No. _____

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner played a relatively minor role in a robbery that went horribly wrong, resulting in the deaths of two innocent people. U.S. District Judge Walter S. Smith, Jr. was assigned to Petitioner's case when it was filed in 1999 and presided over his trial a year later on three capital charges. The proceedings were marked with irregularities from the outset, when Judge Smith, contrary to statue, refused to consult with the Federal Public Defender to ensure that qualified counsel was appointed for Petitioner. Despite this and other errors, the jury recognized Petitioner's minor role, sparing his life on two of the three capital counts while imposing death on the third. In 2004, Petitioner sought relief from sentence, and his motion under 28 U.S.C. § 2255 was assigned to Judge Smith. For seven years Judge Smith took no substantive action on the case. After that inexplicable delay, he abruptly denied Petitioner's motion without discovery or a hearing, in an order that misstated the record and ignored affidavits from forensic and other experts that directly undermined the factual basis for Petitioner's single death sentence and demonstrated his lawyers' ineffectiveness. The Court of Appeals for the Fifth Circuit then refused a Certificate of Appealability, foreclosing appellate review of both the merits of Petitioner's claims and the district court's denial of fact development.

Petitioner later became aware of serious allegations about Judge Smith's fitness: that he had had a severe drinking problem that disabled him as a judge, that he had shown signs of emotional instability, that he had imposed himself sexually on a court staffer, and that he had committed serious professional (or even criminal) misconduct during a judicial investigation into his behavior. The underlying facts remained only partially developed because Judge Smith resigned his position before the investigation was complete, effectively blocking any further inquiry.

Invoking Fed. R. Civ. P. 60(b), Petitioner moved to reopen the judgment denying his § 2255 motion. He argued that full development of these troubling facts could establish that during the pendency of that action, Judge Smith was laboring under an impairment that would constitute a "defect in the integrity" of the proceedings, recognized in *Gonzalez v. Crosby* as a proper basis for a Rule 60(b) motion. 545 U.S. 524, 532 and n.5 (2005).

The district court summarily dismissed Petitioner's Rule 60(b) motion, deeming it a successive application for post-conviction relief. The Fifth Circuit denied a COA, concluding that, under *Gonzalez,* a Rule 60(b) motion challenging the presiding judge's fitness during the pendency of a habeas proceeding is "merits-based" if it argues that the judge's unfitness is evidenced in part by his unreasonable rejection of the movant's meritorious claims for relief.

The following questions are presented.

1. Did the Fifth Circuit err in its reading of *Gonzalez*, given that five other Circuits read *Gonzalez* to allow Rule 60(b) motions to remedy a wide range of procedural defects in habeas proceedings, similar to the one alleged by Petitioner here?

2. If a presiding judge's unfitness qualifies as the sort of "defect in the integrity of the federal habeas proceedings" that would support a Rule 60(b) motion under *Gonzalez*, may a reviewing court in determining that motion consider the reasonableness of that judge's prior disposition of the movant's claims for relief?

3. Did the Fifth Circuit, which to date has never identified any debatable issue in any post-conviction appeal by a death-sentenced federal prisoner, err in denying a COA concerning the district court's application of *Gonzalez* to Petitioner's Rule 60(b) motion?

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I. PETITION FOR WRIT OF CERTIORARI

Brandon Bernard petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

II. OPINIONS BELOW

The Fifth Circuit's published opinion denying a Certificate of Appealability is reported at 904 F.3d 356 (5th Cir. 2018), and attached as Appendix 1. The district court's order denying Petitioner's motion under Fed. R. Civ. P. 60(b) is unreported, and attached as Appendix 2.

III. JURISDICTION

The Fifth Circuit entered judgment on September 14, 2018. *See* Appendix 1. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS INVOLVED

This case involves the relationship between 28 U.S.C. § 2255, the primary avenue for collateral review of federal criminal judgments, and Fed. R. Civ. P. 60(b), which authorizes a district court to grant relief from a final judgment in a civil case on equitable grounds. It also implicates the Court of Appeals' application of 28 U.S.C. § 2253, which bars plenary appellate review in a habeas corpus proceeding unless a court issues a COA. The text of each of these provisions is contained in Appendix 3.

V. STATEMENT OF THE CASE

A. Introduction

This petition arises from an effort by a death-sentenced federal prisoner to reopen post-conviction proceedings in his case after learning that the presiding judge may well have been impaired – physically, emotionally, and/or ethically – during those proceedings.

Petitioner was convicted and sentenced to death in the Western District of Texas in 2000, and the judgment was affirmed on appeal. U.S. District Judge Walter S. Smith, Jr., presided at trial. Petitioner then pursued collateral review, filing a substantial motion under 28 U.S.C. § 2255 and seeking discovery and a hearing. The motion was assigned to Judge Smith, who sat on the case for more than seven years without doing anything to meaningfully advance it towards decision. Then, without having allowed either discovery or an evidentiary hearing, Judge Smith abruptly terminated the proceeding and denied all relief. The Fifth Circuit refused to authorize an appeal, and this Court denied review. Shortly after that denial, the Court would reprimand the Fifth Circuit for the third time in fourteen years for having imposed an unfairly steep standard when deciding whether to issue a COA. *Buck v. Davis*, 137 S. Ct. 759 (2017), *see also Miller-El v. Cockrell*, 537 U.S. 322, 341-48 (2003) and *Tennard v. Dretke*, 542 U.S. 274, 283-89 (2004). Unfortunately, the ruling in *Buck* came too late for Petitioner.

In the months after this Court denied certiorari, Petitioner became aware of substantial reasons to doubt that Judge Smith had been fit to preside during the

pendency of his § 2255 motion. Those reasons included that Judge Smith had a severe drinking problem, which contributed to his sexual aggression against a member of the courthouse staff, and that Judge Smith apparently committed ethical and criminal violations in the course of the judicial investigation into his alcohol-fueled misconduct. Testimony showed that around 1998, Judge Smith was drinking alcohol during the workday; someone who worked closely with Judge Smith at the time described him as "not functioning" and "falling apart." He was so unfit for his judicial duties that he canceled court obligations because he could not even get himself to the courthouse. ROA.2219-21.[1] His judicial behavior over the following year could fairly be described as erratic, as he flouted the statutorily mandated process for appointing counsel in a federal capital prosecution, and committed what the Fifth Circuit recognized were plain errors of law in overseeing the first death penalty trial in his court.[2] In presiding over Petitioner's § 2255 proceeding, Judge Smith did nothing for seven years, and then issued a flurry of rulings in which he appeared unable to comprehend the factual record.[3]

Petitioner moved under Fed. R. Civ. P. 60(b) to reopen the judgment in his § 2255 case, urging that if the evidence surrounding these circumstances were fully developed, he could show that a procedural defect had undermined the integrity of

[1] References to "ROA" are to the appellate record from the United States Court of Appeals for the Fifth Circuit.

