and that a COA was warranted.

The Government also fails to grasp the important distinction between the procedural defect that marred Petitioner's § 2255 action and the consequence of granting his Rule 60(b) motion. By confusing the two concepts, the Government endorses a broad rule that would prohibit any Rule 60(b) motion whose ultimate goal

is reconsideration of § 2255 claims that were not properly adjudicated because of a procedural defect in a habeas proceeding.

The Fifth Circuit's treatment of Rule 60(b) – viewing every assertion of a procedural irregularity as an attempt to evade the bar on successive habeas petitions – is comparable to its approach to post-judgment motions brought in habeas cases under Rule 59. The propriety of that approach is before the Court in *Banister v. Davis*, No. 18-6943 (argued December 4). If not inclined to grant certiorari in this case outright, the Court should hold this Petition pending *Banister*.

## II. ARGUMENT

### A. The Government's response echoes the Fifth Circuit's error of giving only lip service to the relevant COA standard.

Tracking the approach of the court below, the Government insists that former Judge Smith's wide-ranging ethical lapses, apparent illegal actions, and extreme lack of diligence could not possibly have prejudiced Petitioner. The record reflects exactly the opposite.

Before addressing the Government's misapprehension of the record, it is important to restate the governing legal standard. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Dretke*, 537 U.S. 322, 327 (2003)); *see also Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) (same).

This reminder is necessary because the Government, like the Fifth Circuit, devotes considerable effort to addressing the *merits* of Petitioner's complaint. Moreover, its argument that a COA was properly denied because Petitioner suffered no prejudice from the procedural defect in his § 2255 proceeding, *see* BIO at 19-25, rests on speculation about the cause and likely effect of former Judge Smith's impairment. Consistent with its prior failures in this area, *see* Petition for Writ of Certiorari ("Petition") at 21-23, the Fifth Circuit only nodded to the COA standards when deciding the case, essentially addressing the merits despite the underdeveloped record and lack of comprehensive briefing.[1] We examine next how the Government's response replicates those same errors.

### B. The Government's analysis rests on speculation that is contrary to the record and shows that further factual development is required.

The Government's defense of Petitioner's death sentence in the face of former Judge Smith's unfitness rests on wholesale speculation. Confronting sworn testimony that Smith's impairments were so severe that he was "not functioning," "falling apart," and "having to cancel court," the Government blithely posits that because Smith's victim reported his drunken sexual assault against her, his condition "undoubtedly prompted attention internally within the court." BIO at 22. Sadly, the record shows that the victim's report received no meaningful consideration in 1998.

[1] Nor did the court below acknowledge that its COA analysis properly could and should take account of the fact that Petitioner faces execution. *See Buck*, 137 S. Ct. at 779 (treating "the capital nature of th[e] case" as one reason for concluding that a COA should have issued) (citation and quotation omitted).

The Government notes that in their respective 60(b) motions, Petitioner and his death-sentenced co-defendant "filed six pages from the transcript of the March 2014 deposition of the deputy clerk whom Judge Smith had sexually harassed in 1998," while also observing in a footnote that the "full 35-page transcript is available, with redactions, on the Fifth Circuit's website…," providing a link. BIO at 10 and n. 3. But that "full" transcript provides no support for the Government's speculation, *see* BIO at 22, that former Judge Smith's attack on an employee "undoubtedly prompted attention internally within the court." The transcript made available for public view omits from the victim's testimony her explanation that when she reported the matter to the judicial official "in charge of dealing with sexual harassment with federal employees," he treated her dismissively, in a "very derogatory … disrespectful … demeaning" way, demanding that she come up with a solution for the ongoing problem ("What do you want me to do about it? What exactly do you want me to do about it?"). *Compare* Full Redacted Transcript at 22-24 (Appendix 4 at 035a) with Unredacted version of those pages (Appendix 5 at 045a-047a). The victim's redacted testimony ends with her statement that, to her knowledge, there was no meaningful follow-up regarding her complaint until her 2014 deposition testimony triggered the judicial investigation into Smith's unfitness.[2]

[2] To correct the Government's fact-free assertion that the victim's complaint "prompted attention internally within the court" (BIO at 22), Petitioner provides the full redacted report that the BIO references at p. 10, n. 3 as well as the unredacted relevant portions of the report that show the hostile treatment that the victim received. *See* Appendices 4 and 5.

