IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2019

No. _____

BILLY JOE WARDLOW,

Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

CAPITAL CASE

QUESTION PRESENTED

In denying Mr. Wardlow's federal habeas petition, the district court ruled that his claims were procedurally barred but also without merit. The basis for the procedural bar was removed three years later by the Texas Court of Criminal Appeals when it reversed its procedural dismissal of Wardlow's initial state habeas application. Mr. Wardlow returned to federal district court on a Fed. R. Civ. Proc. 60(b) motion arguing that the procedural bar ruling had caused the court to give perfunctory review to the merits of his claims. The district court held that the motion was a successive petition. On appeal, the Fifth Circuit agreed with the district court, without undertaking any analysis, or remanding to he district to conduct any analysis, of whether the procedural bar ruling did impact the district court's determination of the merits.

These proceedings give rise to the following Questions:

1. Whether a Rule 60(b) motion arguing that a procedural defect affected the district court's determination of the merits of the claims in a federal habeas petition is a proper 60(b) motion or an improper successive habeas petition?

2. Whether the conflicting answers given to this question by the United States Courts of Appeals for the Fifth and Tenth Circuits require resolution by this Court?

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

State of Texas v. Billy Joe Wardlow, No. CR12764, 76th District Court of Titus County, Texas (judgment February 11, 1995) (trial proceeding)

Wardlow v. State, No, 72,102 (Tex.Crim.App. 1997) (unpublished) (direct appeal)

Ex parte Wardlow, No. WR-58,548-01 (Tex.Crim.App.) (unpublished) (initial state habeas corpus)

Wardlow v. Director, 2017 WL 3614315 (E.D.Tex. 2017) (federal habeas corpus)

Wardlow v. Davis, 750 Fed.Appx. 374 (5th Cir. 2018) (certificate of appealability application)

Wardlow v. Davis, ___ U.S. ___, 140 S.Ct. 390 (2019) (petition for writ of certiorari)

Ex parte Wardlow, 2020 WL 2059742 (Tex.Crim.App. 2020) (reconsideration of initial state habeas corpus application)

Wardlow v. Texas, No. 19-8712 Petition for Writ of Certiorari, pending (U.S.)

Wardlow v. Texas, No. 19-8835 Petition for Writ of Certiorari, pending (U.S.)

Wardlow v Davis, No. 4:04-cv-00408, Order of Transfer (E.D.Tex. June 30, 2020)

Wardlow v. Davis, No. 20-70012, Memorandum Opinion and Order (5th Cir. July 6, 2020)

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit holding that the motion filed by Mr. Wardlow under Fed. R. Civ. Proc. 60(b) is a successive petition was announced on July 6, 2020. *Wardlow v. Davis*, No. 20-70012 (5th Cir.) [Appendix 1].

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit denying Mr. Wardlow's appeal was entered July 6, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves Federal Rule of Procedure Rule 60(b):

> (b) **Grounds for relief from a final judgment, order, or proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

STATEMENT OF THE CASE

The district court denied Wardlow's habeas petition in 2017 because it was "procedurally

barred and otherwise without merit." *Wardlow v. Director*, 2017 WL 3614315 *1 (E.D.Tex. 2017). The Fifth Circuit denied a COA, *Wardlow v. Davis*, 750 Fed.Appx. 374 (2018), and the Court denied certiorari. *Wardlow v. Davis*, ___ U.S. ___, 140 S.Ct. 390 (2019).

Wardlow's federal habeas corpus proceeding ended with the denial of certiorari on October 15, 2019. On December 3, 2019, able to return to the state courts because of the conclusion of the federal proceeding, Wardlow asked the Texas Court of Criminal Appeals [CCA] to reconsider the procedural basis – his purported waiver of state habeas proceedings – on which it had dismissed his initial state habeas application. The dismissal had provided the basis for the federal district court's determination that the claims presented in Wardlow's federal habeas petition were procedurally barred.