[2] *See* Petitioner's Brief in Support of Certificate for Appealability, *Bernard v. United States* (5th Circuit case no. 18-70008, doc. no. 514427655) (April 12, 2018) at 6-8.

[3] *Id*. at 10-12.

his § 2255 proceeding. ROA.2176-2253. The district court dismissed Petitioner's Rule 60(b) motion, deeming it a successive application for relief. Appendix 2. The Fifth Circuit denied a COA. Appendix 1.

To date, there has never been any factual development concerning the serious questions about Judge Smith's fitness to preside, and the only merits determination regarding Petitioner's numerous substantive constitutional challenges to his death sentence was Judge Smith's abrupt summary denial of relief in 2012 following an unexplained seven-year delay during which he took no action on the case.

B. *Prior Proceedings leading up to Petitioner's Rule 60(b) Motion*: After Petitioner was sentenced to death on a single count, the Fifth Circuit affirmed that sentence on appeal despite recognizing that Judge Smith committed plain error during the trial. Petitioner then sought post-conviction relief, alleging ineffective assistance of counsel and submitting extensive supporting evidence, including affidavits from forensic experts that directly undercut the basis for his death sentence. Ignoring that evidence, and after seven years of unexplained inaction on the case, Judge Smith turned aside Petitioner's § 2255 motion without a hearing.

In 2000, Petitioner and Christopher Vialva were tried before a single jury in the Western District of Texas on charges arising from a carjacking that ended in murder.[4] The case involved a plan by five teenagers – Vialva (then aged 19), Petitioner (18), and three juveniles (17, 16, and 15) – to abduct and rob someone. The plan went horribly awry, ending only when Vialva shot victims Todd and Stacie Bagley in the head at close range, after which their car was set on fire. The

[4] The charges were (1) carjacking resulting in death, *see* 18 U.S.C. § 2119; (2) conspiracy to commit murder, *see* 18 U.S.C. § 1117; and (3 and 4) the murders of Todd and Stacie Bagley, *see* 18 U.S.C. § 1111(a). The district court had jurisdiction over these offenses under 18 U.S.C. § 3231.

Government sought the death penalty against both Vialva and Petitioner, who were convicted on all counts.[5] Petitioner – who was absent when the Bagleys were abducted, took no part in robbing them, and did not fire the bullets that killed them – was plainly less culpable than Vialva. Recognizing this, the jurors spared Petitioner's life on two of the three capital counts, ROA.349, 362, while sentencing Vialva to death on all three death-eligible counts, ROA.309, 322, 335. Their lengthy deliberations and the question they posed to the judge show that the jurors struggled to decide Petitioner's sentence for the third capital count, and raise a compelling inference that they ultimately imposed death because they believed that Ms. Bagley, unlike her husband, had suffered a torturous death from the fire that the Government claimed Petitioner had set.[6]

In fact, the trial evidence showed that Ms. Bagley was unconscious from the moment Vialva shot her, ROA.4480, 4486, and thus did not suffer in dying. But Petitioner's counsel not only failed to mention this fact at closing argument,[7] they

[5] The three other teenagers – Terry Brown, Christopher Lewis, and Tony Sparks – were charged in the offenses, but all were too young to face a death sentence under federal law. Brown and Lewis cooperated with the Government and testified at the Bernard-Vialva trial. The Federal Bureau of Prisons' "Find an inmate" website (https://www.bop.gov/inmateloc/) shows that Brown (Reg. No. 91907-080) was released from custody on April 20, 2018, and that Lewis (Reg. No. 91906-080) was released on June 23, 2017. Sparks (Reg. No. 91929-080) pleaded guilty separately; the BOP website reflects that he remains behind bars with a projected release date of October 2030.

[6] At closing, the Government suggested that Ms. Bagley's death amounted to "torture," justifying a death sentence for Petitioner. ROA.5626-27; *compare* ROA.5686 (acknowledging that Petitioner did not kill Todd Bagley by lighting the fire, because he was already dead when it was lit) *with* ROA.5691 (arguing that he intentionally killed Stacie Bagley by lighting the fire).

[7] *See* ROA.5648-5668.

never obtained any independent forensic opinion about the cause of Ms. Bagley's death in the first place. Had they done so, no death sentence would have issued: expert evidence (submitted in the ensuing § 2255 proceeding) showed that Ms. Bagley likely died when she was shot, and that the Government's forensic claims at trial – suggesting that only Petitioner could have set the fire – were scientifically unsound. ROA.1988-2003.

On appeal, the Fifth Circuit affirmed Petitioner's death sentence in an opinion that explicitly relied on the (now thoroughly debunked) future dangerousness testimony that was not even offered against Petitioner, but only against Vialva.[8] Petitioner then filed a § 2255 motion, in support of which he submitted, *inter alia*, the evidence described above. ROA.1820-2006. This documentary proof showed that Petitioner's trial counsel had unreasonably failed to pursue readily available relevant scientific evidence that would have directly contradicted the factual underpinnings for the single death sentence imposed on Petitioner. ROA.1991-94, 2002. On top of this, Petitioner's documentary submissions established that trial counsel undertook

[8] *See United States v. Bernard*, 299 F.3d 467, 482 n. 11 and accompanying text (5th Cir. 2002) (twice asserting that Dr. Coons's trial testimony had tended to show *Petitioner's* "propensity for violence in prison"). Later, Petitioner argued in seeking a COA that his trial counsel were ineffective for not seeking a limiting instruction to warn jurors against making the same mistake the Fifth Circuit itself had made when affirming Petitioner's death sentence on direct appeal. In response, the Fifth Circuit – citing its own direct appeal opinion – admitted that jurors may well have held Dr. Coons's testimony about Vialva's future dangerousness against Petitioner, but insisted that no reasonable jurist could conclude that this IAC allegation warranted further development. *United States v. Bernard*, 762 F.3d 467, 475 (5th Cir. 2014) ("Contrary to Bernard's assertion, the Government's closing argument did not conflate Dr. Coons's testimony with Bernard's future dangerousness, although a juror could have drawn inferences. *See Bernard*, 299 F.3d at 482 n. 11").

barely any investigation into mitigating evidence (improperly delegating that duty to Petitioner's mother)[9] and failed to object to the "future dangerousness" testimony of a forensic expert that has since been deemed so unreliable that it is barred from Texas courts.[10] Further, Petitioner submitted documentary evidence showing that the Government had concealed vital facts about the prior violent criminal history of codefendant Brown.

