No. _____

IN THE

Supreme Court of the United States

RAMIRO FELIX GONZALES,

Petitioner,

v.

LORIE DAVIS,

DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Respondent.

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

PETITIONER'S APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-70024

United States Court of Appeals
Fifth Circuit
FILED
September 17, 2019
Lyle W. Cayce
Clerk

RAMIRO F. GONZALES,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:10-CV-165

Before HIGGINBOTHAM, DENNIS, and GRAVES, Circuit Judges.

PER CURIAM:*

Petitioner Ramiro Gonzales seeks a COA to challenge the district court's dismissal of his Rule 60(b)(6) motion as an unauthorized successive petition over which it lacked jurisdiction. Because our precedent squarely establishes that Gonzales's motion is not a successive petition, we GRANT a COA on this issue and VACATE the portion of the district court's order dismissing

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Gonzales's motion as successive. Gonzales further requests a COA on the district court's alternative ruling that, if his Rule 60(b) motion was not a successive petition, it should be denied. Because reasonable jurists could not debate the correctness of the district court's denial of relief under Rule 60(b)(6), we DENY a COA on this issue.

I

We previously discussed the facts and procedural history in this case at length in our 2015 decision denying a COA. *See Gonzales v. Stephens*, 606 F. App'x 767, 768 (5th Cir. 2015). Relevant here, a jury found Gonzales guilty of capital murder and sentenced him to death. *Id.* at 768–70. The Texas Court of Criminal Appeals (CCA) affirmed Gonzales's conviction and death sentence on direct appeal and denied his state habeas application. *Id.* at 771.

In 2011, Gonzales filed a federal habeas petition under 28 U.S.C. § 2254 claiming, among other things, that his trial counsel were ineffective for failing to obtain experts to present mitigating evidence that Gonzales suffered from Fetal Alcohol Spectrum Disorder (FASD).[1] The district court denied Gonzales's request for expert funding under 18 U.S.C. § 3599(a) and denied his ineffective assistance of counsel (IATC) claim, finding that it was procedurally defaulted and, alternatively, that it "would fail on the merits." *Id.* at 770. We denied a COA, reasoning that "[t]here is no evidence suggesting that Gonzales's trial counsel conducted less than a reasonable investigation" and that, specifically, trial counsel was not ineffective for failing to obtain experts to present mitigation evidence of FASD. *Id.* at 771–72.

[1] The district court stayed proceedings in federal court to allow Gonzales to exhaust this and other newly presented claims in state court. The CCA dismissed Gonzales's state habeas application as an abuse of the writ and denied a pending motion for investigative funding in the same order. *See Ex Parte Gonzales*, WR-70,969-01, 2012 WL 340407, at *1 (Tex. Crim. App. Feb. 1, 2012). After the state court's judgment, the district court lifted the stay on Gonzales's federal habeas proceeding.

In 2018, the Supreme Court decided *Ayestas v. Davis*, in which it rejected this court's previous articulation of the standard for obtaining funding for "investigative, expert, or other reasonably necessary services" under § 3599(a). 138 S. Ct. 1080, 1092 (2018) (internal quotations omitted). In light of *Ayestas*, Gonzales filed a Rule 60(b)(6) motion in the district court, challenging its earlier denial of funding for an expert investigation to support his IATC claim. Gonzales argued that the denial of expert funding under this court's prior, incorrect standard resulted in a defect in the integrity of his federal proceedings and that the *Ayestas* decision constituted extraordinary circumstances justifying relief under Rule 60(b)(6). The district court denied the Rule 60(b) motion, determining that (1) the motion constituted an unauthorized successive habeas petition that it lacked jurisdiction to consider; and (2) alternatively, no extraordinary circumstances existed under Rule 60(b)(6) to justify relief from judgment. The district court denied a COA on both its dismissal for lack of jurisdiction and its alternative denial of the motion.

II

"Before a second or successive application permitted by [§ 2244] is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244. "We review a district court's determination as to whether a Rule 60(b) motion constitutes a second-or-successive habeas petition de novo." *In re Edwards*, 865 F.3d 197, 202–03 (5th Cir. 2017).

A Rule 60(b) motion is properly construed as a successive habeas petition where it "seeks to add a new ground for relief," or "attacks the federal court's previous resolution of a claim *on the merits*." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). However, motions that "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," are not successive petitions. *Id.* Since issuance of the district court's order in this case, this court has held that a Rule 60(b)(6) motion seeking reconsideration based on *Ayestas*'s change to the standard for funding requests, so long as it does not also revisit the merits of other claims, goes to a defect in the proceedings rather than the merits and therefore "is not a successive habeas petition." *Crutsinger v. Davis*, 929 F.3d 259, 264, 266 (5th Cir. 2019). In light of *Crutsinger*, the district court erred in determining that Gonzales's Rule 60(b) motion was a successive petition. Accordingly, we GRANT a COA on this issue and,[2] reaching the merits of Gonzales's claim on this point,[3] VACATE the district court's judgment of dismissal.

