No.

In the Supreme Court of the United States

JOSEPH GAMBOA, PETITIONER,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Congress in 18 U.S.C. § 3599 gave indigent state prisoners sentenced to death a right to court-appointed counsel in federal habeas proceedings under AEDPA, 28 U.S.C. § 2254. The district court appointed § 3599 counsel to represent petitioner in this case.

Appointed counsel abandoned petitioner. He met with petitioner only once, told petitioner he thought he was guilty, failed to investigate any facts or develop any legal claims, and conducted only one day of legal research. After nearly a year of extensions and virtually no work on the case, counsel filed a sham petition containing seven claims copied and pasted from the petition of another client, Obie Weathers, that contained generic, legally foreclosed challenges to the Texas death penalty scheme. Mr. Weathers's name even appears in the petition's prayer for relief. And in response to the State's answer to the petition he had filed, counsel filed an untimely, two-paragraph reply conceding all seven claims were foreclosed. Petitioner promptly moved *pro se* for the appointment of new counsel. But it was already too late. The district court denied his *pro se* motion and, almost immediately thereafter, denied counsel's habeas petition.

Petitioner sought to remedy counsel's abandonment by filing a Rule 60(b) motion to reopen the judgment. The district court, applying controlling Fifth Circuit precedent, denied petitioner's motion and denied him a certificate of appealability. The Fifth Circuit affirmed over a concurrence by Judge Dennis, who urged the court to take this case en banc to overrule its precedent.

The question presented is:

Whether a Rule 60(b) motion claiming that habeas counsel's abandonment prevented the consideration of a petitioner's claims should always be recharacterized as a second or successive habeas petition under *Gonzalez v. Crosby*, 545 U. S. 524 (2005).

RELATED PROCEEDINGS

379th District Court, Bexar County, Texas:

State v. Gamboa, No. 2005-CR-7168A, 2007 WL 6652622 (Tex. Dist. Mar. 12, 2007) (judgment of conviction)

Texas Court of Criminal Appeals:

Gamboa v. State, 296 S.W.3d 574 (Tex. Crim. App. 2009) (direct appeal)

Ex parte Gamboa, No. WR-78,111-01, 2015 WL 514914 (Tex. Crim. App. Feb. 4, 2015) (state habeas)

United States District Court (W.D. Tex.):

Gamboa v. Davis, No. SA-15-CA-113-OG (W.D. Tex. July 8, 2016) (order striking *pro se* motion to dismiss counsel)

Gamboa v. Davis, No. SA-15-CA-113-OG, 2016 WL 4413280 (W.D. Tex. Aug. 4, 2016) (order denying habeas petition)

Gamboa v. Davis, No. SA-15-CA-113-OG (W.D. Tex. Sept. 8, 2016) (order denying counsel's motion to withdraw)

Gamboa v. Davis, Civ. No. SA-15-CA-113-OG, 2017 WL 11368194 (W.D. Tex. Oct. 6, 2017) (order denying Rule 60(b) motion)

United States Court of Appeals (5th Cir.):

Gamboa v. Davis, 782 F. App'x 297 (5th Cir. 2019) (denying COA)

Gamboa v. Lumpkin, No. 16-70023, 2023 WL 2536345 (5th Cir. Mar. 16, 2023) (dismissing appeal)

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The opinion of the court of appeals dismissing petitioner's appeal as moot (Pet. App. 1a-9a) is unreported but available at 2023 WL 2536345. The opinion of the court of appeals denying petitioner's motion for a certificate of appealability (Pet. App. 10a-23a) is unreported but available at 782 F. App'x 297. The opinion of the district court denying petitioner's Rule 60(b) motion (Pet. App. 24a-34a) is unreported but available at 2017 WL 11368194. The opinion of the district court denying habeas counsel's motion to withdraw (Pet. App. 35a-39a) is unreported. The opinion of the district court denying the habeas petition (Pet. App. 40a-119a) is unreported but available at 2016 WL 4413280. The opinion of the district court striking petitioner's *pro se* motion to dismiss counsel (Pet. App. 120a-125a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2023. Pet. App. 1a. A timely petition for rehearing en banc was denied on April 25, 2023. Pet. App. 126a. On July 18, Justice Alito granted an extension of time to file a petition for certiorari to and including September 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions and rules—28 U.S.C. § 2254, 18 U.S.C. § 3599, Federal Rule of Civil Procedure 60, and Rule 12 of the Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts—are reproduced in the petition appendix, Pet. App. 127a-136a.

STATEMENT OF THE CASE

This petition presents a significant question that has divided the courts of appeals: whether a state prisoner's motion to reopen the judgment under Federal Rule of Civil Procedure 60(b), on the grounds that his attorney's abandonment prevented the consideration of his habeas claims, is necessarily a second or successive application for a writ of habeas corpus under 28 U.S.C. § 2244(b).[1]

The Fifth Circuit holds that abandonment by habeas counsel that prevents the consideration of a petitioner's claims can never constitute a defect in the habeas proceedings that would permit a petitioner to reopen a judgment under Rule 60(b). In the Second, Seventh, and Ninth Circuits, by contrast, abandonment by habeas counsel can constitute a defect in the habeas proceedings that would permit a petitioner to reopen a judgment under Rule 60(b).

The stakes here could not be higher: Petitioner Joseph Gamboa faces execution for two murders he steadfastly denies committing. But his attorney's abandonment and the Fifth Circuit's decision below deprived petitioner of any opportunity to present his case-specific claims to a federal court for review. Had petitioner's case arisen in the Second, Seventh, or Ninth Circuits, he would have been permitted to reopen the judgment. But in the Fifth Circuit, he will be put to death without having the assistance of counsel to file his habeas petition or having his claims reviewed.

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[1] Similar limitations on second or successive collateral attacks generally apply in the context of postconviction review of federal judgments under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2255(h). Because this Court's resolution of the question presented may therefore affect postconviction proceedings for federal prisoners, the United States likely has a substantial interest in this case.

In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress gave each state prisoner a right "to one fair opportunity to seek federal habeas relief from his conviction." *Banister v. Davis*, 140 S. Ct. 1698, 1702 (2020); *see also id.* at 1704. The Fifth Circuit's rule permits attorney abandonment to rob a prisoner of that one fair opportunity and undercuts basic fairness. It also undercuts Congress's purposes in enacting AEDPA and providing indigent capital defendants with a statutory right to appointed counsel in habeas proceedings.