The Government responded to Petitioner's § 2255 motion, and in 2005 Petitioner replied. ROA.1459-1690, 1693-1746. Given the wealth of evidence submitted in support of Petitioner's IAC and *Brady* claims, the next necessary step was a hearing. *See* ROA.1702-04 (identifying 30 disputed issues of material fact raised by Petitioner's evidence). But the unfit and likely impaired Judge Smith instead took no action for the next seven years, and then abruptly and summarily denied all requested relief, including even an evidentiary hearing. ROA.1748-1811, 1820-31, 2041-45. Petitioner unsuccessfully appealed, and this Court declined review.[11]

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[9] *See Sears v. Upton*, 561 U.S. 945, 952 (2010) (specifically condemning as inadequate a mitigation investigation that consisted solely of "talking to witnesses selected by [the defendant's] mother").

[10] *See Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010).

[11] *See United States v. Bernard*, 762 F.3d 467 (5th Cir. 2014) (denying a COA); *cert. denied*, 163 S. Ct. 892 (2016).

C. *The Rule 60(b) Proceeding*: After learning of evidence that Judge Smith may not have been fit to preside over the § 2255 action, Petitioner returned to court in an effort to reopen the judgment.

In early 2016, after this Court denied certiorari following the Fifth Circuit's refusal to grant a COA regarding Judge Smith's summary rejection of his claims for relief, Petitioner became aware of facts raising serious questions about Judge Smith's fitness to preside over the § 2255 proceedings.

Around 1998, Judge Smith, then the only district judge sitting in the Waco Division of Texas's Western District, was making unwelcome sexual advances to at least one member of the courthouse staff. ROA.2217-18. He also apparently had a habit of drinking alcohol during the workday. ROA.2219-21. One sexual assault victim of Judge Smith's testified that his law clerk telephoned her during this time frame, imploring her to "do something" about the fact that Judge Smith was "not functioning," was "falling apart," and was unable to even get himself to the courthouse, adding that Judge Smith's condition had forced him to cancel court obligations. ROA.2221.

Nothing indicates that Judge Smith or any supervising authority sought to corral or address his behavior at any time in the years after the incidents described above, even though the victim reported the sexual assault to her supervisor. ROA.2219. Instead, Judge Smith continued to be assigned cases (including Petitioner's, to which he was assigned on July 13, 1999, shortly after the events described above). ROA.5.

In September 2014, a judicial misconduct complaint was lodged against Judge Smith, arising from the sexual assault allegations. ROA.2208. The Judicial Council of the Fifth Circuit appointed a Special Committee to investigate Judge Smith; it ultimately found that Judge Smith had in fact made "inappropriate and unwanted physical and non-physical sexual advances toward a court employee…" ROA.2208-09.

But the investigation also revealed that Judge Smith behaved in a way that undermined the integrity of federal judicial proceedings to which he was assigned. For example, Judge Smith allowed the lawyer who was representing him in the judicial misconduct investigation to continue to appear before him on other matters in litigation. Judge Smith did not recuse himself from those cases, nor even disclose to counsel for the other party that their opposing counsel was the Judge's own personal attorney. ROA.2209-10.[12]

Perhaps most troubling, the Judicial Council found that in the course of attempting to defend himself in the investigative proceedings into his history of drunkenness and sexual assault, Judge Smith allowed "false factual assertions" to be advanced on his behalf. ROA.2209. The Council found that these "false assertions," coupled with Judge Smith's delays in ultimately admitting wrongdoing, "contributed greatly to the duration and cost of the investigation." ROA.2209.

[12] "[T]o preserve public confidence in the judiciary," the Judicial Council of the Fifth Circuit ordered Judge Smith to desist from those behaviors. ROA.2132 n.1. It also explicitly found that Judge Smith completely failed to "understand the gravity of such inappropriate behavior and the serious effects that it has on the operation of courts." *See id*. ROA.2131.

Despite the finding that he had engaged in conduct that was at best unethical and possibly even criminal, Judge Smith was not threatened with losing his position. Instead, the Council deemed him unfit to take any new cases for one year and ordered him to undergo sensitivity training. ROA.2209-12.

After the initial complaint was resolved, witnesses to other alleged instances of sexual misconduct by Judge Smith were found, and the adequacy of the initial investigation and punishment were called into serious question. ROA.2214. The Judicial Conference Committee ordered the Fifth Circuit to reassess Judge Smith's punishment and examine whether there was a pattern and practice to his behavior. ROA.2214. That further investigation was short-circuited by Judge Smith's abrupt retirement in 2017.[13] Concluding that Judge Smith's retirement deprived it of jurisdiction, the Judicial Council closed the case. ROA.2214-15.

Citing *Gonzalez v. Crosby*, 545 U.S. 524 (2005), Petitioner moved in federal district court under Rule 60(b) to reopen the judgment "on the ground that procedural defects marred the integrity of the proceedings at both the district and appellate stages."[14] In a six-page order, the district court dismissed the motion for want of jurisdiction, deeming it a successive application for post-conviction relief that would

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[13] *See* Tommy Witherspoon, *"Federal Judge Smith retires during ongoing investigation,"* Waco Tribune-Herald (September 19, 2016) (noting that by retiring, Judge Smith ensured he would continue to receive $203,100 from U.S. taxpayers each year for the rest of his life) (available at https://tinyurl.com/y9x8n9dt).

[14] *United States v. Bernard*, Crim. No. W-99-CR-70(2), Civ. No. 04-CV-164 (W.D. Tex.), Doc. 567-1 (Motion for Relief from Judgment (FRCP 60(b)(6)) (hereafter "Rule 60(b) motion")) at 1.

require authorization from the Court of Appeals under 28 U.S.C. §§ 2244(b)(3)(A) and 2255(h). *See* Appendix 2 at 5. The district court further denied a COA, concluding that "reasonable jurists could not debate the denial or dismissal of Movants' motions[15] on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed." *Id*. at 6. On Petitioner's appeal, the Fifth Circuit followed suit, denying COA in a published opinion issued September 14, 2018. *United States v. Vialva*, 904 F.3d 356 (5th Cir. 2018).

1. How the Questions Presented were Raised and Decided Below

a. The district court declared Petitioner's Rule 60(b) motion *ipso facto* a successive application for post-conviction relief, because if granted it would require reexamining the merits of Petitioner's previously rejected claims.