Because the district court's determination that the motion was a successive petition was incorrect, it had jurisdiction to engage in what it called the "alternative analysis"—whether Gonzales was entitled to relief under Rule 60(b)(6). We now take up that question. *See Crutsinger*, 929 F.3d at 266 (considering district court's analysis under Rule 60(b)(6) because the district

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[2] Although Gonzales asserts in his opening brief that a COA is not required for us to consider this issue, we held in *Resendiz v. Quarterman* that "'[a] district court's dismissal of a motion on the ground that it is an unauthorized successive collateral attack constitutes a final order within the scope of 28 U.S.C. § 2253(c), and therefore a certificate of appealability is required.'" 454 F.3d 456, 458 (5th Cir. 2006). Gonzales argues for the first time in his reply brief that *Resendiz* was tacitly overruled by the Supreme Court's decision in *Harbison v. Bell*, 556 U.S. 180 (2009). However, we do not consider arguments raised for the first time in a reply brief. *See In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 460 (5th Cir. 2010). A COA is therefore required for Gonzales to proceed.

The State argues that Gonzales has forfeited his ability to seek a COA on this issue because he failed to explicitly request one. Nevertheless, we construe Gonzales's appeal of this issue as a petition for a COA. *Cf. Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc) ("[W]e have oft stated that the relief sought, that to be granted, or within the power of the Court to grant, should be determined by substance, not a label." (cleaned up)).

[3] *See Kunkle v. Dretke*, 352 F.3d 980, 983 (5th Cir. 2003) (granting COA and reaching the merits in the same opinion).

court "ha[s] jurisdiction to consider the Rule 60(b)(6) motion" where petitioner's motion "is not a successive habeas petition").

III

We ordinarily review a district court's denial of a Rule 60(b) motion for abuse of discretion. *See Buck v. Davis*, 137 S. Ct. 759, 777 (2017). However, a COA is required to proceed with a claim of error as to the district court's denial of relief under Rule 60(b). *See Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007). Accordingly, at the COA stage, we ask "whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Buck*, 137 S. Ct. at 777.

Rule 60(b) allows for "wide discretion in courts," but "relief under Rule 60(b)(6) is available only in extraordinary circumstances." *Id.* (cleaned up). Such circumstances "may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Id.* at 778 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863–64 (1988)). However, courts consistently recognize that a change in law after final judgment on a habeas petition does not necessarily constitute extraordinary circumstances. *Compare Gonzalez*, 545 U.S. at 536; *Adams v. Thaler*, 679 F.3d 312–20 (5th Cir. 2012) (explaining that Supreme Court decisions changing governing law on procedural default did not constitute extraordinary circumstances), *with* 588 U.S. ___ (2019) (Sotomayor, J., concurring) ("*Gonzalez* left open the possibility that in an appropriate case, a change in decisional law, alone, may supply an extraordinary circumstance justifying Rule 60(b)(6) relief.").

Gonzales argues in his motion for COA that it was not merely the change in decisional law brought about in *Ayestas*, but also the ineffectiveness of both his trial counsel and state habeas counsel, that created extraordinary circumstances warranting relief from judgment. However, we already rejected

Gonzales's contention that his state habeas counsel was ineffective, denying a COA on that issue in our earlier ruling. *See Gonzales*, 606 F. App'x at 772–73. In that same ruling, we held that "Gonzales has failed to raise a substantial claim of ineffective assistance of trial counsel." *Id.* at 772. On these facts, then, no reasonable jurist could conclude that the district court abused its discretion in finding no extraordinary circumstances exist. *See Buck*, 137 S. Ct. at 777. Accordingly, we DENY a COA as to the district court's judgment denying Gonzales's Rule 60(b) motion.

***

For these reasons, a COA is GRANTED as to the district court's successiveness finding and the portion of the district court's judgment dismissing Gonzales's motion as successive is VACATED, but a COA is DENIED as to the district court's determination that Gonzales was not entitled to relief under Rule 60(b)(6). Because this disposition does not entitle Gonzales to relief, remand is unnecessary.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
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NEW ORLEANS, LA 70130

September 17, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 18-70024 Ramiro Gonzales v. Lorie Davis, Director
USDC No. 5:10-CV-165

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By: _____
Debbie T. Graham, Deputy Clerk

Enclosure(s)

Mr. Michael Clark Gross
Mr. Jason Douglas Hawkins
Mr. Matthew Dennis Ottoway
Mr. Jeremy Schepers

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RAMIRO F. GONZALES,	§	
TDCJ No. 999513,	§	
	§	
Petitioner,	§	
	§	**CIVIL NO. SA-10-CA-165-OLG**
v.	§	
	§	*** DEATH PENALTY CASE ***
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER ON MOTION FOR RELIEF FROM JUDGMENT

Pending before the Court are Petitioner Ramiro Gonzales's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) (ECF No. 44) and Respondent's opposition (ECF No. 46) thereto. Petitioner is a Texas death-row inmate who previously and unsuccessfully sought both state and federal habeas corpus relief. His post-conviction challenges culminated in the Supreme Court's denial of his petition for certiorari review in December 2015. *Gonzales v. Stephens*, 136 S. Ct. 586 (2015).