Beyond speculating incorrectly that Smith's unfitness was promptly remediated, the Government hypothesizes about why Smith's law clerk called the victim to demand that she cure Smith's incapacitation. BIO at 23. The Government asserts that the law clerk's direction – that the victim solve the problem herself – would have "made no sense" if Smith suffered from some freestanding problem with alcohol. *Id.* Instead, the Government maintains, the law clerk's demand "makes sense only if the judge's problems related to her workplace-harassment complaint." *Id.*

The flaw in this inference is that it "makes no sense" for Smith's law clerk to insist that the victim work to salve Smith's woes *regardless* of whether one describes Smith's condition as a drinking problem, a compulsion to act out sexually, or some combination of the two. Nor did it "make any sense" for the judicial official charged with oversight of such matters to demand that she tell him how to remedy the fact that his colleague had sexually assaulted her. Neither response makes sense, but the record strongly suggests – if not conclusively demonstrates – that both these nonsensical things happened, not long before Petitioner's capital case became Smith's responsibility.

In the end, the Government's repeated resort to speculation, in the face of a record studded with contrary facts, highlights the unfairness of dismissing Petitioner's substantial allegations without further fact development, such as discovery and a hearing. That circumstance, in turn, shows that the Fifth Circuit misapplied the COA standard when it found that Petitioner failed to show any substantial issue warranting an appeal.

### C. Petitioner made a substantial showing that he has suffered the denial of a constitutional right.

Even without the benefit of further expansion, the record contains sufficient evidence from which one can conclude that former judge Smith's unfitness prejudiced Petitioner. The Government of course contends to the contrary. BIO at 32-33. But the record is more than sufficient to make the requisite substantial showing of a denial of a constitutional right that would warrant a COA, *i.e.*, that Smith's unfitness deprived Petitioner of a fundamentally fair collateral review proceeding, in violation of due process.

Before we turn to the specifics, the Court should note that the Government's response confuses cause and effect. The "cause" behind Petitioner's Rule 60(b) motion was former judge Smith's documented unfitness. The "effect" of former judge Smith's unfitness was the deprivation of a full and fair collateral review proceeding for Petitioner under 28 U.S.C. § 2255. The Government gets this exactly backward, contending that "a prisoner cannot relitigate the merits of Section 2255 claims as a means of indirectly suggesting a procedural defect in his proceedings." BIO at 27.

And Petitioner did no such thing. Instead, what he did was to show that the judge who presided over his § 2255 proceeding was unfit, and that his unfitness resulted, *inter alia*, in indefensible rulings, which escaped correction on appeal because the Fifth Circuit imposed the same outcome-determinative COA standard that this Court would later repudiate in *Buck*. Petitioner therefore suffered a constitutionally cognizable harm from the procedural defect in his § 2255 proceeding, one that should be subject to correction via a motion under Rule 60(b).

To reach the contrary conclusion, this Court would have to read *Gonzalez* as barring Rule 60(b) relief because the remedy might ultimately entail revisiting the merits of the underlying constitutional claims which, as a consequence of the very procedural defect that would otherwise justify reopening the habeas judgment, were never properly adjudicated in the first place. That misreading of *Gonzalez* would render Rule 60(b) a dead letter in the habeas context. Yet the Fifth Circuit has embraced that outlier approach, *see* Petition at 15-18, and the Government urges this Court likewise to adopt it.[3] Not only that, but the Government again confuses "cause"

[3] As Petitioner has pointed out, *In re Pickard*, 681 F.3d 1201, 1206 (10th Cir. 2012), explains persuasively why a Rule 60(b) motion does not become an improper "second or successive" habeas application simply because it contemplates eventual reexamination of the merits of the underlying claims. Petition at 12, 13. The Government says the Fifth Circuit "agree[s] with" the Tenth Circuit on this point. BIO at 27.