The district court's six-page order dismissing Petitioner's Rule 60(b) motion contains just two pages of analysis. *See* Appendix 2 at 3-5. It begins by acknowledging that under *Gonzalez* a district court may entertain a Rule 60(b) motion in a habeas corpus proceeding if the motion attacks "some defect in the integrity of the federal habeas proceedings." *Id*. at 3 (citing *Gonzalez*, 545 U.S. at 532). But from that premise, it concludes one sentence later that any such motion "that asserts or reasserts substantive claims of error" must necessarily be dismissed "as a successive Section 2255 motion." *Id*.

The district court thus nowhere acknowledged the possibility that a proper Rule 60(b) motion might *both* allege a "defect in the integrity of the proceedings" *and*

[15] Petitioner's codefendant Vialva had also moved for Rule 60(b) relief, and the district court disposed of both motions in a single order. *See* Appendix 1.

explain how the prior treatment of the movant's claims for relief illustrates the consequences of that defect, and then urge substantive reconsideration of his claims as a way of curing the procedural defect in the prior proceeding. Instead, the district court's analysis stopped cold once it concluded that granting the requested relief (*i.e.*, reopening the judgment) could entail reexamination of the merits. *See* Appendix 2 at 4 (calling Petitioner's Rule 60(b) motion "the very definition of a successive [§ 2255] motion," because "[e]ven a cursory examination" revealed that it would require considering "afresh" the constitutional claims unsuccessfully advanced in Petitioner's § 2255 motion); *see also id.* at 3-4 (a Rule 60(b) motion is proper as long as it "only attacks a 'defect in the integrity' of the movant's federal habeas proceedings and does not seek to advance any substantive claims").

As it happens, Petitioner had directed the district court's attention to *In re Pickard*, 681 F.3d 1201, 1206 (10th Cir. 2012), a thoughtful opinion of the Tenth Circuit explaining why that very same all-or-nothing interpretation of Rule 60(b) would misread *Gonzalez*:

> [T]he fact that the present 60(b) motion anticipates eventual reconsideration of the prior merits decision does not transform this 60(b) motion into a successive habeas application. The Supreme Court affirmed in *Gonzalez* that a Rule 60(b)motion in a habeas proceeding is permissible where it "challenges a defect in the integrity of the federal habeas proceeding, provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition," 545 U.S. at 532. The Tenth Circuit has recognized that this statement "should not be read too expansively. *[It] certainly should not be read to say that a motion is an improper Rule 60(b) motion if success on the motion would ultimately lead to a claim for relief under § 2255. What else could be the purpose of a 60(b) motion? The movant is always seeking in the end to obtain § 2255 relief. The movant in a true Rule 60(b) motion is simply asserting that he did not get a fair shot in the original*

> *§ 2255 proceeding because its integrity was marred by a flaw that must be repaired in further proceedings." In re Pickard*, 681 F.3d 1201, 1206 (10th Cir. 2012).

Rule 60(b) motion at 13-14 n. 11 (emphasis added); ROA.2188-89.

In its two-page analysis, the district court did not acknowledge *Pickard*, spell out why the Tenth Circuit's reasoning should not apply in the circumstances of Petitioner's case, or explain how its analysis was not in conflict with *Gonzalez*, since any Rule 60(b) motion based on defects in the § 2255 proceedings would also ultimately seek a renewed consideration of the merits.[16]

Based on its reading of *Gonzalez* as excluding altogether any Rule 60(b) motion that contemplated reconsideration of the claims from a movant's habeas proceeding, the district court found that it lacked jurisdiction to entertain Petitioner's Rule 60(b) motion. ROA.2257-59.

b. In denying a COA, the Court of Appeals held that an attack on a prior judgment predicated on the presiding judge's likely impairment or unfitness, and evidenced in part by that judge's treatment of the merits in the prior proceeding, is "clearly merits-based," and thus falls outside the range of "defect[s] in the integrity of [the] proceedings" that *Gonzalez v. Crosby*, 545 U.S. 524, 532 and n.5 (2005) contemplated as a proper basis for a Rule 60(b) motion.

Petitioner appealed. Without hearing argument, the Fifth Circuit denied a COA in a published opinion. Unlike the district court, it acknowledged that a Rule

[16] Having found that resort to Rule 60(b) was unavailable because Petitioner's Rule 60(b) motion ultimately sought reconsideration of his claims for relief, the district court had no need to address whether Judge Smith's impairments and unethical behavior could constitute a "defect in the integrity of the [habeas] proceedings" under *Gonzalez*. Thus, those disturbing facts received barely a mention in the district court's order, relegated to a footnote in the "Background" section. *See* Appendix 2 at 2 n. 2.

60(b) motion "can legitimately ask a court to reevaluate already-decided claims," if it "credibly alleges a non-merits defect in the prior habeas proceedings." 904 F.3d at 361 (Appendix 2). And it recognized that Petitioner's Rule 60(b) motion had alleged that Judge Smith's impairment and unfitness undermined the procedural integrity of Petitioner's own § 2255 proceeding because, *inter alia*, they led him to deny discovery and an evidentiary hearing regarding Petitioner's substantial claims for post-conviction relief despite circumstances plainly calling for full development of the facts. *Id.* at 362. But the Fifth Circuit concluded that Petitioner's Rule 60(b) motion was "merits-based" because it referenced – alongside extra-record evidence documenting Judge Smith's impairment and unfitness – the merits of Petitioner's § 2255 motion itself as evidence that the prior adjudication had been marred by a defect in the integrity of the proceeding that would be cognizable under *Gonzalez*. *Id.* Based on that characterization, the Fifth Circuit concluded that no reasonable jurist could disagree with the district court's view that Petitioner's Rule 60(b) motion was a successive application for post-conviction relief, and it denied a COA.

VI. REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to resolve a conflict among the Circuits regarding the circumstances under which, as *Gonzalez* contemplated, a procedural defect in the integrity of an initial federal post-conviction proceeding can warrant later reopening the judgment in that action on equitable grounds under Fed. R. Civ. P. 60(b). Beyond the Fifth Circuit's substantive misreading of *Gonzalez*, its having denied a COA on this issue reflects yet another failure by that court to properly apply

28 U.S.C. § 2253, particularly as it relates to challenges brought by death-sentenced federal prisoners. Even though this Court has thrice corrected earlier misapplications of the same statute by the same court in cases involving state prisoners, further guidance is required.

A. Reading *Gonzalez* to foreclose the possibility of Rule 60(b) relief in this case creates a conflict between the Fifth and Ninth Circuits on one side, and five other Courts of Appeals on the other.