Citing the Supreme Court's recent decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), Petitioner now asks this Court to reopen his federal habeas proceedings, vacate the Court's Opinion denying relief (ECF No. 34), and reconsider the Court's previous denial of funding for expert services (ECF No. 27). After carefully considering the pleadings and relief sought by Petitioner, however, the Court has concluded Petitioner's motion is actually a successive petition over which this Court lacks jurisdiction. Alternatively, Petitioner has not demonstrated the extraordinary circumstances necessary for relief under Rule 60(b)(6). Petitioner's motion will therefore be dismissed for lack of jurisdiction and denied in the alternative.

I. Background

In August and September 2006, Petitioner was convicted of capital murder and sentenced to death for the kidnapping, rape, robbery, and murder of Bridget Townsend. His conviction and sentence were affirmed on direct appeal, and certiorari was denied by the United States Supreme Court. *Gonzales v. State*, No. 75,540, 2009 WL 1684699 (Tex. Crim. App. June 17, 2009) (unpublished); *Gonzales v. Texas*, 559 U.S. 942 (2010). While his direct appeal was still pending, Petitioner also filed an eight-page state habeas application raising four claims for relief. This state habeas application was denied by the Texas Court of Criminal Appeals in September 2009. *Ex parte Gonzales*, No. 70,969-01, 2009 WL 3042409 (Tex. Crim. App.).

Represented by new counsel, Petitioner filed his original federal habeas corpus petition in this Court in January 2011, and sought a stay and abeyance so that he may return to state court to exhaust new claims not previously raised in his first state habeas proceeding. ECF Nos. 12, 13. Petitioner also requested over $40,000 in funding for investigative and expert assistance to help support these new claims, including an ineffective-assistance-of-trial-counsel (IATC) claim alleging counsel were ineffective for (1) failing to investigate and present evidence that he suffered from Fetal Alcohol Spectrum Disorder (FASD), and (2) failing to obtain an expert to evaluate and present evidence of "the sexual, emotional, physical, and biological effects of childhood sexual abuse." ECF No. 14. On January 31, 2011, this Court granted Petitioner's request to stay and held in abeyance Petitioner's request for funding pending the results of his return to state court. ECF No. 16.

Upon returning to state court, Petitioner raised six new claims for relief in his second state habeas corpus application, including the IATC claim previously mentioned, which the Texas Court of Criminal Appeals ultimately dismissed as an abuse of the writ. *Ex parte*

Gonzales, No.70,969-02, 2012 WL 340407 (Tex. Crim. App. 2012). The state court also dismissed Petitioner's motion for funding of expert assistance. *Id.* Thereafter, this Court lifted the previously-issued stay and set briefing deadlines for Petitioner's federal habeas proceedings. ECF No. 26. The Court also denied without prejudice Petitioner's motion for funding for investigative and expert assistance. ECF No. 27. Following the submission of Petitioner's amended federal habeas petition and Respondent's answer, the Court denied relief in a Memorandum Opinion and Order dated January 15, 2014. ECF No 34. Specifically, with regard to Petitioner's new IATC claims, the Court determined the claims were procedurally defaulted and alternatively failed on the merits as well. This determination was affirmed by the Fifth Circuit in April 2015 in an unpublished opinion, and certiorari was then denied by the Supreme Court. *Gonzales v. Stephens*, 606 Fed. Appx. 767 (5th Cir. 2015); *Gonzales v. Stephens*, 136 S. Ct. 586 (2015).

On May 22, 2018—over four years after this Court denied federal habeas relief—Petitioner filed the instant motion requesting that the Court reopen these proceedings under Rule 60(b)(6) in order to reconsider the denial of funding for investigative and expert assistance pursuant to 18 U.S.C. § 3599. Citing the *Ayestas* opinion, Petitioner contends the Court erred in denying funding by failing to apply the correct standard governing such requests under § 3599. This "misapprehension" of the correct standard, Petitioner argues, constitutes a defect in the integrity of the proceedings that tainted the post-conviction review process and amounted to an extraordinary circumstance sufficient to justify reopening the habeas proceedings. As such, Petitioner asks to be restored to the position he was in just prior to the issuance of this Court's denial of § 3599 funding.

II. Successive Petition

A district court has jurisdiction to consider a Rule 60 motion in habeas proceedings so long as the motion "attacks, not the substance of the federal court's resolution of the claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A motion that seeks to add a new ground for relief or attack the previous resolution of a claim on the merits is, in fact, a successive petition subject to the standards of 28 U.S.C. § 2244(b). *Id.* at 531-32; *In re Sepulvado*, 707 F.3d 550, 552 (5th Cir. 2013). A Rule 60 motion is also a subsequent petition when it presents new evidence in support of a claim already litigated, or when it asserts a change in the substantive law governing the claim. *Id.*; *Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007).

