

No. _____

In the Supreme Court of the United States

JOSEPH GAMBOA,

Applicant,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

1. Pursuant to Supreme Court Rule 13.5, Applicant Joseph Gamboa respectfully requests a 60-day extension of time, to and including Friday, September 22, 2023, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Fifth Circuit issued opinions on March 16, 2023 (Exhibit A) and on August 1, 2019 (Exhibit B). Copies of those opinions are attached. The Fifth Circuit denied Applicant's timely rehearing petition on April 25, 2023 (Exhibit C). This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on Monday, July 24, 2023. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. The undersigned counsel was recently retained, only days ago, by Applicant Joseph Gamboa. A 60-day extension would allow counsel sufficient time to fully examine the Fifth Circuit's decisions and consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally, the undersigned counsel have a number of other pending matters that will interfere with counsel's ability to file the petition on or before Monday, July 24, 2023.

4. This case concerns an important issue: Whether a Rule 60(b) motion alleging abandonment by counsel can, at least in some instances, attack a defect in the integrity of the habeas proceedings.

5. Mr. Gamboa was convicted and sentenced to death for the murder of two individuals during a robbery at Taco Land, a bar in San Antonio, Texas. Following the exhaustion of his state post-conviction process, Mr. Gamboa sought to petition for federal habeas corpus. The federal habeas statute provides that capital defendants are entitled to court-appointed counsel. So in 2015, Mr. Gamboa filed a motion seeking appointment of counsel under 18 U.S.C. § 3599 to prepare a federal habeas petition. The district court appointed counsel to represent Mr. Gamboa and set a deadline to file a habeas petition. Over the next several months, the court-appointed attorney moved three times for an extension of time to file Mr. Gamboa's habeas petition, seeking the full one-year limitations period under AEDPA, 28 U.S.C. § 2244(d)(1).

6. When he finally filed a petition, the court-appointed attorney copied claims from another client's petition wholesale and pasted them without change into Mr. Gamboa's petition. So complete was counsel's failure to tailor the argument to Mr. Gamboa's case that

the habeas petition even asked for relief *for that other client*. After discovering what his counsel had done, Mr. Gamboa wrote a *pro se* letter to the court moving for different counsel. The district court denied the change-of-counsel motion for failing to comply with the local rules and, one month later, dismissed the habeas petition.

7. Mr. Gamboa then moved under Rule 60(b), arguing that the abandonment by his counsel was an extraordinary circumstance that should have allowed him to reopen the judgment and file a *real* habeas petition. The district court denied the motion, holding that Mr. Gamboa's 60(b) motion was in reality an unauthorized successive habeas petition, and denied Mr. Gamboa a certificate of appealability. *Gamboa v. Davis*, 782 F. App'x 297, 299 (5th Cir. 2019).

8. Mr. Gamboa, represented by new counsel, moved for a certificate of appealability in the Fifth Circuit. *Id.* A panel of the Fifth Circuit denied the motion, holding that controlling Fifth Circuit precedent foreclosed Mr. Gamboa's claim because, in the Fifth Circuit, "the alleged abandonment of ... habeas counsel" is always a successive habeas claim and not a valid basis for a Rule 60(b) motion. *Id.* at 300-01 (quoting *In re Edwards*, 865 F.3d 197, 204 (5th Cir. 2017)).

9. Judge Dennis specially concurred to express his view that controlling circuit precedent should have been reconsidered and overruled in this case because a Rule 60(b) motion alleging abandonment by counsel can, in circumstances like these, where the abandonment prevents the district court from ever considering the petitioner's claims on the merits, be used to attack a defect in the integrity of the habeas proceedings. *Id.* at 301-04 (Dennis, J., specially concurring). "[B]ut for" controlling circuit precedent, Judge Dennis

wrote, “Gamboa’s Rule 60(b) motion would not be an unauthorized successive habeas petition.” *Id.* at 304.

10. As you wrote in your concurrence in *Holland v. Florida*, “attorney misconduct that is not constructively attributable to the petitioner” is a valid ground for excusing otherwise-binding provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d), like the ordinarily-applicable statute of limitations. 560 U.S. 631, 659 (2010) (Alito, J., concurring in part and concurring in the judgment). As you explained: “Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.” *Id.* “That is particularly so if the litigant’s reasonable efforts to terminate the attorney’s representation have been thwarted by forces wholly beyond the petitioner’s control.” *Id.* at 659-60. That is exactly the situation Mr. Gamboa confronted. His allegation in this case is that his court-appointed habeas counsel was not “operating as his agent in any meaningful sense of that word” and robbed him of his one and only chance to have his claims heard on the merits.

11. When a petitioner files a 60(b) motion on the basis of such misconduct—as Mr. Gamboa did here—the “Rule 60(b) motion attacks, not the substance of the federal court’s resolution of a claim on the merits” but rather a fundamental “defect in the integrity of the federal habeas proceedings.” *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). As the Court recognized in *Gonzalez*, although “an attack based on ... habeas counsel’s omissions ... *ordinarily* does not go to the integrity of the proceedings,” a “[f]raud on the federal habeas court is one example of such a defect.” *Id.* at 532 n.5 (emphasis added). The filing of

a sham petition by “an attorney who is not operating as [petitioner’s] agent in any meaningful sense of that word” is akin to fraud on the habeas court. *Holland*, 560 U.S. at 659.

12. The decision below deepens an intractable conflict with other circuits over an exceptionally important question of federal law. *See, e.g., Brooks v. Yates*, 818 F.3d 532, 534 (9th Cir. 2016) (holding that “gross negligence by counsel amounting to ‘virtual abandonment’ can be an ‘extraordinary circumstance’ that justifies [relief under] Rule 60(b)(6).” (alterations in original)); *Ramirez v. United States*, 799 F.3d 845, 849-50, 856 (7th Cir. 2015) (ordering a Rule 60(b)(6) motion granted where petitioner’s habeas counsel “deserted him”); *Harris v. United States*, 367 F.3d 74, 81 (2d Cir. 2004) (explaining that relief under Rule 60(b)(6) is proper where the movant’s “lawyer agreed to prosecute a habeas petitioner’s case, abandoned it, and consequently deprived the petitioner of any opportunity to be heard at all”).

Wherefore, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to Friday, September 22, 2023.

Dated: July 13, 2023

Respectfully submitted,



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