On April 29, 2020, the CCA "reconsider[ed] that dismissal" due to "Applicant's pleadings and the evolution of Article 11.071[] caselaw." *Ex parte Wardlow*, 2020 WL 2059742 *1 (Tex.Crim.App.) [attached as an Exhibit to the 60(b) motion, at ROA 859-60[1]]. The CCA then listed the claims Wardlow had raised in his habeas application and held as follows: "After reviewing Applicant's claims and the record of the case, we have determined that the claims should be denied." *Id.*

With the basis for the procedural bar holding having been removed by the CCA, on June 18, 2020, Wardlow moved for relief from the judgment in the district court pursuant to Federal Rule of Civil Procedure 60(b)(6), arguing that the procedural bar ruling predisposed the court to find no merit in his claims. ROA 828-60. On June 30, 2020, the district court ruled that the 60(b) motion was a second or successive habeas petition and transferred the motion to the Fifth

[1]"ROA" is the electronic record on appeal filed in the Fifth Circuit/

Circuit for its consideration under 28 U.S.C. § 2244. ROA 903-13.

Wardlow filed a notice of appeal on June 30, 2020. ROA 914.

On July 6, 2020, the Fifth Circuit affirmed the district court's ruling.

REASONS FOR GRANTING CERTIORARI

THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND TENTH CIRCUITS IN TREATING, AS SUCCESSIVE PETITIONS OR PROPER MOTIONS, RULE 60(b) MOTIONS ARGUING THAT A PROCEDURAL DEFECT IN THE HABEAS PROCEEDING AFFECTED THE RESOLUTION OF THE MERITS OF THE CLAIMS IN THAT PROCEEDING

A. The Fifth Circuit held that Wardlow's 60(b) motion was a successive petition because it sought "'a second chance to have the claims determined favorably[,]'" wholly disregarding the impact the procedural bar holding may have had on the determination of the merits.

The Fifth Circuit held that the 60(b) motion was a merits-based attack on the district court's 2017 judgment, disguised as a proper 60(b) motion, forbidden by *Gonzalez v. Crosby*, 545 U.S. 524 (2005). It explained its decision as follows:

> Wardlow wants the district court to take another look now that the procedural bar is supposedly gone. But that request is exactly what the Supreme Court has said makes a nominal Rule 60 motion a successive habeas petition: it 'does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably.' *Id*. at 532 n.5.

Appendix 1, at 5. The Fifth Circuit acknowledged that Wardlow made a "non-merits-based attack by asserting that the district court's procedural bar determination 'skewed' its alternative merits rulings." *Id*. at 6. But the court dismissed "this allegation [a]s pure speculation[,]" adding, "there was nothing unusual about the court making alternative holdings. Courts, including ours, often do so." *Id*.

B. The Fifth Circuit held here, as it has in previous cases, that a 60(b) motion that challenges a district court decision on the basis of a procedural defect, but also asks the district court to examine the impact the procedural defect had on the merits determination, is a successive petition, putting the Fifth Circuit in conflict with the Tenth Circuit.

The Fifth Circuit held that Wardlow already received what he was entitled to – a merits determination – when the district court found his claims both procedurally barred and without merit. Thus, the CCA's removal of the basis for the procedural bar is immaterial, and Wardlow is simply seeking a redetermination of the merits. Wardlow's argument is that the district court's merits review was tainted by the procedural bar determination, and that prevented him from receiving a full and fair merits review. In Wardlow's favor, this Court has recognized that a procedural bar can have the effect of diminishing the quality of review given the barred claim:

> Having found a procedural bar, ... the Eleventh Circuit had no need to address whether petitioner was otherwise entitled to an evidentiary hearing and gave this question, at most, perfunctory consideration that may well have turned on the District Court's finding of a procedural bar.

Wellons v. Hall, 558 U.S. 220, 222 (2010).

Wardlow did ask the district court in his 60(b) motion to conduct a limited re-examination of its analysis of three of his habeas claims. ROA 842-56. The stated purpose of this, however, was to show how the merits review was the result of "perfunctory consideration that may well have turned on the District Court's finding of a procedural bar." *Wellons*. In making this argument, Wardlow set out the basis for each of three claims, then examined the district court's resolution of each claim, and finally, attempted to show how the procedural bar ruling truncated the court's review of each claim. In doing this, he of course took issue with the district court's merits review. However, his taking issue was not a re-argument of the merits but

an effort to show how the merits analysis was truncated by the procedural bar determination. *See* ROA 844-45, 847-49, 853-56.