Moreover, the Fifth Circuit's rule creates bizarre and arbitrary results. Under this Court's cases, had habeas counsel abandoned petitioner by filing nothing, rather than by filing a sham petition, petitioner would have had an opportunity to file an out-of-time habeas petition under *Holland v. Florida*, 560 U.S. 631 (2010). Had habeas counsel abandoned petitioner by filing a real petition late, rather than by filing a sham petition by the deadline, Rule 60(b) would have been available to reopen the judgment to seek to have it considered. *See Christeson v. Roper*, 574 U.S. 373, 380-81 (2015) (per curiam) (remanding to permit substitution of counsel to assist with the filing of a Rule 60(b) motion seeking equitable tolling under *Holland*).

The question presented is important and recurring, and this case is an ideal vehicle to resolve the circuit split. There can be no "fair opportunity to seek federal habeas relief," *Banister*, 140 S. Ct. at 1702, when the petitioner's attorney is "not operating as his agent in any meaningful sense of that word," *Holland*, 560 U.S. at 659-60 (Alito, J., concurring in part and concurring in the judgment). The Court should grant review and reverse the decision below.

A. Legal Background

1. The Federal Rules of Civil Procedure generally apply in federal habeas proceedings to the extent they are consistent with the habeas statutes. *See* 28 U.S.C. § 2254; Rule 12, Rules Governing Section 2254 Cases in the

United States District Courts (providing that the Federal Rules of Civil Procedure "may be applied" to Section 2254 cases "to the extent that they are not inconsistent with any statutory provisions").

Federal Rule of Civil Procedure 60(b) lists six reasons a court may relieve a party in civil litigation from a final judgment, including mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud. Fed. R. Civ. P. 60(b). Rule 60(b)(6) permits a court to reopen a judgment when the movant shows "any … reason justifying relief from the operation of the judgment other than the more specific circumstances in Rules 60(b)(1)-(5)." *Gonzalez*, 545 U.S. at 528-29. Under Rule 60(b)(6), a civil litigant can obtain relief, even in habeas corpus actions, where "extraordinary circumstances justify the reopening of a final judgment." *Christeson*, 574 U.S. at 380-81 (cleaned up) (quoting *Gonzalez*, 545 U.S. at 535).

AEDPA, at 28 U.S.C. § 2244, provides that a "claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed" unless it relies on a new rule of constitutional law made retroactive by this Court or presents newly available and convincing evidence of the prisoner's factual innocence. 28 U.S.C. § 2244(b)(1)-(2). And a prospective petitioner cannot even file a second or successive application unless an appeals court panel certifies that the prisoner has made a prima facie showing that the application meets one of those exceptions. *See* 28 U.S.C. § 2244(b)(3). The restrictions on successive habeas applications were intended to serve AEDPA's "goal of streamlining federal habeas proceedings." *Rhines v. Weber*, 544 U.S. 269, 277 (2005); *see Woodford v. Garceau*, 538 U.S. 202, 206 (2003).

2. The Court clarified the relationship between Rule 60(b) and the limitations in § 2244(b) in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). In *Gonzalez*, the Court held

that when a state prisoner seeks to reopen a judgment using "the language of a true Rule 60(b) motion," courts must consider the substance of the submission to determine whether it is "a 'habeas corpus application'" for purposes of Section 2244(b) or "at least similar enough [to a habeas corpus application] that failing to subject it to the same requirements would be 'inconsistent with' the statute." 545 U.S. at 531 (citation omitted). The Court explained that Section 2244(b)'s bar on successive petitions thus precludes a nominal Rule 60(b) motion when a state prisoner seeks to use "a Rule 60(b) motion [to] advance[] one or more 'claims'" for relief from a state court judgment. *Gonzalez*, 545 U.S. at 532.

Even so, the Court explained, "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Id.* at 534. Habeas petitioners can use Rule 60(b) to "attack[] not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," such as fraud on the court or a misapplication of the statute of limitations. *Id.* at 532; *see id.* at 532 n.5, 533. The rule against second-or-successive habeas petitions bars Rule 60(b) motions only when petitioners "seek[] to add a new ground for relief" or "attack[] the federal court's previous resolution of a claim on the merits." *Id.* (emphasis omitted); *see Banister*, 140 S. Ct. at 1708-09 & 1709 n.7 (describing *Gonzalez*'s holding).

3. Since *Gonzalez*, this Court has held that attorney misconduct permits equitable exceptions to AEDPA's limitations on defaulted applications.

In *Holland v. Florida*, the Court held that "bad faith, dishonesty, [and] divided loyalty" by counsel can excuse the late filing of a federal habeas petition notwithstanding the one-year statute of limitations in 28 U.S.C. § 2244(d). 560 U.S. at 634, 649. In *Holland*, a court-appointed attorney failed to file a federal habeas petition within the

one-year deadline or communicate with his client. *Id.* at 635-38. The Court held that "general equitable principles" recognize that "at least sometimes, professional misconduct" by a habeas petitioner's attorney can "amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id.* at 651. The Court observed that the petitioner's counsel had "violated fundamental canons of professional responsibility," which "seriously prejudiced a client who thereby lost what was likely his single opportunity for federal habeas review of the lawfulness of his imprisonment and of his death sentence." *Id.* at 653.

Justice Alito concurred, agreeing that equitable tolling is available under AEDPA, but, in his view, only in cases of "attorney abandonment." *Id.* at 659 (Alito, J., concurring in part and concurring in the judgment). When habeas counsel abandons a client, he reasoned, the attorney's conduct "is not constructively attributable to the petitioner." *Id.* "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.

In *Maples v. Thomas*, 565 U.S. 266 (2012), and *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court held that the rule against raising defaulted claims in a federal habeas petition can be excused in cases where egregious misconduct by counsel in the earlier state-court proceedings led to the default. *See Maples*, 565 U.S. at 283; *Martinez*, 566 U.S. at 7-9. In *Maples*, a habeas petitioner was represented in state postconviction proceedings by two attorneys serving pro bono. 565 U.S. at 274. While his petition for postconviction relief was pending in the state trial court, his attorneys left their

firm without notifying him or the court. *Id.* at 275-76. The court denied his petition, and his time to appeal expired. *Id.* at 276-78. When the petitioner realized what had happened, he sought federal habeas relief. *Id.* at 278. But a federal district court and the Eleventh Circuit denied his petition given his procedural default in state court. *Id.* at 279. This Court reversed, reasoning that where a client is "abandoned" by his attorneys, he cannot be charged with their acts and omissions. *Id.* at 283. And in *Martinez*, the Court held that ineffective assistance of state postconviction counsel can excuse a petitioner's failure to raise a claim of ineffective assistance of trial counsel. 566 U.S. at 7-9; *see also Trevino v. Thaler,* 569 U.S. 413 (2013) (extending *Martinez* to Texas's state habeas procedure).