The Fifth Circuit held that no reasonable jurist could debate the district court's conclusion that, under *Gonzalez*, Petitioner's Rule 60(b) motion was actually a successive application for habeas relief, even though the motion challenged the presiding judge's fitness and its impact on his procedural rulings in Petitioner's § 2255 action. In so concluding, the Fifth Circuit aligned itself with the Ninth Circuit, which has refused to treat allegations that a district court unjustly failed to develop the record, rule on all of a petitioner's claims, or conduct an evidentiary hearing as asserting procedural defects cognizable via Rule 60(b) under *Gonzalez*. *See*, *e.g.*, *United States v. Washington*, 653 F.3d 1057, 1064 (9th Cir. 2011).

The Fifth Circuit has joined the Ninth Circuit in embracing a very narrow interpretation of "procedural defect" under *Gonzalez*, here by labeling as "merits-based" Petitioner's allegation that Judge Smith's unfitness deprived him of a fair § 2255 process simply because Petitioner's Rule 60(b) motion argued that the merits disposition itself, *along with other documented facts about Judge Smith's condition and behavior*, evidenced a "procedural defect." These two Circuits are in conflict with five other circuits, which have read *Gonzalez* to give a district court jurisdiction to

consider a Rule 60(b) motion that alleges a procedural defect antecedent to a merits ruling on par with the claim that Petitioner alleged.

The Eleventh Circuit, for example, would likely permit a Rule 60(b) motion such as the one advanced by Petitioner here. In *Williams v. Chatman*, 510 F.3d 1290 (11th Cir. 2007), that court held that a habeas applicant's complaint in his Rule 60(b) motion – that the district court should have issued a briefing schedule giving him an adequate opportunity to brief the issues and the respondent a fair chance to respond – did not "fall within the *Gonzalez* Court's definition of a successive habeas petition." 510 F.3d at 1295. The Eleventh Circuit held that the movant's attack on the court's denial of a fair process did not attack the merits of its decision denying relief, and thus could be raised as part of a Rule 60(b) motion. *Id.*

Other Circuits have reached the same conclusion in similar situations. For example, the Sixth Circuit has held that a Rule 60(b) motion challenging the district court's failure to hold an evidentiary hearing was a proper Rule 60(b) motion because it identified a defect in the integrity of the habeas procedure. *Mitchell v. Rees*, 261 Fed. App'x 825, 829 (6th Cir. 2008), *abrogated on other grounds, Penney v. United States*, 870 F.3d 459, 462 (6th Cir. 2017).

Likewise, the Tenth Circuit has ruled that a 60(b) motion, asserting that the district court denied a § 2255 motion without giving the petitioner an adequate opportunity to access record documents and amend his pleadings to properly present his claims, alleged a defect in the integrity of the proceedings rooted in procedural

due process. *United States v. Marizcales-Delgadillo*, 243 Fed. App'x 435, 438 (10th Cir. 2007).

Similarly, the Third Circuit has held that where a petitioner had sought extra time to file his habeas petition, and the district court never ruled on that motion before ultimately dismissing the petition as untimely, a motion seeking relief from that dismissal due to the district court's earlier failure to rule on the extension request was not an attack on the merits of its decision and thus was properly brought under Rule 60(b). *United States v. Andrews*, 463 Fed. App'x 169, 171-72 (3d Cir. 2012).

The Fourth Circuit has taken the same approach. *See*, *e.g.*, *Rowe v. Dir., Dep't of Corr.*, 111 Fed. App'x 150, 151 (4th Cir. 2004) (holding that petitioner's Rule 60(b) motion alleging that the "district court erred by failing to conduct an evidentiary hearing" before dismissing his § 2254 petition "did not directly attack [the petitioner's] conviction or sentence" but instead "asserted a defect in the collateral review process itself" and thus "constituted a true Rule 60(b) motion"); *United States v. Gonzalez*, 570 Fed. App'x 330, 335-36 (4th Cir. 2014) (where district court granted an evidentiary hearing but failed to appoint counsel to represent petitioner at that hearing, the petitioner's Rule 60(b) motion challenging that decision as a procedural defect did not constitute a successive habeas petition).[17]

[17] In other Circuits, district courts have likewise rejected reading *Gonzalez* so narrowly that Rule 60(b) relief would never be available for procedural defects analogous to the one alleged by Petitioner. In *Malpica-Garcia v. United States*, No. CIV. 08-2055 JAF, 2012 WL 1121420 (D.P.R. Apr. 3, 2012), for example, the petitioner's Rule 60(b)(6) motion alleged that his habeas attorney had committed "gross negligence" by not calling a certain witness during an evidentiary hearing or seeking post-judgment relief on that account. *Id*. at *2. The court allowed the motion to proceed, finding that those allegations challenged "procedural aspects of th[e] habeas proceeding" rather than the movant's underlying

In Petitioner's view, the five Circuits that take a broader view of *Gonzalez* have the better of the argument. But for present purposes, the important point is that the Fifth and Ninth Circuits take a very narrow view of what constitutes a potential "procedural defect" under *Gonzalez*, and five other Circuits have adopted a more generous interpretation.[18] That conflict is significant and recurring, and deserves this Court's attention.

B. This Court's intervention is warranted because the court below continues to apply an unfairly steep COA standard in federal-prisoner habeas cases, and does so (as here) in cases where the factual record is inadequately developed.

Whether or not Petitioner would ultimately have prevailed on his challenge to the district court's dismissal of his Rule 60(b) motion, there can be no question that a COA was warranted. According to sworn testimony, at a point in Petitioner's case prior to the pendency of his § 2255 motion, Judge Smith labored under a disabling impairment that at times left him unable to perform his judicial duties and led him to commit grossly improper, if not criminal, misconduct. Other evidence shows that within two years after he abruptly terminated Petitioner's § 2255 case in late 2012,

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conviction. *Id*. In *Figueroa v. Walsh*, No. 00–CV–1160, 2010 WL 772625 (E.D.N.Y. Mar. 4, 2010), the petitioner's Rule 60(b) motion alleged that the district court's denial of an evidentiary hearing constituted a procedural defect, and the court agreed that such a motion was "the proper vehicle" for that challenge. *Figueroa*, 2010 WL 772625, at *6.

[18] As it happens, *dicta* in the Ninth Circuit's decision in *Washington* would actually *support* Petitioner's resort to Rule 60(b). *See Washington*, 653 F.3d at 1064 (stating that "allegations that a judge was biased, had a conflict of interest, *or otherwise engaged in behavior that gave rise to an appearance of impropriety* may be a basis for claiming a defect in the integrity of the proceedings for Rule 60(b) purposes") (emphasis added) (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)). That interpretation of *Gonzalez* could reach the allegations in Petitioner's 60(b) motion, if full development of the underlying facts were allowed.