The Fifth Circuit's decision against Wardlow is consistent with its history of treating any Rule 60(b) motion that touches on the merits as a successive petition raising "claims." While understandably wary that movants may attempt to use Rule 60(b) for unauthorized purposes, the Fifth Circuit has often embraced an all-or-nothing approach that treats movants punitively if the court sees signs of "claims" when it "carefully police[s]" such motions to ensure they are not "successive habeas petitions in disguise." *In re Segundo*, 757 Fed. Appx, 333, 336 (5th Cir. 2018). In *Segundo*, for example, the court affirmed a district court's determination that a Rule 60(b) motion was not true "because it raise[d] and extensively brief[ed] various substantive claims related to ineffective assistance of counsel." *Id*. at 335. The movant contended, however, that "he ha[d] properly identified one non-merits-based defect in the integrity of the federal habeas proceedings – the use of an erroneous legal standard to deny him services guaranteed by 18 U.S.C. § 3599." *Id*. In its vigilance to identify habeas petitions "in disguise," the Court minimized the legitimate allegation of a defect in the integrity of the proceedings, effectively holding that the presence of merits-based arguments automatically makes the "true" Rule 60(b) allegations in the motion irrelevant. *See id*. at 335. The court stated that its method is to "classify" the document as a whole, using an either-or framework. *Id*. ("we have repeatedly applied this principle to identify all of the claims raised in a particular petition and classify that petition accordingly – as a Rule 60(b) motion or successive habeas petition").

Confusion arises because movants like Wardlow cannot exclusively discuss defects in the integrity of the federal proceedings in their Rule 60(b) motions. It is necessary to include some

discussion of the claims, as Wardlow does, to show the impact of the procedural defect on the habeas proceeding. The Fifth Circuit has, however, often treated the inclusion of this sort of argument as decisive proof that the motion is not a genuine one. *See, e.g., Preyor v. Davis*, 704 F. App'x 331, 339 (5th Cir. 2017) ("Preyor's Rule 60 motion does not confine itself to a nonmerits aspect of the first federal habeas proceeding that precluded a merits determination").

Rather than fixate on information that may be extraneous to the core 60(b) issue, the rule should be to examine whether the movant presses any allegation that is cognizable under Rule 60(b). The presence of argument concerning the merits, if that argument is connected to the procedural defect, should not disrupt or dictate the court's decision-making process the way it did in *Segundo*, *Preyor*, and now, *Wardlow*. The approach employed in *Segundo* places petitioners that have filed motions that must touch on the merits of claims in an impossible position, because if they fail to address how the procedural defect infected the merits determination, they risk not showing the necessary "inference of defects in the habeas proceedings at issue here." *United States v. Vialva*, 904 F.3d 356, 361 (5th Cir. 2018).

In contrast to the Fifth Circuit's approach, the Tenth Circuit's opinion in *In re Pickard*, 681 F.3d 1201 (10th Cir. 2012) provides the appropriate guidance to help courts distinguish between a successive petition and a true 60(b) motion that also addresses the merits of a prior determination in the habeas proceeding. There, the 60(b) movants argued that the prosecutor made false statements to the district court in the habeas proceeding that caused the court to deny discovery, and thereafter, the merits of a *Brady/Giglio* claim concerning a prosecution trial witness. After obtaining the information through a FOIA request that could have been gained through discovery, the movants argued in the 60(b) motion that had the discovery been granted,

the facts revealed would have allowed the movants to establish their claim. *Id*. at 1203-04. On this basis, the movants argued that misconduct by the prosecutor affected the integrity of the habeas proceeding and the court's resolution of the *Brady/Giglio* claim. *Id*. at 1203.

In deciding that the 60(b) motion was a proper 60(b) motion and not a successive habeas petition, the Tenth Circuit first explained that a Rule 60(b) motion is not improper because it seeks habeas relief. The court asks rhetorically, "What else could be the purpose of a 60(b) motion?" It then answers, "The movant in a true Rule 60(b) motion is simply asserting that he did not get a fair shot in the original § 2255 [or 2254] proceeding because its integrity was marred by a flaw that must be repaired in further proceedings." 681 F.3d at 1206. The court then set out this passage in *Gonzalez*:

> [A] true Rule 60(b) motion does not 'attack[ ] the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.'

681 F.3d at 1206 (quoting *Gonzalez*, 545 U.S. at 532). The court then explained that this "proviso [in *Gonzalez*] means only that a Rule 60(b) motion is actually a second-or-successive petition if the *success of the motion depends on a determination that the court had incorrectly ruled on the merits in the habeas proceeding*." *Id*. (emphasis supplied). The success of the motion in *Pickard* did *not* "depend[] on a determination that the district court had incorrectly ruled on the merits in the habeas proceeding." Rather, the success of the motion depended on whether "the prosecutor's false statement improperly prevented them from obtaining relevant discovery in the § 2255 proceedings." *Id*. at 1207.