While the opinion below does state that Rule 60(b) motions "can legitimately ask a court to reevaluate already-decided claims," 904 F.3d at 361, the Fifth Circuit's actions in other cases speak louder than its words. In *Gamboa v. Davis*, 782 Fed. App'x. 297 (5th Cir. 2019), for example, a death-sentenced state prisoner argued that his complete abandonment by his court-appointed federal habeas counsel constituted a procedural defect under Rule 60(b). *Id.* at 299. The Fifth Circuit disagreed, holding that it had previously decided that if the movant's ultimate aim is to litigate new claims, he may not proceed under Rule 60(b). *Id*. at 301 (citing *In re Edwards*, 865 F.3d 197, 204–05 (5th Cir. 2017)). Judge Dennis, writing separately, invoked *Pickard* in arguing that it would be "obviously incorrect" to find a Rule 60(b) motion improper simply because "granting it would ultimately permit a party to pursue claims for relief" against his conviction or sentence, because in the habeas context a Rule 60(b) motion "is designed" for precisely that purpose. *Id*. at 301-02 (Dennis, J.., specially concurring). *See also*, *e.g.*, *In re Segundo*, 757 F. App'x 333, 336 (5th Cir. 2018) (finding Rule 60(b) motion improper where its "clear objective" was to secure reexamination of a claim of ineffective assistance of counsel); *Preyor v. Davis*, 704 F. App'x 331, 339-40 (5th Cir. 2017) (purported 60(b) motion was improper, because although it alleged that prior habeas counsel had fraudulently induced the prisoner to accept their services, it ultimately aimed "to reopen [the] habeas proceeding in order to assert a new claim and to introduce new evidence").

and "effect" in misreading *Gonzalez*. *See* BIO at 20-21 ("In other words, petitioners presented 'claims couched in the language of a true 60(b) motion' but, as *Gonzalez* teaches, their motions constituted successive motions for collateral relief *because they sought* to 'revisit[]' the *merits* of the district court's denial [of] their Section 2255 claims as the means for establishing a nominal procedural defect.") (first emphasis added; brackets in original).

Like the Fifth Circuit, the Government summarily declares that former judge Smith's unfitness was "unrelated" to Petitioner's collateral review proceeding, BIO at 24, and further that Petitioner has only "nominally couched" his arguments in the language of Rule 60(b). BIO at 25.[4]

But this is what we know: there is sworn testimony from a former court official that Smith was nonfunctional, incapable of coming to work, falling apart, and not attending to his judicial duties as a result. Nothing in the record impeaches this testimony, which described events that took place mere months before Petitioner's capital case landed on Smith's docket. Smith's first judicial action regarding Petitioner was to appoint as his lawyer an attorney unqualified to handle the matter, a step Smith took without first conferring, as required by statute, with the local Federal Public Defender. *See* Petition at 3. When Smith's unfitness came publicly to

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As these decisions show, the Fifth Circuit has effectively adopted the view that any 60(b) motion filed with the intent of ultimately obtaining further review of the underlying claims for relief, or asserting additional claims, is *ipso facto* improper. These cases belie the Government's assurances that no daylight exists between the Fifth Circuit's approach to 60(b) motions and the Tenth Circuit's in *Pickard*.

[4] The Government relies on quotations from the opinion below, which itself failed to engage with the real evidence of Smith's impairment. BIO at 21, 24-25.

light in 2014, its persistence was demonstrated by Smith's own behavior in misleading the investigation and failing to comply with rudimentary judicial norms. Nothing in the record suggests former judge Smith's condition ever improved, and the Fifth Circuit's sanctions – which rested on Smith's improper conduct in *both* 1998 (his sexual assault on the court employee) *and* 2014-15 (his campaign to frustrate and obstruct the judicial investigation into his conduct in 1998) – manifest a belief that it did not. Petition at 8-10.

That Smith was unfit during Petitioner's collateral review proceeding is demonstrated by the fact that he was either incapable or unwilling to take any action whatsoever regarding Petitioner's § 2255 motion for *nearly eight years*. What, other than unfitness, could account for such a delay? Nothing in the record explains it, and the Government's own silence on the issue speaks volumes.

When after long years of silence Smith finally summoned the initiative to make a ruling, its contents suggested that he could not understand the record or muster the effort necessary to do so. *See* Petition at 3. Here are but two examples,[5] each of which demonstrates that the collateral review process Petitioner received was not fundamentally fair:

First, Petitioner raised meritorious claims regarding the suppression of *Brady* material and a *Napue* violation arising from the Government's misrepresentation of the criminal background of its witness Terry Brown, a cooperating codefendant.

[5] Other examples are set forth in detail in the briefing below. *See* Petitioner's Brief in Support of Application for Certificate of Appealability at 3-12. (5th Cir. 18-7008: Doc No. 00514427655).