Judge Smith behaved unethically in cases pending before him and was suspected of additional and more serious ethical breaches. The Government has never disputed these events, which temporally bookend Petitioner's § 2255 proceeding – his only opportunity for post-conviction review of his death sentence.

Nevertheless, the Fifth Circuit denied a COA based on its view that Petitioner had not alleged a procedural defect "cognizable under Rule 60(b)." 904 F.3d at 361. The Fifth Circuit asserted that Petitioner had "offer[ed] no evidence—beyond gross speculation—that Judge Smith was … 'impaired or unfit" to oversee [the] 2000 trial and subsequent habeas rulings" despite that fact that Petitioner's motion was supported by sworn testimony from a court staffer that Judge Smith was so impaired that he was "not functioning" a year before Petitioner's trial, the absence of any evidence that his condition improved before Petitioner's § 2255 motion was filed, the fact that Judge Smith failed to take any substantive action on the § 2255 motion for years, and the undisputed fact that Judge Smith behaved unethically (if not criminally) when his unfitness was brought to light. *Compare id. with* ROA.2176-2252; Petitioner's Brief in Support of COA[19] at 3-12; Petitioner's Reply Brief in Support of COA[20] at 5-9.

Left unexplained is what sort of evidence would be sufficient for the Fifth Circuit to authorize a COA on an issue of judicial impropriety or unfitness. Here,

[19] This brief is doc. no. 514427655 (filed April 12, 2018) in Fifth Circuit case no. 18-70008.

[20] This brief is doc. no. 514533494 (filed June 27, 2018) in Fifth Circuit case no. 18-70008.

other than Judge Smith's documented unfitness, the record suggests no explanation for Judge Smith's wholesale failure to take any action on this capital case for the better part of a decade or his apparent inability to recognize, when he finally did act, that Petitioner's counsel had submitted extensive evidence supporting his IAC claims.

Certainly reasonable jurists could differ about whether Petitioner was in fact afforded a fair habeas procedure under the circumstances presented in this case. But the court below seems to have been animated by a concern that granting a COA here would require it to revisit other cases where Judge Smith's unfitness may have deprived some other party of a fair judicial hearing. 904 F.3d at 361 ("To hold otherwise would implicate every one of Judge Smith's decisions for an undetermined period of time nearly twenty years ago and would justify circumventing the second-or-successive limitations in countless cases"). But the fear that Judge Smith's unfitness might have denied justice to other litigants presents no logical basis to ignore the denial of fair process that Judge Smith's unfitness appears to have inflicted upon Petitioner in this federal capital case.

At the end of the day, the Fifth Circuit's analysis merely paid "lipservice" to *Gonzalez*'s recognition that Rule 60(b) should operate to protect habeas applicants against procedural defects that rob a habeas proceeding of integrity. *Cf. Tennard*, 542 U.S. at 283-84 (criticizing the Fifth Circuit for having "pa[id] lipservice to the principles guiding issuance of a COA" while in fact applying a materially different standard). Based on its decision in this case, the Fifth Circuit would label any 60(b)

motion as a successive habeas petition if it challenged the wrongful denial of a § 2255 motion based on judicial unfitness, or any other procedural irregularity that impaired the integrity of the previous habeas proceeding, as long as the movant cited the strength of his original habeas claims as evidence of that irregularity, and regardless of whether other evidence outside the record might support the claim of judicial unfitness.

The decisions from other Circuits authorizing Rule 60(b) motions in the face of much less grave procedural irregularities, *see supra*, suggest at least a substantial question whether *Gonzalez* allows resort to Rule 60(b) in the unusual and highly troubling circumstances of Petitioner's case. The Fifth Circuit's confident rejection of any such possibility reflects its continuing failure to appreciate when a habeas case presents a "debatable" question of procedural or substantive law.

Over the past fifteen years, the Court has repeatedly found it necessary to correct the Fifth Circuit's application of the COA standard. The first occasion was in 2003. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 341 (2003) (finding that in purporting to determine whether a prisoner had made a "substantial showing" that his constitutional rights were violated, the Fifth Circuit in fact was requiring prisoners to demonstrate at the threshold stage that they would prevail if the merits were reached, an interpretation that was "too demanding … on more than one level"). The second was in 2004. As previously noted, in *Tennard*, 542 U.S. 274, this Court took a sharply critical tone as it again upbraided the Fifth Circuit for having merely "pa[id]

lipservice" to the COA standard in concluding that no reasonable jurist would find Tennard's claim even debatable. 542 U.S. at 283-84.

After *Miller-El* and *Tennard*, the Fifth Circuit seemed to get the message at least temporarily, granting COAs from time to time in habeas appeals by state prisoners without reference to the ultimate merit of the claims presented.[21] By 2015, however, Justices of this Court were questioning whether the Fifth Circuit had in fact corrected its course after *Miller-El* and *Tennard*. *See Jordan v. Fisher*, 135 S. Ct. 2647, 2651-52 (2015) (Sotomayor, Ginsburg, and Kagan, JJ., dissenting from denial of certiorari) (arguing that the Fifth Circuit had "accurately recited" the COA standard but failed to apply it according to this Court's precedents).

Not long thereafter, the Court found it necessary for a third time to rectify the Fifth Circuit's failure to ensure meaningful appellate review in habeas cases. *Buck v. Davis,* 580 U.S. ___, 137 S. Ct. 759 (2017).

Buck rebuked the Court of Appeals for effectively "invert[ing] the statutory order of operations" required by 28 U.S.C. § 2253 when it yet again treated a habeas applicant who had not shown that he should prevail on the merits as *ipso facto* not entitled to a COA. *Buck*, 137 S. Ct. at 774. This Court reminded the court below that such an approach placed "too heavy a burden on the prisoner *at the COA stage*":

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[21] *See*, *e.g.*, *Smith v. Dretke*, 422 F.3d 269, 278 (5th Cir. 2005) (granting COA on penalty-phase IAC claim); *Smith v. Quarterman*, 515 F.3d 392, 404 (5th Cir. 2008) (denying relief on same claim); *Skinner v. Quarterman*, 528 F.3d 336, 344 (5th Cir. 2008) (granting COA on guilt-phase IAC claim); *Skinner v. Quarterman*, 576 F.3d 214 (5th Cir. 2009) (denying relief on same claim).

> The dissent … argu[es] that a reviewing court that deems a claim nondebatable "must necessarily conclude that the claim is meritless." *Post*, at 781 (opinion of THOMAS, J.). Of course *when a court of appeals properly applies the COA standard* and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable.