Applying this principle to the Wardlow's case, the success of his 60(b) motion, as in

Pickard, did not "depend[] on a determination that the district court had incorrectly ruled on the merits in the habeas proceeding." Rather, it depended on the district court's determination whether the procedural bar ruling had an effect on, and indeed, led to a "perfunctory consideration," *Wellons*, of the merits of Wardlow's claims. The district court did not make that determination. Instead it misconstrued Wardlow's motion as doing nothing more than "attacking the substance of the court's resolution of the claims on the merits." ROA 910. The Fifth Circuit did not even address whether the district court should have considered the effect of the procedural bar ruling on its consideration of the merits. It just assumed there was no effect, because "[c]ourts, including ours, often do so [i.e., find a procedural bar but also rule on the merits]." Appendix at 6.

C. Wardlow's 60(b) motion called for a determination by the district court whether the procedural bar holding led to a perfunctory consideration of the merits.

Federal habeas corpus proceedings in capital cases, like trial proceedings, must be conducted with the awareness that death is different. "From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." *Wellons*, 558 U.S. at 220. Federal habeas review serves a "vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). For these reasons, Wardlow is entitled to "one full and fair round of federal habeas review" of his federal constitutional claims. *Gonzalez v. Crosby*, 545 U.S. at 542 (Stevens, J., dissenting). The district court's adjudication of the merits of his claims may not have been adequate to constitute that review because of the relationship between the procedural bar ruling and the merits ruling.

As *Coleman v. Thompson*, 501 U.S. 722 (1991) makes clear, because of the procedural bar determination, the district court would have been precluded from granting relief on the merits if it had determined that any of Wardlow's claims entitled him to relief:

> We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. The doctrine *applies to bar federal habeas* when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement.

501 U.S. at 729-30 (emphasis supplied). In *Lambrix v. Singletary*, 520 U.S. 518 (1997), the Court went further and made it clear that even *consideration* of the merits of claims that are procedurally barred is impermissible. Although the "'independent and adequate state ground' doctrine is not technically jurisdictional" in federal habeas proceedings,"[w]e have nonetheless held that the doctrine applies to *bar consideration* on federal habeas of federal claims that have been defaulted under state law." *Id*. at 523 (emphasis supplied). Under the rule of *Coleman* and *Lambrix*, therefore, the district court was bound not to consider the claims on the merits, and if it did do so, to determine there was no merit to his claims. The court could not have given effect to any other conclusion.

Nevertheless, after first determining that the claims were procedurally barred, the district court went on to review the merits of Wardlow's claims "in the interest of justice," 2017 WL 3614315 at *19, *29 n.6. If the district court was even somewhat familiar with the law, this was a hollow declaration. If the results of a review in the interest of justice are predetermined, as they were here by the procedural bar ruling, that cannot be a just review.

Wardlow does not believe the district court acted in bad faith when it said it was

conducting a review of the merits in the interest of justice. But if the court understood the rule of *Coleman* and *Lambrix*, the court would at some level have realized that it could not give full and fair consideration to the merits of the claims because the procedural bar ruling kept it from being able to do that. To consider claims fully and fairly, the court had to be able to approach the claims with the possibility of not only denying but also *granting* relief – a judgment Wardlow was entitled to have the court make solely on the basis of the merits of the claims within the framework of federal habeas. But, *the Court could not do that* because the procedural bar ruling "bar[red] habeas relief[.]" *Coleman v. Thompson*, 501 U.S. at 729-30. It is that simple, and that profound. The Court's merits ruling was not a "sham," and that is not at all what Mr. Wardlow argued. What he argued is that a merits ruling made in the shadow of a procedural bar ruling *may well not have been* the same if there had been no procedural bar ruling.

At the very least, in these circumstances Wardlow was entitled to have the district court make a clear-eyed appraisal of whether it gave the claims a more "perfunctory consideration" than it otherwise would have because of the procedural bar. *Wellons*, 558 U.S. at 222. That is what would have happened had Wardlow's case been in the Tenth Circuit. It should have been the same in the Fifth Circuit.