In *Buck v. Davis*, 580 U.S. 100 (2017), the Court ordered a federal district court to grant a Rule 60(b)(6) motion in a § 2254 action filed years after the final judgment. 580 U.S. at 104-05. The habeas petitioner's capital sentencing proceeding had been tainted by racial bias introduced by his own ineffective counsel. *Id.* at 107-08. But petitioner's counsel in his first state postconviction proceeding failed to raise the claim. *Id.* at 108-09. Thus, when petitioner brought his federal habeas petition in 2006, the district court denied his ineffective assistance claim as procedurally defaulted and unreviewable. *Id.* at 110-11.

Eight years later, in 2014, the petitioner sought to reopen the judgment under Rule 60(b)(6) on the grounds that, under *Martinez* and *Trevino*, counsel's ineffectiveness excused his procedural default. 580 U.S. at 104, 112-13. The district court denied the motion and the Fifth Circuit declined to issue a certificate of appealability. *Id.* at 113-14. This Court summarily reversed. *Id.* at 115-28. No party in *Buck* disputed that *Gonzalez* permitted consideration of the Rule 60(b) motion.

B. Factual Background

1. In March 2007, Petitioner Joseph Gamboa was convicted of capital murder by a Texas jury and sentenced to death for the killing of Ramiro Ayala and Douglas Morgan during a 2005 robbery at Taco Land, a San Antonio bar. Pet. App. 11a. Petitioner's conviction and sentence were affirmed on direct appeal. *Id.* Petitioner then filed a state habeas application, which was denied on October 24, 2014. *Id.* The Texas Court of Criminal Appeals affirmed the denial on February 4, 2015. *Id.*

a. In 2015, following his unsuccessful state habeas proceedings, petitioner filed a motion seeking appointment of counsel under 18 U.S.C. § 3599 to prepare his 28 U.S.C. § 2254 federal habeas petition. Pet. App. 11a. On March 19, 2015, the district court appointed John Ritenour, Jr., to represent petitioner and set a deadline of July 1, 2015, to file a habeas petition. *Id.* Over the next several months, Ritenour thrice moved for extensions of time to file the petition, ultimately seeking the full one-year limitations period under AEDPA, that is, through February 3, 2016. Pet. App. 11a; 28 U.S.C. § 2244(d)(1). The district court granted those motions. Pet. App. 11a.

Ritenour abandoned substantive work on petitioner's case almost immediately after his appointment. Five days after his appointment, Ritenour had a ten-minute call with state habeas counsel, Jay Brandon. ROA.665, Exh. C John Ritenour billing documents. That was the only investigation into the case that Ritenour ever conducted. *See* ROA.608-96, Exh. C John Ritenour billing documents.

Six days after his call with Brandon, and eleven days after his appointment, Ritenour made his one and only visit with petitioner before filing the federal habeas petition nearly a year later. ROA.698 at para. 3, Joseph Gamboa declaration; ROA.706-07, at para. 5, John Ritenour declaration. Petitioner brought numerous documents to that meeting, which he hoped would help

Ritenour investigate the claims petitioner thought should be raised in his petition. Those potential habeas claims included both exhausted and unexhausted claims of ineffective assistance of trial and appellate counsel, actual innocence, and claims related to his innocence of capital murder, including later-arising *Brady* claims. *See* ROA.698 at para. 3.

For example, petitioner showed Ritenour a statement by a woman who said that her husband, Efren, had committed the murders alongside petitioner's co-defendant Jose Najera, ROA.712, Exh. F Linda M. Najera blog post ("joseph gamboa did not do it. it was jose and efren my husband.that killed ram"), and petitioner told Ritenour about another potential witness who could support the woman's account, ROA 698-99, Exh. D Joseph Gamboa declaration. Notably, at petitioner's state habeas evidentiary hearing, the state for the first time disclosed the prosecutor's pretrial notes showing that the woman's husband—Efren—and Jose Najera were brothers and that Efren had been in the bar right before the shootings occurred. ROA.441-42. State habeas counsel then asserted that a *Brady* violation had occurred. ROA.442. Ritenour had access to the state habeas records and transcripts that showed this *Brady* material had not been discovered to petitioner's trial counsel. On top of the viable third-party suspect and *Brady* issue, Petitioner also pointed Ritenour to other potentially viable habeas claims.

Ritenour did not take the case materials petitioner had collected and brought to share with him. ROA.698, Exh. D Joseph Gamboa declaration. Instead—contrary to the view of petitioner's state habeas counsel, and despite having been appointed to the case only eleven days earlier—Ritenour told petitioner that he had already formed the opinion petitioner was guilty of capital murder. *Id.*

Over the ensuing months—during which he never again met with petitioner and conducted no further investigation, *see id.*; ROA.706-09, Exh. E John Ritenour declaration—Ritenour was unable to adequately prepare petitioner's habeas petition. In a motion for extension of time, Ritenour notified the district court that he had spent at least three days being treated for atrial fibrillation and would require hospitalization for a scheduled surgical procedure to take place at the end of 2015. ROA.120, Motion for Extension of Time. He also explained that in September 2015, he learned that his wife's incurable cancer had returned and that he could not work effectively. ROA.122, Motion for Extension of Time. Finally, he informed the court that he had a busy caseload, including a COA application for another client, Obie Weathers, which was due on November 16, 2015. ROA.121. Despite his personal unavailability, Ritenour did not hire an investigator or form a habeas team in conformity with the American Bar Association standards for capital counsel.[2] *See* Pet. App. 16a n.6.

b. Eleven months after his appointment and two days after the court-imposed deadline, on February 3, 2016, Ritenour filed a habeas petition.[3] Ritenour did not secure petitioner's signature or verification of the petition as required by 28 U.S.C. § 2242. *See* Pet. App. 185a-187a; ROA.201. Ritenour later acknowledged that he "did not consult with petitioner[] concerning the issues [he] did and did not include in the petition." ROA.708, Exh. E John Ritenour declaration.

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[2] *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.15.1, 31 Hofstra L. Rev. 913, 1085 (2003) ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation ….").

[3] On February 16, 2016, the district court granted Ritenour's third extension request retroactively. ROA.240, Order.