Buck, 137 S. Ct. at 774 (first emphasis in *Buck*, citing *Miller-El*, 537 U.S. at 336-37; second emphasis added).[22]

Here, as in *Miller-El*, *Tennard*, and *Buck*, the Court of Appeals foreclosed a colorable appeal with a substantial factual basis because it apparently concluded that Petitioner would not prevail if the merits were reached. As in those cases, this Court should intervene to preserve the process Congress prescribed in 28 U.S.C. § 2253.[23]

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[22] Having found that the Fifth Circuit had erred in denying a COA, the Court went on to address the merits and grant relief. *Buck,* 137 S. Ct. at 780.

[23] The very fact that the court below found it appropriate to publish its opinion denying COA in this case reflects that court's underlying confusion about what constitutes a "debatable" issue. Fifth Cir. R. 47.5.1 describes the Court of Appeals' criteria for deciding whether to publish an opinion – *e.g.*, publishing where the court's decision modifies a legal rule or applies it to significantly different facts, "[e]xplains, criticizes, or reviews the history of existing … law"; or "[c]reates or resolves a conflict of authority either within the circuit or between this circuit and another." Those categories do not map perfectly onto the types of cases where one would expect a COA to issue, but at least suggest that relatively few decisions *denying* COA should warrant publication. Yet the Fifth Circuit frequently publishes its opinions denying COA, presumably because they contain the kind of deep analysis contemplated by Fifth Cir. R. 47.5.1, rather than the far less complete analysis of "debatability" contemplated by a COA motion. *See*, *e.g.*, *Allen v. Stephens*, 805 F.3d 617 (5th Cir. 2015), *abrogated on other grounds*, *Ayestas v. Davis*, 138 S. Ct. 1080 (2018); *Carter v. Stephens*, 805 F.3d 552 (5th Cir. 2015); *Young v. Stephens*, 795 F.3d 484 (5th Cir. 2015); *Flores v. Stephens*, 794 F.3d 494 (5th Cir. 2015); *Garcia v. Stephens*, 793 F.3d 513 (5th Cir. 2015); *Ward v. Stephens*, 777 F.3d 250 (5th Cir. 2015), *abrogated on other grounds*, *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). The Fifth Circuit's habit of publishing its COA-denial opinions, which so closely resemble its opinions addressing appeals on the merits, suggests that it still does not appreciate the distinction between a plenary decision on the merits and the "threshold" review required by *Miller-El*.

This Court's attention is also required because the Fifth Circuit's track record in misapplying the COA requirement in capital cases is severely out-of-step with that of other circuits.[24] Justice Kagan voiced this same concern during oral argument in *Buck*:

> JUSTICE KAGAN: Mr. Keller, you know, some of the statistics that Petitioner ha[s] pointed us to -- in capital cases, a COA is denied in 60 percent of Fifth Circuit cases as compared to 6 percent of Eleventh Circuit cases, two roughly similar circuits where COA's are denied in capital cases ten times more in the Fifth Circuit. I mean, it does suggest one of these two circuits is doing something wrong.

Buck v. Davis, No. 15-8049, Oral Arg. transcript at 38.

In fact, the Fifth Circuit has yet to grant a single COA in a case involving a death-sentenced federal prisoner.[25] And in six of these nine cases denying a COA (all but *Garza*, *Jones*, and *Webster*), the case involved the question whether the defendant had met the low bar for obtaining an evidentiary hearing under § 2255.[26]

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[24] This point was made in greater detail by an *amicus curiae* supporting Petitioner's request that this Court review the Fifth Circuit's denial of COA in his original § 2255 appeal. *See Bernard v. United States*, No. 14-8071, Brief *Amicus Curiae* of the Federal Capital Habeas Project in Support of Petitioner, at 14-16. ROA.2239-41.

[25] *See Bernard*, 762 F.3d at 483 (denying COA as to all issues presented by both defendants); *see also United States v. Fields*, 761 F.3d 443 (5th Cir. 2014) (denying COA as to all issues); *United States v. Robinson*, No. 09-70020 (5th Cir., June 8, 2010) (unpublished) (same); *United States v. Hall*, 455 F.3d 508 (5th Cir. 2006) (same); *United States v. Webster*, 392 F.3d 787 (5th Cir. 2004) (same); *United States v. Jones*, 287 F.3d 325 (5th Cir. 2002) (same); *United States v. Garza*, 165 F.3d 312 (5th Cir. 1999) (same). *See also United States v. Bourgeois*, 537 Fed. App'x 604 (5th Cir. 2013) (denying COA on every issue on which COA had not previously been granted by the district court).

[26] *See Robinson*, slip op. at 10-11; *Hall*, 455 F.3d at 523; *Fields*, 761 F.3d at 483; *Bourgeois*, 537 Fed. App'x at 611-17; *Bernard*, 762 F.3d at 483 (as to both Bernard's and Vialva's separate requests for hearings).

While the Fifth Circuit did not have the benefit of *Miller-El* when it weighed whether to authorize an appeal in *Jones* or *Garza* (though it did for the other seven cases), it is remarkable that the court below has *never* found a single issue in a federal death penalty post-conviction case worthy of a COA. And this is so despite the fact that in such cases – in contrast to post-conviction cases brought by state prisoners under 28 U.S.C. § 2254 – only conventional standards of appellate review apply, rather than the special deference due under § 2254.[27]

Beyond the sharp divergence between the Fifth and Eleventh Circuits identified by Justice Kagan, the Fifth Circuit also stands apart from the Fourth and Eighth Circuits, the two other Circuits with a significant number of federal death-sentenced prisoners, in granting COAs in federal cases. Where the Fifth Circuit has approved zero out of nine requests for COAs in such matters, as set forth above (a 0% grant rate), the Eighth Circuit has approved at least one issue for COA in all five

[27] The Fifth Circuit's wholesale denial of COAs in capital § 2255 appeals is also hard to square with the consensus among the Circuits that, in a capital case, the seriousness of the potential sentence is a legitimate consideration in granting COA. *See, e.g.*, *Williams v. Woodford*, 384 F.3d 567, 583 (9th Cir. 2004); *Jermyn v. Horn*, 266 F.3d 257, 279 n.7 (3d Cir. 2001); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997); *Hutchins v. Woodard*, 730 F.2d 953, 962 (4th Cir. 1984) (Phillips, J. concurring).

cases in which it has faced that issue[28] (a 100% grant rate), and the Fourth Circuit has approved at least one issue in two out of three cases (a 67% grant rate).[29]