CONCLUSION

For these reasons, Mr. Wardlow requests that the Court grant certiorari to resolve the conflict between the Fifth and Tenth Circuits. The fairness of the application of Rule 60(b) in federal habeas proceedings is at stake in the Fifth Circuit.

Respectfully submitted,

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Appendix 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
July 6, 2020

Lyle W. Cayce
Clerk

No. 20-40445

In re: BILLY JOE WARDLOW,

Movant

Consolidated with 20-70012

BILLY JOE WARDLOW,

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 Eastern District of Texas

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

PER CURIAM:*

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* 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.

With his execution approaching, Billy Wardlow sought to reopen his federal habeas case under Federal Rule of Civil Procedure 60(b)(6). The district court determined that his filing was instead a successive petition for habeas relief and transferred it to us. Wardlow appeals that ruling, but the district court properly characterized the filing. And because Wardlow does not even try to invoke one of the grounds for filing a second habeas petition, he is not eligible for any relief or a stay of execution.

I.

A jury convicted Wardlow of capital murder after he shot and killed Carl Cole during a robbery of Cole's home. He was sentenced to death. The Texas Court of Criminal Appeals affirmed his conviction and sentence on direct appeal.

Several months later, the state trial court held a hearing on appointing Wardlow counsel for postconviction proceedings. Wardlow told the court he did not want a lawyer or to pursue postconviction remedies at all. The trial court found Wardlow was mentally competent and that his waiver of appointed counsel was knowing and voluntary. So it granted his request and sent its findings to the Court of Criminal Appeals.

Wardlow then changed his mind. Mandy Welch agreed to represent him, and she notified the state courts that Wardlow wanted to proceed with postconviction review. The state trial court confirmed Wardlow's wishes in supplemental findings it sent to the Court of Criminal Appeals. That court appointed Welch as Wardlow's attorney and ordered his application to be filed within 180 days.

Less than three weeks before the deadline, however, Wardlow changed his mind again. He told the Court of Criminal Appeals he wanted "to waive and forego all further appeals." The court granted the request. Welch filed

Wardlow's habeas application before the deadline anyway. Her filing included a statement from Wardlow authorizing it and asking the court to ignore his latest waiver request. The Court of Criminal Appeals dismissed the application on the procedural ground that Wardlow had waived postconviction remedies.

Wardlow next filed a habeas petition in federal district court. There too he was unsuccessful. *See Wardlow v. Director*, 2017 WL 3614315, at *1 (E.D. Tex. Aug. 21, 2017). The district court first concluded that the Court of Criminal Appeals' dismissal of his state habeas application on account of waiver was "a valid procedural bar to consideration of his claims." *Id.* at *10. It then held in the alternative that Wardlow's claims lacked merit. *Id.* at *11–35. We denied a certificate of appealability, recognizing that neither the district court's procedural bar ruling nor its rejection of his claims' merits were debatable. *Wardlow v. Davis*, 750 F. App'x 374 (5th Cir. 2018) (per curiam).

After an execution date was set, Wardlow asked the Court of Criminal Appeals to reconsider its dismissal of his initial state habeas application. The court agreed, but it still "determined that his claims should be denied." *Ex parte Wardlow*, 2020 WL 2059742, at *1 (Tex. Crim. App. Apr. 29, 2020). It also dismissed a subsequent application as an abuse of the writ. *Id.* at *2.

The Court of Criminal Appeals' reconsideration of Wardlow's state habeas application prompted him to file a motion with the federal district court. He claimed the Court of Criminal Appeals had removed the procedural bar that had "predisposed" the district court to rule against him on the merits. So he asked the district court to reexamine the merits of his petition without the procedural bar and its "distorting effects" lurking in the background. He also requested a stay of his execution. The district court concluded that his filing—labeled a Rule 60 motion for relief from a judgment—was actually a

successive habeas petition that it lacked jurisdiction to consider without authorization from the court of appeals. *See* 28 U.S.C. § 2244(b)(3)(A). It transferred Wardlow's motion to us.

He now seeks review of the district court's determination. We do so *de novo*. *In re Edwards*, 865 F.3d 197, 202–03 (5th Cir. 2017) (per curiam). And we consolidated Wardlow's appeal of the district court's ruling with the proceeding requesting authorization to file a successive petition that was created as a result of the district court's transfer.

II.