Petitioner's state appellate counsel had previously raised 18 case-specific claims of trial error, and his state habeas counsel had previously raised 29 case-specific claims for relief. *Gamboa v. State*, 296 S.W.3d 574, 577 (Tex. Crim. App. 2009); *Ex parte Gamboa*, No. WR-78,111-01, 2015 WL 514914, at *1 (Tex. Crim. App. Feb. 4, 2015); Pet. App. 326a-345a (decision on direct appeal); Pet. App. 190a-325a (state habeas petition). These claims included investigators' improper use of suggestive photo arrays, witnesses' inconsistent identification of petitioner, removal of a prospective juror and a seated juror, failure of trial counsel to conduct a sufficient mitigation investigation, and jury instructions challenges at both the guilt and sentencing phases of trial.

Despite state appellate counsel's and state habeas counsel's development of numerous case-specific claims, Ritenour's unverified petition raised only seven claims for relief; all were generic, facial challenges to the Texas death penalty statutes. Pet. App. 139a-187a (federal habeas petition). The petition did not include a single claim specific to petitioner's case. *See* Pet. App. 169a-185a. The claims section of the petition did not even include petitioner's name. *See* Pet. App. 169a-185a. All but a portion of one claim had never been raised in state court and were therefore unexhausted, procedurally defaulted, and barred. *See* Pet. App. 62a-113a (decision denying habeas). All seven claims were also substantively barred under a robust body of Fifth Circuit precedent. *See* Pet. App. 62a-113a.

With only very minor edits, all seven claims for relief that Ritenour filed were copy-and-pasted duplicates of the seven generic claims he had filed on behalf of his client Obie Weathers in 2014. *See* ROA.718-1055, Exh. H, *Weathers v. Stephens*, No. 5:06-cv-00868, Dkt. #57 (Amended petition filed Nov. 7, 2014. Denied Aug. 31, 2015). Not a single claim was specific to petitioner's case

or involved any of its unique issues. *See* Pet. App. 169a-185a. The only original work product related to petitioner's case by Ritenour was a two-sentence description of the state habeas proceedings and a few paragraphs of additional argument updating an *Apprendi* challenge to the Texas death penalty scheme.[4] Otherwise, even the typographical errors and grammatical mistakes in Mr. Weathers's petition were carried over into petitioner's application. *Compare* ROA.718-843, Exh. H, Weathers Petition, *with* ROA.148-202, Gamboa Petition.

The prayer for relief states: "Wherefore, *Mr. Weathers* prays that this Court vacate Mr. Gamboa's sentence of death, and impose a sentence of life." Pet. App.185a (emphasis added); *see also* ROA.201.

Five months before Ritenour filed his untimely habeas petition, the district court had denied relief to Mr. Weathers. In that opinion, the court held that all seven boilerplate challenges Ritenour would later copy and paste wholesale from Mr. Weathers's habeas petition into the petition in this case—and which formed the entirety of that petition—were "without arguable merit[]." *Weathers v. Stephens*, No. SA-06-CA-00868-XR, 2015 WL 5098872, at *40 (W.D. Tex. Aug. 31, 2015). Ritenour did not even address the district court's reasoning in *Weathers* in the petition in this case despite having

[4] Ritenour's records reflect that the legal research he conducted to update the *Apprendi* challenge occurred on February 2 and 3, 2016, after the court-ordered deadline had passed and shortly before his untimely filing of the petition. ROA.1060-66, Exh. I Case law printed by Ritenour; *see also* ROA.608-13, Exh. C John Ritenour billing documents. Given that Ritenour conducted no investigation of petitioner's case, and that all claims alleged by Ritenour were boilerplate, non-case-specific claims copied and pasted from another inmate's federal habeas petition, Ritenour could not have spent more than a handful of hours total preparing the habeas petition.

months of advance notice that the claims were previously denied.

Ritenour visited petitioner on February 10, 2016, to discuss the petition he had filed. *See* ROA.706-07, Exh. E John Ritenour declaration. At this meeting, petitioner expressed his displeasure that Ritenour had not investigated his case or raised any claims related to the facts of his case, including the viable claims petitioner had raised in state court. ROA.700, Exh. D Joseph Gamboa declaration. Petitioner again explained to Ritenour the factual bases for many of his potential claims, including areas that required further investigation; Ritenour ignored petitioner's objections to his decision to abandon investigation and presentation of all fact-based claims in his case, neglected to seek to amend the petition, and failed to conduct a post-filing investigation or seek discovery. *See* ROA.708-09, Exh. E John Ritenour declaration.

On April 12, 2016, respondent answered that all but a portion of one claim were procedurally defaulted because they had never been presented to the state courts and, in any event, lacked merit. ROA.249, Response to Petition. Respondent also argued that even if controlling precedent should change with regard to one of those claims, petitioner could not benefit from that (unlikely) change of law under the non-retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989). *See* ROA.247-300, Response to Petition.

Without notifying the district court or petitioner, Ritenour then failed to file a reply brief by the deadline. Ten days after the reply brief was due, he filed a motion requesting an extension of two additional weeks to file it, listing *non-capital* cases on his docket that he said had taken all his time and attention. ROA.301-06, Motion for Extension of Time. The court never ruled on the motion.

c. On May 26, 2016, twenty-four days after it was due, Ritenour filed a two-paragraph reply brief. The first paragraph summarized respondent's arguments. The second paragraph stated only:

> After considerable review and reflection, petitioner concedes that his argument regarding each of his claims has been foreclosed under currently existing, adversely decided, precedent. That said, petitioner neither waives nor abandons any issue, and continues to raise each to preserve it for further review as changes to the legal landscape may develop.

Pet. App. 137a-138a.

Ritenour did not address respondent's extensive arguments related to exhaustion and procedural default or make any other argument explaining how a federal court could grant relief on the claims he raised in the habeas petition. He made no attempt to demonstrate that, in the event that "the legal landscape may develop" favorably related to one of the claims he presented, any new rule of law would apply retroactively to petitioner's case under *Teague*. In short, Ritenour made no effort to explain how a federal court could ever grant relief on the issues he was claiming to "preserve […] for further review." Instead, he simply conceded that petitioner was not entitled to habeas relief on any of the claims he had copied and pasted from Obie Weathers's petition.

Ritenour did not consult with petitioner before conceding in the reply brief that the claims in the habeas petition were without merit and were procedurally barred, ROA.700, Exh. D Joseph Gamboa declaration, even though these concessions were devastating to petitioner's opportunity to seek federal redress. On June 8, 2016, Ritenour wrote to petitioner enclosing the reply brief. He offered the following explanation for the filing:

> As you can tell, I was forced to conclude, reluctantly, that all of the issues we raised have been foreclosed by existing court decisions. I could find no way to argue them that someone else had not thought of, and lost on, before. However, I am not giving up. I am going through everything again, starting from scratch. In addition, there are new court decisions every day that have the potential for a new claim, and I am following them for any opening.