The Fifth Circuit's unbroken string of COA denials in capital § 2255 appeals only strengthens the conclusion that in refusing a COA to review the district court's denial of Petitioner's Rule 60(b) motion, the Fifth Circuit once again imposed too high a standard for judging what qualifies as an issue "debatable among jurists of reason." *Buck*, 137 S. Ct. at 777.[30]

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[28] *See Allen v. United States*, 829 F.3d 965, 966 (8th Cir. 2016) ("This court … granted a certificate of appealability" on the defendant's IAC claim); *United States v. Lee*, 715 F.3d 215, 217 (8th Cir. 2013) (noting that although the district court had granted a COA, the Court of Appeals "expanded [the] certificate" to include an additional IAC claim); *Purkey v. United States*, 729 F.3d 860, 862 (8th Cir. 2013) ("We granted a certificate of appealability to review whether Purkey received effective assistance of counsel during the penalty phase …"); *Nelson v. United States*, 297 Fed. App'x. 563 (8th Cir. 2008) at **2 (granting a certificate of appealability on multiple IAC claims and remanding with instructions to the district court to hold an evidentiary hearing); *Paul v. United States*, 534 F.3d 832, 834-35 (8th Cir. 2008) (granting certificate of appealability on two IAC claims and a claim of mental incompetency); *see also* Brief of Appellant, *Holder v. United States*, 2010 WL 5484480 at *1 (district court had granted a COA and prisoner did not challenge its scope on appeal).

[29] *See United States v. Higgs*, 663 F.3d 726, 730 (4th Cir. 2011) ("We granted a certificate of appealability to consider Higgs's claim that his constitutional rights to due process of law and effective assistance of counsel were violated"); *United States v. Caro*, 733 F. App'x 651, 653 (4th Cir. 2018) ("This court also granted Caro a Certificate of Appealability to consider whether his trial counsel's decision not to proffer mental-health testimony" was constitutionally ineffective); Judgment Order, *United States v. Jackson*, Case No. 09-10, Dkt. No. 31 (4th Cir. Feb. 11, 2011) (denying COA).

[30] Counsel's research indicates that at present, there are three additional death-sentenced federal prisoners whose cases are in § 2255 proceedings but have yet to be considered by the Fifth Circuit (Shannon Agofsky, Edgar Garcia, and Mark Snaar), as well as three more such individuals whose cases are pending on direct appeal in the Fifth Circuit and who will presumably seek post-conviction review if their cases are affirmed (Thomas Sanders, Christopher Cramer and Ricky Fackrell). Thus, absent this Court's intervention, the problem presented by the Fifth Circuit's misapplication of § 2253 in cases arising from federal capital prosecutions will persist.

Moreover, the Fifth Circuit's holding that no reasonable jurist could disagree with the district court's view that *Gonzalez* required it to treat Petitioner's 60(b) motion as a successive habeas application was erroneous because the district court reached that conclusion prematurely, without the benefit of a fully developed record. Petitioner acknowledged in his Rule 60(b) motion that the record would likely require expansion before the impact of Judge Smith's unfitness on the process of resolving Petitioner's claims could be fully assessed. *See* ROA.2128 (asking that Petitioner be "allow[ed] … to present evidence at a hearing to prove that former Judge Walter Smith was unfit to preside over [Petitioner's] post-conviction proceedings"). Yet in the course of dismissing his Rule 60(b) motion and denying a COA, neither the district court nor the Fifth Circuit even acknowledged that Petitioner had requested a hearing, much less considered how a fully developed record might have illuminated the troubling questions surrounding Judge Smith's fitness and demonstrated a "procedural defect" warranting Rule 60(b) relief.

An evidentiary hearing was essential here not just because it would have afforded Petitioner the chance to present evidence to prove the specific facts he alleged in his Rule 60(b) motion concerning Judge Smith's unfitness, but because it would have given him the tools necessary to, *e.g.*, a method to obtain evidence from reluctant witnesses. The power to subpoena witnesses means that witnesses who previously may have refused to speak with the prisoner's attorney or investigator can be compelled to provide relevant testimony in open court. Here, that power is particularly necessary because the hesitant witnesses may well know facts that

would embarrass, imperil, or anger a prominent retired federal judge if aired in public. The Fifth Circuit's confidence in its ultimate conclusion finding Petitioner's appeal unworthy of plenary consideration is especially unwarranted given the incomplete state of the district court record, which itself should have weighed in favor of granting a COA.

C. This Court may soon consider another petition raising the same issues presented here; if it grants review there, it should hold this Petition pending its decision.

As noted, Petitioner's codefendant Vialva has also been pursuing Rule 60(b) relief based on some of the same concerns about Judge Smith's unfitness to preside during the pendency of both defendants' § 2255 motions. The Court of Appeals recently denied rehearing in Vialva's case,[31] and he will likely seek certiorari review in this Court, presenting issues closely related to the questions presented here. If the Court concludes that the disposition of the issues in this Petition might be affected by its decision in *Vialva*, Petitioner asks that the Court defer final action on his petition pending that decision. If the Court ultimately grants certiorari in *Vialva*, Petitioner urges the Court to grant review here and consolidate the cases for decision, or, in the alternative, to hold his case pending its decision in *Vialva*.

VII. CONCLUSION AND PRAYER FOR RELIEF

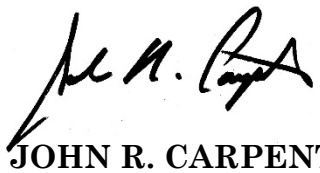
The Circuits need guidance about how to apply this Court's holding in *Gonzalez* that Rule 60(b) should be available to habeas petitioners in circumstances where a

[31] Order on Petition for Rehearing, *United States v. Vialva*, No. 18-70007, doc. no. 514729350 (November, 19, 2018).

defect in the integrity of the proceedings led to the denial of relief. At present, the Fifth and Ninth Circuits are taking a significantly narrower view of what constitutes an actionable "procedural defect" than five other Circuits, a conflict that deserves resolution by this Court. Absent this Court's intervention, the Fifth Circuit's misapplication of *Gonzalez* means that no court will review whether Judge Smith's serious substance abuse problem and ethical infirmities constituted such a defect and unfairly deprived Petitioner of his sole opportunity for post-conviction review of his death sentence. And the Fifth Circuit's continued misapplication of the COA standard means that Petitioner and other death-sentenced federal defendants will never get an appropriate chance at appellate review of substantial legal and factual disputes in their post-conviction proceedings.

This Court should grant certiorari to review the Fifth Circuit's judgment refusing to grant a COA on the issues raised in Petitioner's Rule 60(b) motion, summarily reverse the decision below, hold this case as it considers the scope of *Gonzalez* in another case, or grant such other relief as justice requires.

Respectfully submitted,



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