By contrast, a motion that shows "a non-merits-based defect in the district court's earlier decision on the federal habeas petition" falls within the jurisdiction of the district court to consider. *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010). In other words, if the Rule 60 motion only attacks a "defect in the integrity" of the petitioner's federal habeas proceedings, the motion shall not be treated as a second-or-successive petition. *Gonzalez*, 545 U.S. at 532. However, because such procedural defects are "narrowly construed," it is extraordinarily difficult to establish. *In re Coleman*, 768 F.3d 367, 371-72 (5th Cir. 2014). A procedural defect includes fraud on the habeas court, as well as previous rulings which precluded a merits determination—for example, "a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* (citing *Gonzalez*, 545 U.S. at 532 n.4).

Petitioner argues his request for Rule 60 relief is not a successive habeas petition because it is solely an attack on a defect in his prior habeas proceedings—the denial of § 3599 funding under the allegedly incorrect standard. Petitioner purportedly does not seek to advance new

claims nor attack this Court's substantive ruling on existing claims, but rather only wishes to litigate his entitlement to funding under § 3599 pursuant to the correct standard annunciated in *Ayestas*. But such a statement is misleading. Although Petitioner ostensibly seeks only to relitigate his entitlement to funding for expert assistance, it is beyond question that such funding, if eventually granted, would be used to develop evidence that would support the IATC allegations mentioned previously. Because Petitioner's Rule 60 motion essentially seeks to present new evidence in support of these claims, it is a subsequent petition. *Gonzalez*, 545 U.S. at 531-32; *Ruiz*, 504 F.3d at 526.

Furthermore, by asking to be "restored" to the position he was in before funding was originally denied, Petitioner all but announces his intention to relitigate the underlying IATC claims once funding is granted. It thus appears Petitioner's Rule 60 motion is simply a means to re-open the proceedings for the ultimate purpose of resurrecting IATC claims this Court has already adjudicated on the merits. That is the very definition of a successive petition. *See United States v. Hernandes*, 708 F.3d 680, 682 (5th Cir. 2013) (finding Rule 60(b) motion to be a "[§ 2254] motion in disguise" because it attacked federal court's previous resolution of claim on the merits). Moreover, the alleged defects in this case did not preclude a merits determination of Petitioner's procedurally-defaulted IATC claims. *In re Coleman*, 768 F.3d at 371-72. Quite the opposite, the district court adjudicated the claims in the alternative on the merits and denied relief, and the Fifth Circuit denied review when the claims were raised on appeal. Although Petitioner may allege the review ultimately given by the district court and Fifth Circuit was lacking because it was without the benefit of the additional expert testimony obtained by the § 3599 funding, such an argument is substantive rather than procedural.

Petitioner disagrees with the result of the previous proceedings and is essentially asking "for a second chance to have the merits determined favorably." *Id.* at 372. Because the alleged procedural defect is simply an attempt to circumvent § 2244, however, the Rule 60 motion must be dismissed. *Hernandes*, 708 F.3d at 681. Petitioner has not obtained leave from the Fifth Circuit Court of Appeals to file a successive habeas petition as dictated by § 2244(b)(3)(A). Therefore, this Court lacks jurisdiction to consider the motion. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (§ 2244(b)(3)(A) "acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition" until the appellate court has granted petitioner permission to file one).

III. Alternative Analysis

Even if Petitioner were able to show that his motion is not a successive petition, he has not shown extraordinary circumstances that would justify Rule 60(b) relief. Pursuant to Rule 60(b)(6), a court may reopen a final judgment when a party shows "any other reason that justifies relief." But while considered a "grand reservoir of equitable power to do justice," Rule 60(b)(6) relief is available only if "extraordinary circumstances" are present. *Gonzales*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)); *Rocha v. Thaler*, 619 F.3d 387, 400 (5th Cir. 2010). In determining whether extraordinary circumstances are present, a court may consider a wide range of factors, including "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017) (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 (1988)).[1] However, the Supreme Court has stated that "[s]uch circumstances will rarely

[1] The Fifth Circuit has also articulated a number of other equitable factors relevant to the Rule 60(b) inquiry: (1) that final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether the judgment was a default or a dismissal in

occur in the habeas context." *Gonzales*, 545 U.S. at 535. And indeed, such circumstances do not exist in this case.

Petitioner contends this Court's denial of § 3599 funding during his federal habeas proceeding constitutes an extraordinary circumstance sufficient to warrant re-opening the judgment. According to Petitioner, the denial of funding was due, in part, to the overly burdensome "substantial need" standard imposed by the Fifth Circuit in such circumstances which was recently rejected by the Supreme Court in *Ayestas*. 138 S. Ct. at 1093 (finding the "substantial need" standard carries a heavier burden than the "reasonably necessary" standard set forth in the statute). However, a change in decisional law does not, on its own, constitute an extraordinary circumstance warranting relief from judgment. *Gonzalez*, 545 U.S. at 536; *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (citing *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990)).