Petition at 7. This claim was supported by notes taken by Brown's attorney during a Government-led proffer session with Brown. Petition at 7; ROA.869-71. At trial, the Government portrayed Brown as a mere misdemeanant, but the notes reveal he had a criminal past far worse than Petitioner's. ROA.592-593; 1377-78. Misleading the jury on this point was critically important to the death verdict, since it is a statutory mitigating factor under the Federal Death Penalty Act that other equally culpable individuals are not facing the death penalty. Brown's role in the murders was essentially indistinguishable from Petitioner's (neither was present during the carjacking but both were called to the scene later and assisted by purchasing lighter fluid, which was used to set the victims' car on fire). Brown escaped a federal capital prosecution because he was just under age 18 at the time of the offense, while Petitioner was just over that line.[6] Knowing the truth about Brown's serious prior criminal history could have persuaded jurors that Brown was as culpable as Petitioner, and that because Brown was not facing execution, nor should Petitioner.

Despite the documentary evidence that supported this *Brady/Napue* claim, Smith dismissed the allegation without any fact development. ROA.1809-10. In refusing to issue a COA on this (or any other) issue, applying the unfairly steep COA standard this Court would later reject in *Buck*, the Fifth Circuit inexplicably limited its discussion to whether the *Brady* violation harmed Petitioner at the guilt phase,

[6] Brown, sentenced to roughly 20 years (248 months), was released from prison in 2018, although the Bureau of Prisons website indicates that he has since re-entered federal custody. His and Petitioner's relative ages can also be found via the BOP website. *See* bop.gov/inmateloc (BOP reg. nos.: 91908-080; 91907-080).

ignoring altogether Petitioner's argument that harm more likely occurred at sentencing. *See United States v. Bernard*, 762 F.3d 467, 480-81 (5th Cir. 2014).

A second telling example relates to the factual underpinnings of Petitioner's sole death sentence. In denying Petitioner's § 2255 motion, Smith excused trial counsel's failure to secure funds for experts who could have challenged the Government's forensic evidence (which was key to Petitioner's sole death sentence). ROA.1788. Without having allowed any fact development, Smith simply declared that "with limited funds available for experts nothing would have been accomplished except a decrease in funds if trial counsel had attempted to retain experts to contest the experts presented by the Government." ROA.1788. In short, former judge Smith's position was essentially that Petitioner's trial counsel should have blindly accepted as true all the Government's claims about the forensic evidence. In our adversarial system, of course, no conscientious defense attorney would take such a position.

Moreover, in seeking reconsideration of Smith's order, Petitioner submitted sworn statements from two prominent forensic experts that attacked the key factual underpinnings of his single death sentence. ROA.1824; ROA.1988-2003. Without even acknowledging the existence of these expert opinions, Smith dismissed Petitioner's motion for reconsideration as "present[ing] nothing beyond … [his] original § 2255 motion" on the relevant points. ROA.2043. That characterization was simply false.[7] And then, applying the same excessively strict interpretation of the

[7] The record thus firmly rebuts the Fifth Circuit's description of former judge Smith's treatment of this issue as "careful review[.]" *United States v. Vialva*, 904 F.3d 356, 358 (5th Cir. 2018).

COA standard that this Court would later reject in *Buck*, the Fifth Circuit endorsed Smith's disposition without even allowing a full appeal. *See United States v. Bernard*, 762 F.3d 467 (5th Cir. 2014).[8]

No one can deny that Smith failed to discharge his duties appropriately in this federal capital case, nor that his shoddy performance likely reflected longstanding impairments related to alcohol addiction, coupled with indifference to longstanding norms of judicial behavior. As yet, no federal court at any level has given real scrutiny to the scope of Smith's impairments and their destructive impact on Petitioner's § 2255 proceeding. By denying a COA, the Fifth Circuit cut short even the possibility of such consideration. Endorsing such dismissive treatment of these serious allegations would further diminish the public's respect for the federal courts and feed skepticism about their integrity. This Court cannot repair all the damage former Judge Smith inflicted on the reputation of the federal courts, but by intervening here it will ensure meaningful post-trial review in a federal capital prosecution involving a defendant with no serious prior violent history who was just past age 18 (and thus barely eligible for a death sentence). The Government's accelerating efforts to execute federal prisoners makes that intervention critical.

[8] To this day, both the Government and the Fifth Circuit continue to treat the claim that Stacie Bagley died of smoke inhalation (the factual premise upon which Petitioner's death sentence rests) as though it were an uncontested fact. *See*, *e.g.*, *Vialva*, 904 F.3d at 358; App. 003a; BIO at 5. Neither ever even acknowledges that in seeking reconsideration of Smith's dismissal of his original § 2255 motion in 2012, Petitioner submitted a sworn expert opinion to the contrary, creating a factual dispute that no factfinder has ever resolved.