ROA.1068, Exh. J Letter, John Ritenour to Joseph Gamboa. Ritenour did not conduct any follow-up investigations as his letter promised.

d. On June 29, 2016, less than three weeks after learning that his court-appointed counsel had unilaterally abandoned his one opportunity in federal court to challenge the constitutionality of his murder conviction and death sentence, petitioner moved *pro se* for appointment of new counsel. The motion was docketed in the district court on July 5, 2016. In his *pro se* motion, petitioner stated that Ritenour had failed to file requested claims, or appropriate claims, and failed to adequately communicate with him. Petitioner also explained that he had lost faith in Ritenour, no longer trusted Ritenour's advice, felt that Ritenour's representation had been ineffective, and believed that he and Ritenour now had "irreparable, antagonistic relationship." ROA.1070-72, Exh. K Joseph Gamboa *Pro Se* Motion to Dismiss Counsel.

The district court did not inquire into petitioner's complaints against Ritenour or his request for new counsel. Instead, on July 8, 2016, it struck his *pro se* motion for new counsel from the docket for failure to include a certificate of conference and a certificate of service. Pet. App. 120a-125a. The court alternatively denied the motion on the grounds that petitioner's *pro se* motion (1) had not alleged any "specific facts" showing an

"actual or potential conflict of interest;" (2) had not "identified with specificity any irreconcilable conflict" between himself and Ritenour; (3) had not "identif[ied] any non-frivolous claims for relief;" (4) had not identified new counsel to replace Ritenour; and (5) was sought too late because the limitations period for the filing of a federal petition had already passed. ROA.310-14, Order Striking Mot. to Dismiss Counsel. The court did not offer petitioner the opportunity to make the required showing, did not order Ritenour to respond to the allegations in petitioner's motion, and made no other inquiries.

e. On August 4, 2016, the district court denied the habeas petition, Pet. App. 40a-119a, relying on Ritenour's concession that "all of [petitioner's] claims were foreclosed by well-settled legal authority." Pet. App. 56a; ROA.327, Order (citing Ritenour's two-paragraph reply brief); ROA.1068, Exh. J Letter, John Ritenour to Joseph Gamboa.

On September 6, 2016, Ritenour filed a motion to withdraw, citing petitioner's request that he take no further action on his case. ROA.386-87, Motion to Withdraw. Again, without any inquiry, on September 8, 2016, the district court denied the motion, Pet. App. 35a-39a, because petitioner and Ritenour "failed to present this Court with a rational justification for permitting petitioner's counsel to withdraw from representation." Pet. App. 36a; ROA.392, Order on Motion to Withdraw. On September 12, 2016, petitioner filed a *pro se* notice of appeal of the court's orders denying his request for conflict-free counsel and denying his petition. ROA.399-401, Notice of Appeal.

f. On appeal, Ritenour again moved to withdraw, and the Fifth Circuit granted the motion. After obtaining new, pro bono counsel, petitioner obtained a stay of proceedings in the appeals court so that he could file a motion for relief from judgment under Federal Rule of

Civil Procedure 60(b) in the district court. In his Rule 60(b) motion, petitioner argued that Ritenour abandoned him, depriving him of the legal representation guaranteed in his federal habeas proceedings under § 3599, and that the proceedings should therefore be reopened to cure that defect. The district court denied the Rule 60(b) motion as an unauthorized successive petition and, alternatively, denied the motion on the merits for failure to show extraordinary circumstances justifying Rule 60(b) relief. Pet. App. 24a-33a. The district court also denied petitioner a COA. Pet. App. 33a.

2. Following the denial of his Rule 60(b) motion and the denial of a COA by the district court, petitioner sought a COA in the Fifth Circuit to challenge the district court's ruling on his Rule 60(b) motion.

a. The court of appeals denied the motion. Pet. App. 10a-23a. As the Fifth Circuit explained, circuit precedent holds that even allegations of "wholesale abandonment" that "depriv[e]" a prisoner of "his statutory right to counsel under § 3599" are successive habeas claims because, by definition, they seek to "re-open the proceedings for the purpose of adding new claims." Pet. App. 16a-17a (quoting *In re Edwards*, 865 F.3d 197, 204-05 (5th Cir. 2017)).

In a footnote, the Fifth Circuit recognized the seriousness of petitioner's allegations. Pet. App. 16a n.6. As the Fifth Circuit recounted:

> Gamboa claims that Ritenour's case load, ailing health, and other personal matters led Ritenour to abandon him. Specifically, he claims that Ritenour only met with him once prior to filing the habeas petition and "told [Gamboa] that he had read the state court record in [his] case and believed [Gamboa] was guilty"; that, despite the standards for federal habeas counsel in death penalty cases, Ritenour failed to form a representation team that included multiple

> attorneys, investigators, and experts; that Ritenour failed to speak to Gamboa's family members, or to investigate and prepare Gamboa's petition even after three filing extensions; that Ritenour failed to conduct legal research until the day before the filing deadline; that Ritenour ignored documents Gamboa gave him that Gamboa contends contained potential witnesses and leads; that Ritenour failed to communicate with him throughout the proceedings; that Ritenour filed a seven-claim petition that he copied and pasted from the habeas petition of another client, Obie Weathers, that contained generic, legally-foreclosed challenges to the Texas death penalty scheme; and that Ritenour filed an untimely, two-paragraph reply brief conceding the claims in the habeas petition were foreclosed.

Pet. App. 17a & n.6. But "[t]roubling though Gamboa's allegations of attorney abandonment may be," the panel explained, "reasonable jurists would not debate the district court's holding that his Rule 60(b) motion was an unauthorized successive habeas petition in light of *Edwards*." Pet. App. 17a. The Fifth Circuit therefore denied petitioner a COA. *Id.*

b. Judge Dennis wrote a concurrence to "express [his] view that *Edwards*'s holding should be reconsidered and overruled because 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." Pet. App. 18a. Judge Dennis explained his view that "*Edwards*'s broad holding that a Rule 60(b) motion alleging abandonment is [always] a successive habeas petition," Pet. App. 23a, is "overly broad and misses the mark," *id.* at 19a.

Citing this Court's decision in *Gonzalez*, 545 U.S. at 532 n.5, Judge Dennis explained that "the Supreme Court has implicitly noted that extraordinary omissions by

counsel may rise to the level of a defect in the integrity of habeas proceedings." Pet. App. 19a-20a. "In *Gonzalez*, the Supreme Court 'note[d] that an attack based on . . . habeas counsel's omissions . . . ordinarily does not go to the integrity of the [habeas] proceedings,' thereby implicitly suggesting that some omissions by counsel could rise to the level of impacting the integrity of the proceedings." Pet. App. 20a.