Even assuming *Ayestas* could potentially constitute an extraordinary circumstance, it would have no effect on this case because, in rejecting Petitioner's request for funding, this Court never cited nor relied on the "substantial need" test denounced in *Ayestas*. ECF No. 27. Instead, the Court determined Petitioner failed to satisfy either the standards for discovery set forth in Rule 6(a) of the Rules Governing Section 2254 Proceedings or the "reasonably necessary" standard for expert funding set forth in 18 U.S.C. § 3599(g)(2).[2] *Id.* at 6. Such a determination is hardly an extraordinary circumstance, particularly when there is nothing to indicate the decision was influenced by the "substantial need" test as Petitioner contends.

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which there was no consideration of the merits and whether there is merit in the movant's claim or defense; (6) whether the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack. *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

[2] Section 3599(g)(2) states, in part, that funding for "investigative, expert, and other *reasonably necessary* services authorized under subsection (f) shall not exceed $7,500 in any case unless payment in excess of that limit is certified by the court . . . and approved by the chief judge of the circuit." (emphasis added).

Petitioner acknowledges that the change in decisional law effectuated by *Ayestas* is insufficient, on its own, to demonstrate an extraordinary circumstance. He maintains, however, that the balance of equities weighs in his favor because he has demonstrated substantial IATC claims in that a reasonable attorney would consider the requested funding for experts to be sufficiently important. But whether there is merit in the IATC claims only becomes a relevant factor in the Rule 60(b) analysis if "there was no consideration of the merits" in the first place. *Seven Elves*, 635 F.2d at 402. That is not the case here. To the contrary, the Court thoroughly reviewed in the alternative the merits of Petitioner's defaulted IATC claims and denied relief. Thus, the fact Petitioner was given a fair opportunity to present him claims and these claims were adjudicated on the merits during the original federal habeas proceedings do not weigh in Petitioner's favor.

The majority of the remaining equitable factors mentioned in *Seven Elves* also weigh against granting Rule 60(b)(6) relief. In addition to the fact that Petitioner's IATC claims were rejected on the merits, the Court also takes into account the fact that "final judgments should not be lightly disturbed." *Seven Elves*, 635 F.2d at 402. Indeed, finality is a particularly strong consideration in the habeas context. *See Diaz v. Stephens*, 731 F.3d 370, 376 n. 1 (5th Cir. 2013) (holding that, "in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting.). Petitioner was convicted by a jury in state court nearly twelve years ago, and has unsuccessfully sought habeas relief in both state and federal court. Thus, the "State's strong interest in the finality of [Petitioner's] conviction and sentence[] and the delay that will undoubtedly result from reopening this long-closed case all weigh in favor of denying [his] Rule 60(b)(6) motion." *Id.* at 378.

The Court also takes into account whether the Rule 60(b) motion is being "used as a substitute for appeal" and whether the motion "was made within a reasonable time." *Seven Elves*, 635 F.2d at 402. Petitioner did not appeal this Court's denial of funding under § 3599, and it appears the underlying purpose of the instant motion is to eventually force the Court to review the merits of his IATC claims afresh. As such, he is impermissibly using Rule 60(b)(6) as a "substitute for appeal." *Seven Elves*, 635 F.2d at 402; *see also Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002) ("Rule 60(b)(6) motions are not substitutes for timely appeals."). Moreover, Petitioner challenges the denial of funding from September 2012 (ECF No. 27) and seeks to set aside a judgment that became final in December 2015 (ECF No. 41). Given that the *Ayestas* opinion has no bearing on the Court's denial of funding, Petitioner has provided no reason why this motion could not have been presented sooner. His motion, therefore, has not been presented "within a reasonable time." *Seven Elves*, 635 F.2d at 402.

In sum, Petitioner fails to establish any risk of "injustice to the parties" or of "undermining the public's confidence in the judicial process," much less that "extraordinary circumstances" exist to grant Rule 60(b) relief. *Buck*, 137 S. Ct. at 777-78; *Seven Elves*, 635 F.2d at 402.

IV. Conclusion

The Court concludes that Petitioner's Rule 60 motion should be construed as a successive petition and dismissed without prejudice for want of jurisdiction. Alternatively, the motion is without merit because Petitioner has not established an extraordinary circumstances that would justify relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Accordingly, based on the foregoing reasons, **IT IS HEREBY ORDERED** that:

1. Petitioner's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b), filed May 22, 2018 (ECF No. 44), is **DISMISSED** without prejudice for want of jurisdiction. Alternatively, the Motion for Relief from Judgment is **DENIED**;

2. No certificate of appealability shall issue in this case, as reasonable jurists could not debate the denial or dismissal of Petitioner's motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); and

3. All other remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this the 3 day of July, 2018.

ORLANDO L. GARCIA
Chief United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RAMIRO FELIX GONZALES, TDCJ No. 999513,	§	
Petitioner,	§	
V.	§	**CIVIL NO. SA-10-CA-165-OG**
RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
Respondent.	§	

ORDER GRANTING STAY

The matters before this Court are (1) petitioner's motion for stay and abeyance, filed January 25, 2011, docket entry no. 13, and (2) petitioner's motion requesting approximately thirty-five thousand dollars in funding for expert assistance to conduct an investigation into petitioner's background and neuropsychological evaluation of petitioner to determine whether petitioner suffers from fetal alcohol syndrome, filed January 25, 2011, docket entry no. 14.