### D. The outcome of *Banister v. Davis*, No. 18-6943 (argued December 4) may bear upon this case, so the Court may wish to hold this Petition pending *Banister*.

If the Court is not inclined to immediately grant review, Petitioner asks that the Court defer final action on this petition pending its forthcoming decision in *Banister*. There, as here, the Fifth Circuit ruled that a district court lacked jurisdiction over a post-judgment motion filed under the civil rules in a habeas proceeding, because the motion in fact constituted a successive application for relief requiring pre-filing authorization from the Court of Appeals. Apparently because Banister's motion was filed under Rule 59(e) while Petitioner's invoked Rule 60(b), the Government contends that *Banister* does not "raise claims of the sort at issue here" and thus will not bear on the Court's resolution of this Petition. BIO at 29. But the issue in *Banister* is precisely whether Rules 59(e) and 60(b) "warrant the same treatment under AEDPA." *See* Brief for Respondent, *Banister v. Davis* (No. 18-6943) at 23-29. Thus, *Banister* will likely further refine the scope of *Gonzalez* as well as the meaning of "second or successive," a key statutory term undefined by AEDPA, and both those concepts bear directly upon this case. If the Court agrees, Petitioner asks that it hold this Petition pending *Banister*.

## III. CONCLUSION

Ultimately, this case asks what kind of process is required in a federal death penalty prosecution to protect against an unjust execution. When the Fifth Circuit originally upheld Smith's judgment denying Petitioner's § 2255 motion in 2014, it did

so without even allowing a full appeal. Supported by an expert *amicus*,[9] Petitioner complained to this Court that the Fifth Circuit was continuing a pattern of misapplying the COA standard.[10] The Court chose not to intervene, but shortly thereafter reversed the Fifth Circuit in *Buck* for committing precisely the same sort of error.

Notwithstanding such guidance from this Court, on Petitioner's most recent return to the Fifth Circuit, that court appears once again to have employed an unreasonably strict reading of the COA standard. Given what the record already shows regarding former judge Smith's unfitness, any reasonable jurist would conclude that Petitioner's appeal should have been allowed to proceed. Petitioner has made a substantial showing that Smith's impairments, whatever their precise cause and scope, deprived him of due process in his § 2255 proceeding. If the underlying facts were fully developed, they could well show that Petitioner's death sentence should not stand.

At a minimum, Petitioner's case satisfied the COA standard. The Fifth Circuit should have afforded him full appellate review of whether and how Smith's unfitness constituted a procedural defect warranting reexamination of the judgment in the original § 2255 proceeding pursuant to Rule 60(b). Had Petitioner been convicted and sentenced elsewhere in the United States, he would surely have obtained at least a COA. *See* Petition at 16-17.

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[9] *See* Brief *Amicus Curiae* of the Federal Capital Habeas Project in Support of Petitioner, *Bernard v. United States*, No. 14-8071.

[10] *See Bernard v. United States*, 136 S. Ct. 892 (2016).

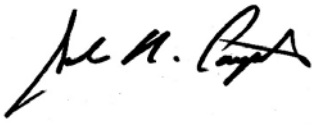
As *amicus curiae*, The Ethics Bureau at Yale has well described the stakes in this case:

> Needless to say, judges who drink on the job, harass employees, and encourage others to lie on their behalf should be aggressively policed by disciplinary committees. Public confidence in the judiciary is eroded when that kind of misconduct goes unaddressed or is punished only with a "slap on the wrist." But that is not the only kind of behavior that undermines public confidence. The District Court and the Fifth Circuit contributed to this problem by turning a blind eye to former Judge Smith's misconduct, in the process denying [Petitioner] procedural protections he was due and creating the impression that judges will not police their own effectively.

Brief of *Amicus Curiae* The Ethics Bureau at Yale in Support of Petitioner, at 14.

This Court can ensure that Petitioner obtains those procedural protections by granting certiorari here and imposing a uniform interpretation of *Gonzalez* to guide the Courts of Appeals in applying Rule 60(b). The Court's intervention is particularly urgently needed now that the Government is vigorously pursuing executions, because Petitioner in no way deserves that ultimate punishment.

Respectfully submitted,



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