Judge Dennis observed that this Court in *Gonzalez* "noted with approval the Second Circuit's holding in *Harris v. United States*, 367 F.3d 74, 80-81 (2d Cir. 2004), that a Rule 60(b) motion asserting that counsel omitted a Sixth Amendment claim was a successive habeas petition." Pet. App. 20a. But in *Harris*, Judge Dennis explained, the Second Circuit excepted Rule 60(b) motions based on allegations of attorney abandonment from the general prohibition on Rule 60(b) motions. Pet. App. 20a. "This distinction exists," Judge Dennis observed, "because, unlike ordinary omissions by counsel, abandonment 'sever[s] the principal-agent relationship' and 'an attorney no longer acts, or fails to act, as the client's representative.'" Pet. App. 21a (quoting *Maples*, 565 U.S. at 281). He continued: "[A] client [cannot] be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." Pet. App. 21a (quoting *Maples*, 565 U.S. at 283).

Judge Dennis also noted that the *Edwards* rule conflicts with Fifth Circuit precedent holding that an allegation that an attorney has a conflict of interest attacks the integrity of the habeas proceedings and not the substance of the district court's resolution of the claim on the merits. Pet. App. 21a-23a. "A similar deprivation thus results from counsel's abandonment and conflict of interest, as each prevents the district court from ever

considering the petitioner's claims on the merits." Pet. App. 23a.

Judge Dennis concluded that "where, as here, a petitioner alleges that counsel abandoned him prior to filing a habeas petition and ultimately filed a petition containing only pro forma claims, allowing the petitioner to proceed with new and adequate representation would cure the defect in the habeas proceedings resulting from counsel's abandonment." Pet. App. 23a. Thus, in his view, "but for *Edwards*, Gamboa's Rule 60(b) motion would not be an unauthorized successive habeas petition." Pet. App. 23a.

3. Three and a half years after denying petitioner's COA motion, the Fifth Circuit dismissed petitioner's appeal. *See* Pet. App. 1a-9a. Petitioner's remaining claim on appeal was that that the district court should have granted his motion to substitute counsel before dismissing his habeas petition and that the case should have been remanded to the district court to undo the prejudice from the failure to grant that motion. *See* Pet. App. 5a,7a.

The Fifth Circuit rejected that argument. Pet. App. 7a. The court reasoned that granting that relief would "at a minimum, imply the invalidity of the order denying [Gamboa's] petition, as it was issued following the denial of the motion to substitute counsel." Pet. App. 7a. But under AEDPA, the Fifth Circuit panel was "powerless to vacate or invalidate the district court's judgment denying Gamboa's federal habeas petition without first issuing a COA." Pet. App. 7a. Because in the Fifth Circuit's view all of the claims in the habeas petition were meritless, none warranted a COA. Pet. App. 8a. And to the extent petitioner argued that the failure to grant him substitute counsel denied him due process by depriving him of a meaningful opportunity to be heard,

the Fifth Circuit held that that argument, too, did not warrant a COA. Pet. App. 8a-9a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE INVOLVES A SQUARE CONFLICT OVER AN EXCEPTIONALLY IMPORTANT QUESTION

The Fifth Circuit's decision exacerbates a circuit split over whether Rule 60(b) can be used to re-open a judgment where habeas counsel's abandonment prevented the consideration of a habeas petitioner's claims. The Second, Seventh, and Ninth Circuits have held that abandonment can justify Rule 60(b) relief. The Fifth Circuit, by contrast, holds that such relief is never available. As it stands, a prisoner's access to a remedy under Rule 60(b)(6) following abandonment by habeas counsel depends entirely on the circuit where the prisoner's petition is filed.

1.a. The Fifth Circuit's rule conflicts with established law in the Second Circuit. In *Harris v. United States*, 367 F.3d 74 (2d Cir. 2004), a case this Court cited favorably in *Gonzalez*, *see* 545 U.S. at 531-32, the Second Circuit explained that, unlike garden-variety claims of ineffective assistance, claims of attorney abandonment are available grounds for Rule 60(b) motions in habeas proceedings. 367 F.3d at 81. A Rule 60(b) motion can be granted, the Second Circuit opined, where a habeas petitioner "show[s] that his lawyer agreed to prosecute a habeas petitioner's case, abandoned it, and consequently deprived the petitioner of any opportunity to be heard at all." *Id.*

In *Harris*, a prisoner retained counsel to file a § 2255 petition following his conviction for wire and bank fraud. 367 F.3d at 78. The attorney worked pro bono, researched the prisoner's claims, and filed a petition that the district court denied. *Id.* at 78. The prisoner retained new counsel

and submitted a second habeas petition, which the court of appeals rejected as successive. *Id.* at 78-79. The prisoner then moved to reopen the initial habeas proceeding under Rule 60(b), arguing that the original habeas counsel was ineffective. The district court denied the motion, concluding that counsel's alleged ineffectiveness "did not subvert the integrity of the previous habeas proceeding." *Id.* at 79.

The Second Circuit affirmed. The court held that ineffective assistance of counsel does not warrant relief under Rule 60(b); instead, "[t]o obtain relief under Rule 60(b)(6), a habeas petitioner must show that his lawyer abandoned the case and prevented the client from being heard, either through counsel or *pro se*." 367 F.3d at 77, 81-82. According to the court, abandonment would be an "extraordinary circumstance" that would undermine "the integrity of [the] habeas proceeding." *Id.* at 81-82. The Second Circuit nonetheless concluded that, on the facts of the case, petitioner's attorney's performance did not rise to the level of abandonment.[5] *Id.* at 82.

b. The decision below also conflicts with law in the Ninth Circuit. In *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012), the Ninth Circuit held that "when a federal habeas petitioner has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense that has jeopardized the petitioner's appellate rights [in a federal habeas proceeding], a district court may grant relief pursuant to Rule 60(b)(6)." 682 F.3d at 1253.

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[5] *Harris* is routinely applied in the Second Circuit. *See Daniel v. T&M Prot. Res., LLC*, 844 F. App'x 433, 436 (2d Cir. 2021) (relying on the *Harris* standard); *Murph v. United States*, No. 13-CV-2594 (JMA), 2020 WL 5577731, at *5 (E.D.N.Y. Sept. 17, 2020) (same); *United States v. Ferranti*, No. 95-CR-119 (RPK), 2022 WL 1239954, at *2 (E.D.N.Y. Apr. 27, 2022) (same).