Motion for Stay

Petitioner filed his original federal habeas corpus petition in this cause on January 20, 2011, docket entry no, 12, asserting therein a claim of ineffective assistance premised in part upon petitioner's trial counsel's failure to request or obtain the assistance of a variety of experts whom petitioner now alleges could have furnished a wide range of additional, potentially

mitigating, evidence. Petitioner's trial counsel had the assistance of an mental health expert (i.e., a neuropsychologist) who testified during petitioner's capital murder trial. Petitioner argues this expert inadequately tested and evaluated petitioner for fetal alcohol syndrome. Petitioner argues his trial counsel should have obtained the services of a fetal alcohol syndrome expert to properly test petitioner and offer testimony regarding same. Petitioner also now argues that, while there was testimony regarding petitioner's childhood history of sexual abuse at the hands of a relative, the failure of petitioner's trial counsel to secure the assistance and testimony of experts on the impact of sexual abuse and substance abuse on petitioner amounted to ineffective assistance.

Petitioner admits he failed to exhaust state remedies on this "expanded" ineffective assistance claim. Petitioner requests that this Court stay this cause so as to permit petitioner to return to state court and exhaust state habeas remedies on this new, unexhausted, ineffective assistance claim. Petitioner argues his original state habeas counsel failed to perform in a diligent manner, thus preventing petitioner from fairly presenting his currently unexhausted claims during his initial state habeas corpus proceeding.

In a situation similar to petitioner's herein, this Court dismissed Rolando Ruiz's unexhausted federal habeas corpus claims

as procedurally defaulted without permitting Ruiz an opportunity to return to state court and exhaust available state habeas remedies on same. *Ruiz v. Dretke*, 2005 WL 2146119 (W.D. Tex. August 29, 2005); *Ruiz v. Dretke*, 2005 WL 2402503 (W.D. Tex. September 13, 2005); *Ruiz v. Dretke*, 2005 WL 2402669 (W.D. Tex. September 15, 2005). The Fifth Circuit effectively affirmed this Court's denial of federal habeas relief when it denied petitioner's request for a Certificate of Appealability. *Ruiz v. Quarterman*, 460 F.3d 638 (5th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007).

Ruiz subsequently returned to state court, where his attempt to raise new ineffective assistance claims was dismissed by a divided Texas Court of Criminal Appeals under state writ-abuse principles. This Court subsequently denied a request for a stay of execution from Ruiz. *Ruiz v. Quarterman*, 2007 WL 2437401 (W.D. Tex. July 10, 2007). The Fifth Circuit granted a stay of execution and reversed this Court, however, holding it was error for this Court to have deprived petitioner of an opportunity to present his unexhausted claims to the state courts when petitioner had alleged a facially non-frivolous complaint about the performance of his first state habeas counsel. *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007).

The Texas Court of Criminal Appeals will not undertake any disposition of petitioner's currently unexhausted habeas corpus claims unless and until this Court first stays this federal habeas

corpus proceeding. *Ex parte Soffar*, 143 S.W.3d 804, 807 (Tex. Crim. App. 2004).

Petitioner's currently unexhausted ineffective assistance claims have not yet been factually or legally developed. This Court is not the appropriate forum for the initial factual development of petitioner's currently unexhausted ineffective assistance claims. *See Hernandez v. Johnson*, 108 F.3d 554, 558 & n.4 (5th Cir. 1997)(under the AEDPA, the proper forum for the making of all factual determinations in habeas cases is the state courts "where it belongs" and recognizing the AEDPA clearly places the burden on the federal habeas petitioner "to raise and litigate as fully as possible his potential federal claims in state court"), *cert. denied*, 522 U.S. 984 (1997).

There is no reasonable likelihood the state courts will ever address petitioner's unexhausted claims unless and until this Court stays this cause. This Court is statutorily prohibited from granting relief on unexhausted claims unless respondent expressly waives the exhaustion requirement. 28 U.S.C. §2254(b). Respondent has not indicated any intention to waive the exhaustion requirement. Under such circumstances, this Court had no choice but to grant petitioner's motion for stay and abeyance and stay this cause to permit petitioner to return to state court and exhaust available state habeas remedies on his unexhausted claims.

Given the principles of comity underlying the AEDPA, and the Fifth Circuit's ruling in *Ruiz*, this Court is compelled to permit the state habeas courts a reasonable opportunity to address the merits of (or dismiss under an adequate state procedural rule) petitioner's currently unexhausted claims for federal habeas corpus relief. Thus, out of an abundance of caution, this Court will permit petitioner to return to state court and exhaust available state habeas remedies on any and all currently unexhausted claims petitioner wishes this court to entertain in this cause.