In *Mackey*, a California court sentenced a prisoner to life imprisonment for attempted murder and other crimes. *Id.* at 1248. The prisoner's postconviction attorney represented him through state habeas and the early stages of his § 2254 proceedings. *Id.* The attorney submitted the § 2254 petition but failed to file a reply. *Id.* The attorney informed the prisoner to expect a hearing date but then failed to notify him when the federal court denied the § 2254 petition without a hearing. *Id.* at 1248-49. The prisoner learned of the denial more than eight months later after contacting the district court, long after the deadline to appeal had passed. *Id.* at 1249. The district court denied the prisoner's motion to vacate and reset the appeal period, "determin[ing] that it lacked discretion to vacate the judgment pursuant to" Rule 60(b). *Id.* at 1250.

The Ninth Circuit reversed. "Under agency principles," it explained, "a client cannot be charged with the acts or omissions of an attorney who has abandoned him." *Id.* at 1253. (quoting *Maples*, 565 U.S. at 283). The court thus concluded that a district court may grant Rule 60(b)(6) relief from judgment in cases where "attorney abandonment … jeopardize[s] the petitioner's appellate rights," *id.*, and remanded with instructions to determine whether the prisoner was abandoned, *id.* at 1254.[6]

c. The law in the Fifth Circuit also directly conflicts with law in the Seventh Circuit. In *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), the Seventh Circuit held that a Rule 60(b) motion alleging a defect in the habeas proceedings based on attorney abandonment is "not a disguised second or successive motion under

[6] The *Mackey* rule is routinely applied in the Ninth Circuit. *See Brooks v. Yates*, 818 F.3d 532, 534 (9th Cir. 2016) (applying *Mackey*); *Foley v. Biter*, 793 F.3d 998, 1002-03 (9th Cir. 2015) (discussing *Mackey*).

section 2255, and thus may be evaluated on its own merit." 799 F.3d at 850.

In *Ramirez*, a prisoner's attorney filed a § 2255 petition but "he did not inform [the prisoner] of the court's decision; he failed to file any postjudgment motions; and he failed to file a notice of appeal." *Id.* at 849. The Seventh Circuit dismissed the prisoner's *pro se* notice of appeal as untimely. *Id.* The prisoner "then moved to vacate the district court's judgment under" Rule 60(b)(6), contending that his counsel "had deserted him" and that this "constituted an extraordinary circumstance warranting the reopening of the judgment" to allow for appeal. *Id.* The district court denied the motion. *Id.*

The Seventh Circuit reversed. The court reasoned that the petitioner's Rule 60(b) motion was not a "disguised second or successive motion" because he was "not trying to present a new reason why he should be relieved of either his conviction or his sentence" but rather was "trying to reopen his existing section 2255 proceeding and overcome a procedural barrier to its adjudication." *Id.* The Seventh Circuit thus held that the Rule 60(b) motion predicated on counsel's abandonment constituted one of the "rare circumstances" in which "Rule 60(b) may be used by a prisoner." *Id.* The court remanded with "instructions to grant the Rule 60(b) motion and reopen the proceedings under section 2255." *Id.* at 856.

2. In contrast with the Second, Ninth, and Seventh circuits, the Fifth Circuit held in *In re Edwards*, 865 F.3d 197 (5th Cir. 2017), that Rule 60(b) motions claiming that attorney abandonment prevented the consideration of a petitioner's claims are always second or successive habeas applications. In *Edwards*, a prisoner filed a § 2254 petition following conviction for capital murder. 865 F.3d at 201. After the district court denied the petition, the prisoner moved for Rule 60(b) relief, arguing "that he was

effectively abandoned by his federal habeas counsel." *Id.* at 202. The district court denied the motion, and the Fifth Circuit affirmed. *Id.* at 201.

The Fifth Circuit noted that because the prisoner "stressed that he was not seeking to advance any [new] claims" through the motion, the court would consider it a "Rule 60(b) [motion] regarding alleged abandonment." *Id.* at 204. The court determined that the motion was nonetheless "a successive claim" because it sought to "re-open proceedings for the purpose of adding new claims." *Id.* The Court opined that where attorney abandonment results in a habeas petition failing to include claims, the Rule 60(b) motion necessarily "seeks to re-open the proceedings for the purpose of adding new claims," and that "is the definition of a successive claim." *Id.* at 204-05.

The Fifth Circuit routinely applies this rule to deprive habeas petitioners of Rule 60(b) relief, including in capital cases. *See, e.g.*, *Runnels v. Davis*, 746 F. App'x 308, 314-15 (5th Cir. 2018) (applying *Edwards* to recharacterize Rule 60(b) motion alleging attorney abandonment as a second or successive petition in capital case; petitioner later executed); *Preyor v. Davis*, 704 F. App'x 331, 343 (5th Cir. 2017) (same; petitioner later executed); *see also In re Garcia*, 756 F. App'x 391, 393-94 (5th Cir. 2018) (similar); *see also In re Robinson*, 917 F.3d 856, 863-64 (5th Cir. 2019) (similar).

3. Judge Dennis recognized the conflict between the Fifth Circuit's *Edwards* decision and the Second Circuit's *Harris* decision in his concurrence below. Pet. App. 20a-21a. Judges in other circuits likewise have urged that Rule 60(b) relief be available in instances of abandonment. Dissenting from the Eighth Circuit's denial of en banc rehearing of a Rule 60(b) ineffective-assistance-of-counsel claim, for example, Judge Kelly urged the circuit to clarify whether a Rule 60(b) motion would be proper "where the petitioner's counsel entirely abandoned him or her."

United States v. Lee, 811 F.3d 272, 275 (8th Cir. 2015) (Kelly, J., dissenting from denial of en banc rehearing). Judge Wilson on the Eleventh Circuit likewise argued in dissent that "abandonment" "constitutes the kind of 'extraordinary circumstances' that Rule 60(b)(6) exists to correct." *White v. Jones*, 408 F. App'x 293, 296-97 (11th Cir. 2011) (Wilson, J., dissenting); *see also Franqui v. Florida*, 638 F.3d 1368, 1378 (11th Cir. 2011) (Wilson, J., dissenting) (urging the court to allow Rule 60(b) relief for "an extraordinary omission by counsel" where "bad-faith actions by [a petitioner's] own counsel" deny him the opportunity to have his best claims heard in federal court).