In an effort to expedite the disposition of petitioner's successive state habeas corpus proceeding, this Court will appoint petitioner's current federal habeas counsel to serve as petitioner's state habeas counsel and will direct said counsel to file a successive state habeas corpus application in the appropriate state court without delay.

Counsel to Represent Petitioner in His Successive State Proceeding

Petitioner has no right under state law, barring highly unusual circumstances not present herein, to the assistance of counsel state-funded habeas counsel in connection with a *successive* state habeas writ application. Thus, if this Court simply stays this cause without doing more, petitioner will be left without any realistic means of "fairly presenting" his currently unexhausted claims to the state courts in a successive state habeas corpus proceeding. The attendant delay in the disposition of any *pro se*

submission made to the state courts by petitioner could be substantial.

At one point in time, the Fifth Circuit forbid federal District Courts from compensating federal habeas counsel for their work in seeking to exhaust state remedies on otherwise unexhausted claims for relief. *See Tucker v. Scott*, 66 F.3d 1418, 1419 (5th Cir. 1995)(petitioner had no right to the assistance of federally appointed counsel or experts to exhaust state remedies, even if state refused to appoint state habeas counsel); *Sterling v. Scott*, 57 F.3d 451, 454-58 (5th Cir. 1995)(holding federal habeas petitioner had no federal statutory right to the assistance of federally-funded counsel for the purpose of exhausting state remedies on otherwise unexhausted claims), *cert. denied*, 516 U.S. 1050 (1996). However, in *Harbison v. Bell*, ___ U.S. ___, 129 S.Ct. 1481, 1485-88, 173 L.Ed.2d 347 (2009), the Supreme Court construed 18 U.S.C. §3599(e) as authorizing the appointment of federal habeas counsel to assist a petitioner challenging a conviction or sentence under 28 U.S.C. §2254 in pursuing "all available post-conviction processes," including state clemency proceedings.

This Court believes *Harbison* offers a simple solution to the procedural log jam that has commonly occurs when a federal District Court in Texas stays a federal habeas corpus proceeding to permit a petitioner to return to state court and exhaust state habeas remedies on new, unexhausted, claims discovered and developed for

the first time by federal habeas counsel. In such instances, the federal court should authorize federal habeas counsel to file all necessary pleadings, *including a successive state habeas corpus application*, to enable the petitioner to "fairly present" the state courts with petitioner's new federal constitutional claims for relief. The Supreme Court's construction of §3599(e) in *Harbison* fully supports the conclusion that federal habeas counsel are available to assist state prisoners seeking to exhaust available state habeas remedies through the filing of successive state habeas corpus applications.

Furthermore, the principles of comity underlying the exhaustion doctrine warrant a "fair presentation" of such claims to the state habeas courts. Requiring a Texas death row inmate to proceed *pro se* when seeking to navigate the rocky shoals of Texas writ-abuse law and obtain a merits review of new federal constitutional claims, often discovered and asserted for the first time by the petitioner's federal habeas counsel, would undermine those same comity principles. The Texas state habeas courts deserve to be presented in capital cases with successive state habeas writ applications that are coherent, intelligent, and well-written. It is a rare *pro se* litigant who can achieve that standard.

Appointing federal habeas counsel to represent petitioner in a subsequent state habeas corpus proceeding will also permit this

Court to expedite and monitor the disposition of petitioner's subsequent state habeas corpus proceeding by eliminating undue delay in the filing of petitioner's subsequent state habeas corpus application and requiring petitioner to present the state habeas court with all factual, legal, and evidentiary theories which petitioner claims warrant habeas corpus relief. This Court will not permit petitioner another opportunity to return to state court. Petitioner must present the state habeas court with everything petitioner wishes this Court to consider in reviewing petitioner's federal constitutional claims herein.

Motion for Expert Funding

Petitioner requests expert funding in an amount in excess of thirty-five thousand dollars for the purpose of subjecting petitioner to extensive medical and neuropsychological testing to ascertain whether, as petitioner's federal habeas counsel now suspects, petitioner suffers from the deleterious effects of fetal alcohol syndrome.

The problem is that petitioner has requested this Court stay this cause so as to permit petitioner to return to state court and exhaust available state habeas remedies on petitioner's currently unexhausted "expanded" ineffective assistance claim. Once this Court stays this cause for that purpose, this cause will be held in abeyance and the proper source from which petitioner should seek

funding for such an evaluation of petitioner is the state habeas court.

Petitioner has furnished this Court with a highly detailed recitation of the reasons for believing petitioner suffers from fetal alcohol syndrome. *See Declaration of Richard S. Adler, M.D., attached as Exhibit 10 to Petitioner's Petition, filed January 20,1 2011, docket entry no. 12.* Nonetheless, competent counsel represented petitioner during petitioner's initial state habeas corpus proceeding. This Court's ability to understand the bizarre procedures which apparently took place during the course of petitioner's state habeas corpus proceeding is hampered by virtue of the fact that neither party has yet furnished this Court with complete copies of the state court records relating to petitioner's state habeas corpus proceeding.

While the circumstances surrounding the disposition of petitioner's first state habeas corpus application, as represented by petitioner's federal habeas counsel, are troubling (especially the failure of the state habeas court to afford petitioner an evidentiary hearing when apparently both parties conceded such a hearing was necessary), infirmities in state habeas corpus proceedings, standing alone, do not furnish a basis for federal habeas corpus relief. *See Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir. 2005)("alleged infirmities in state habeas proceedings are not grounds for federal habeas relief"), *cert. denied*, 546 U.S. 1217

(2006); *Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004)("It is axiomatic that 'infirmities in state habeas proceedings do not constitute grounds for federal habeas relief.' This is because 'an attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself.'"(*citation omitted*)); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003)("It is well-settled that 'infirmities in state habeas proceedings do not constitute grounds for federal habeas relief.'"), *cert. denied*, 540 U.S. 1163 (2004); *Rudd v. Johnson*, 256 F.3d 317, 319-20 (5th Cir. 2001)("A long line of cases from our circuit dictates that 'infirmities in state habeas proceedings do not constitute grounds for relief in federal court.' That is because an attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself." (*citations omitted*)), *cert. denied*, 534 U.S. 1001 (2001); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir 2001)("infirmities in state habeas proceedings do *not* constitute grounds for relief in federal court"), *cert. denied*, 534 U.S. 945 (2001).

Whether petitioner will be entitled, ultimately, to an evidentiary hearing in this Court will depend, in no small part, on whether the state habeas court affords petitioner a reasonable opportunity to "fairly present" petitioner's expanded ineffective assistance and other currently unexhausted claims to the state habeas court.

There is no general right to the assistance of an investigator or discovery in a federal habeas corpus proceeding for the purpose of conducting a fishing expedition into the possible existence of additional, potentially mitigating, evidence. *Rule 6(b), Rules Governing Section 2254 Cases in the United States District Courts,* provides a party requesting discovery must provide reasons for the request. In fact, under *Rule 6(a), Rules Governing Section 2254 Cases in the United States District Courts,* discovery is to be authorized only upon a showing of "good cause."

There may very well be legitimate reasons for believing that, with the assistance of a trained investigator or someone else possessing expertise or qualifications, undiscovered potentially mitigating evidence relevant to the issues that can legitimately be brought before this Court at this juncture (i.e., which existed at the time of the petitioner's trial) are still available for discovery at this point in time. However, the appropriate time for this Court to address this issue is AFTER the state habeas court has had an opportunity to address the merits of petitioner's currently unexhausted "expanded" ineffective assistance claim herein. Petitioner is also advised the limitations set forth by Section 3599(g)(2) of Title 18, United States Code, constrain the ability of this Court to authorize funding for the type of experts expenses petitioner has requested. Petitioner is further advised that authorization for investigative or expert funding at the

levels requested by petitioner must be approved by the Fifth Circuit and is appropriate only when reasonably necessary.

Accordingly, it is hereby **ORDERED** that:

1. Petitioner motion for stay and abeyance, filed January 25, 2011, docket entry no. 13, is **GRANTED** as set forth hereinafter.

2. Pending further order of this Court, this cause is **STAYED** and held in abeyance.

3. On or before thirty days from the date of this Order, petitioner's federal habeas counsel shall file a subsequent state habeas corpus application in the appropriate state court setting forth all currently unexhausted claims for federal habeas relief petitioner wishes to present to this Court, including all currently unexhausted claims contained in petitioner's original federal habeas corpus petition herein, filed in this Court on January 20, 2011, docket entry no. 12.

4. Every ninety days thereafter, petitioner's federal habeas counsel shall file an advisory informing this Court and respondent's counsel of the status of petitioner's efforts to exhaust available state habeas remedies with regard to any currently unexhausted claims for relief which petitioner has presented or might present to this Court in this cause.

5. Once the state habeas court has disposed of petitioner's subsequent state habeas corpus application, if necessary, this Court will lift the stay implemented by this Order and issue a new

scheduling order for the disposition of this cause. Petitioner and respondent will be permitted to re-urge any other, including any currently pending, motions at that juncture if they so desire.

6. Petitioner's motion for authorization of more than thirty-five thousand dollars in expert funding, filed January 25, 2011, docket entry no. 14, is **HELD IN ABEYANCE** pending petitioner's return to state court to exhaust available state remedies on his currently unexhausted "expanded" ineffective assistance claim.

7. Petitioner's federal habeas counsel shall immediately notify this Court once the Texas Court of Criminal Appeals has finally disposed of petitioner's successive state habeas corpus application.

SIGNED and ENTERED this 31 **day of January, 2011.**

ORLANDO L. GARCIA
United States District Judge