* * * * *

The circuits are in irreconcilable conflict over the correct application of *Gonzalez* to Rule 60(b) motions alleging attorney abandonment. Only the Fifth Circuit takes the uncompromising view that a Rule 60(b) motion alleging attorney abandonment is *always* a second or successive habeas application. And there is no chance that the Fifth Circuit will reconsider: It denied rehearing en banc in this case and, as explained above, it routinely applies *Edwards* to affirm the denial of Rule 60(b) motions. Given the stakes of this capital case, resolution is not only warranted but urgent.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

This petition raises an issue of profound national significance. The *Edwards* rule is fundamentally flawed, with life-and-death consequences. This Court's precedents underscore the injustice of the rigid *Edwards* rule, which contravenes AEDPA's approach—reflected most in *Holland*—of providing relief in extraordinary habeas cases. Although AEDPA tightened common law restrictions on repeat habeas applications, *see* 28 U.S.C. § 2244(b), it also preserved the basic principle that "[a]

state prisoner is entitled to one fair opportunity to seek federal habeas relief from his conviction," *Banister*, 140 S. Ct. at 1702. When habeas counsel's abandonment deprives his client of this vital opportunity, it constitutes a fundamental "defect in the integrity of the federal habeas proceedings" and therefore may be "attack[ed]" and set aside by a Rule 60(b) motion. *Gonzalez*, 545 U.S. at 532.

The Fifth Circuit's rule produces an absurd outcome, punishing a habeas petitioner when his own counsel abandons him. Such twisted rules erode public confidence in the fairness and integrity of the justice system. The Fifth Circuit's rule is particularly ill-suited to cases involving the death penalty, where Rule 60(b) may be a petitioner's last chance to correct a grievous error before execution.

1. The categorical rule against Rule 60(b) motions based on attorney abandonment in habeas cases, which the court below derived from its earlier decision in *Edwards*, is obviously wrong. When, as in this case, an attorney abandons a client by filing a sham habeas petition and conceding every claim, a Rule 60(b) motion seeking to reopen the judgment on that basis "attacks[] not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* The original habeas petition is "not constructively attributable to the petitioner," because "[c]ommon 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." *Holland*, 560 U.S. at 659 (Alito, J., concurring in part and concurring in the judgment); *see also Downs v. McNeil*, 520 F.3d 1311, 1320-21 (11th Cir. 2008) (collecting cases). The original habeas petition, in other words, is in no meaningful sense a habeas petition brought by the petitioner.

Thus, when a petitioner in such a case seeks to reopen the judgment to file a true habeas petition, he is seeking not to "*add* a new ground for relief," *Gonzalez*, 545 U.S. at 532 (emphasis added), but rather to bring the claims that an obstacle beyond his control—attorney abandonment—prevented the court from considering. Just as "fraud on the habeas court" that prevents a petitioner from bringing a claim warrants reopening a judgment, *id.* at 532 n.5, so too must attorney abandonment with the same consequence. The filing of a sham petition by "an attorney who is not operating as [petitioner's] agent in any meaningful sense of that word," *Holland*, 560 U.S. at 659 (Alito, J.), is akin to fraud on the habeas court.

Any alternative interpretation of AEDPA, Rule 60(b), and *Gonzalez* would be nonsensical. As noted, a petitioner whose counsel fails to file a petition *at all* may be entitled to equitable tolling. *See Christeson*, 574 U.S. at 378 (citing *Holland*, 560 U.S. at 651-52). In that case, the petitioner is entitled to relief from counsel's abandonment. But under the Fifth Circuit's rule, a petitioner whose counsel files a *sham* petition *within* the deadline—abandoning the petitioner in every practical sense—deprives the petitioner of any relief. In the Fifth Circuit, therefore, the lawyer who files nothing at all does the petitioner a service compared to the lawyer who files a makeweight petition. Similarly, as the Court recognized in *Buck*, Rule 60(b) can be used to overcome a procedural default by state postconviction counsel even years after the fact. *See* 580 U.S. at 104-05. But under the Fifth Circuit's rule, a petitioner whose federal habeas counsel abandons him by filing a sham petition has no recourse even if, as in this case, he immediately takes every measure available to remedy the misconduct. Those inconsistencies in AEDPA's interpretation and application are indefensible.

"[S]tatutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 165 (1951) (Frankfurter, J., concurring). AEDPA, no less than other statutes, observes that basic rule of construction: it plainly preserves access to the Rule 60(b) remedy in extraordinary situations like this, where habeas counsel abandons his client.

2. The correct disposition of the question presented is critical to federal habeas petitioners. Rule 60(b) often stands as the sole recourse in instances of attorney abandonment, because by the time misconduct by habeas counsel comes to light, it is frequently too late to rectify the forfeiture. Federal habeas counsel is entrusted with a substantial degree of faith by the federal judiciary. Incarcerated federal-habeas petitioners have limited means to oversee their counsel's performance and ensure that their interests are genuinely represented. The whole point of legal representation is that clients are less equipped than attorneys to investigate the pertinent facts of their cases, connect those facts with the legal arguments most likely to secure relief, and—perhaps most importantly—navigate the court system. For these reasons, an attorney's abandonment of a client can be difficult for the client to detect and rectify until it is too late—unless the judgment can be reopened.

The correct disposition of the question presented is especially important for the fair resolution of capital habeas cases. Congress gave each state prisoner a right "to one fair opportunity to seek federal habeas relief from his conviction." *Banister*, 140 S. Ct. at 1702, 1704. And in 18 U.S.C. § 3599, Congress gave capital petitioners a statutory right to habeas counsel in those proceedings. *See Martel v. Clair*, 565 U.S. 648, 652 (2012). By providing a statutory right to appointed counsel, Congress

expressed its intent that *greater* protections should apply to capital petitioners' federal habeas claims to ensure "fundamental fairness in the imposition of the death penalty." *See McFarland v. Scott*, 512 U.S. 849, 859 (1994). "Congress" does not enact "self-defeating statute[s]." *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019). Congress designed capital habeas proceedings to provide for counsel, so abandonment by definition impairs those proceedings. Congress clearly did not intend to preclude capital habeas petitioners from securing habeas relief in cases of abandonment by the very attorneys Congress provided them by statute.

3. This petition is an excellent vehicle to address the question presented. Petitioner raised the question presented at every stage of this case: he sought a COA and rehearing en banc from the Fifth Circuit, which rejected his argument, opining that "[t]roubling though [petitioner's] allegations of attorney abandonment may be, reasonable jurists would not debate the district court's holding that his Rule 60(b) motion was an unauthorized successive habeas petition in light of *Edwards*." Pet. App. 17a. This case presents a question of life-or-death importance to petitioner and to other habeas petitioners nationwide, and it is an ideal case in which to address it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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