Rule 60(b)(6) permits a court to relieve a party from a previous judgment and reopen the case "for any . . . reason that justifies relief." FED. R. CIV. P. 60(b)(6); *see also Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). But in a habeas case, Rule 60 motions are subject to the strictures of the Antiterrorism and Effective Death Penalty Act (AEDPA). *Gonzalez*, 545 U.S. at 529. To prevent Rule 60 from providing an end run around AEDPA's limits on filing multiple federal habeas petitions, a Rule 60 motion that effectively amounts to a successive habeas petition should be treated as such. *Id.* at 531–32. When a purported Rule 60 motion either presents a new habeas claim or attacks a federal habeas court's previous resolution of a claim on the merits, it must comply with AEDPA' limits on successive petitions. *In re Edwards*, 865 F.3d at 203–04; *see also* 28 U.S.C. § 2244(b). Only a motion that credibly alleges "a non-merits-based defect" in the district court's initial decision is a proper Rule 60 motion. *Id.* at 204 (citation omitted).

One situation warranting a Rule 60 motion is when a state court decision removes the basis for a federal habeas court's prior procedural default ruling that prevented the federal court from reaching a petition's merits. *See Ruiz v. Quarterman*, 504 F.3d 523, 525–28, 531–32 (5th Cir. 2007). Wardlow says that

is what happened when the Texas Court of Criminal Appeals reconsidered its earlier dismissal of his state habeas application. It is not clear whether the court was reversing its earlier procedural bar decision or merely providing alternative, merit-based grounds to deny Wardlow's application. *See Ex parte Wardlow*, 2020 WL 2059742, at *1. We nevertheless assume *arguendo* that Wardlow is right that the state court withdrew its procedural ruling.

That is not enough for Wardlow. The district court not only decided his claims were procedurally defaulted; it rejected his claims on the merits too. Its procedural holding thus did not "preclude[] a merits determination." *Gonzalez*, 545 at 523 n.4. Wardlow wants the district court to take another look now that the procedural bar is supposedly gone. But that request is exactly what the Supreme Court has said makes a nominal Rule 60 motion a successive habeas petition: it "does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Id.* at 532 n.5.

Recognizing that his motion looks like an attempt to relitigate the merits of his habeas petition, Wardlow argues the district court lacked jurisdiction to make its alternative merits holdings in light of the procedural bar it found. But the Supreme Court has explained that, in the habeas context, procedural default is "grounded in concerns of comity and federalism," not jurisdiction. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).[1] That is why a state can forfeit its procedural default defense, and a court is not required to raise it *sua sponte*. *Trest v. Cain*, 522 U.S. 87, 89 (1997). That is also why courts need not "invariably" answer a procedural default question before others. *Lambrix v.*

[1] By contrast, the independent and adequate state ground doctrine has a jurisdictional basis when the Supreme Court is considering a direct appeal from a state court. That is because the Court's jurisdictional statute allows it to review only *judgments* that implicate a federal question. *See* 28 U.S.C. § 1257. "[I]f resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Coleman*, 501 U.S. at 730.

Singletary, 520 U.S. 518, 525 (1997); *see also Busby v. Dretke*, 359 F.3d 708, 720 (5th Cir. 2004) (deciding the merits of a claim after "looking past any procedural default"). The district court thus had jurisdiction to assess the merits in its original habeas opinion despite also finding procedural default.

Wardlow next tries to portrays his motion as a non-merits-based attack by asserting that the district court's procedural bar determination "skewed" its alternative merits rulings. But this allegation is pure speculation, and there was nothing unusual about the court making alternative holdings. Courts, including ours, often do so. Our court even "follows the rule that alternative holdings are binding precedent and not *obiter dictum*." *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991). If anything, addressing the merits after recognizing a procedural bar—especially when that merits analysis extends to 24 pages, *see Wardlow*, 2017 WL 3614315, at *11–35—shows the district court's conscientious treatment of Wardlow's case, not its neglect.

The district court was correct: Wardlow's recent filing should be treated as a successive habeas petition.

III.

Wardlow does not seek our authorization to file a successive petition. He likely recognizes that he does not qualify for any of the paths for doing so. When it comes to a successive habeas petition, "any claim that has already been adjudicated in a previous petition must be dismissed." *Gonzalez*, 545 U.S. at 529–30 (citing 28 U.S.C. § 2244(b)(1)). Wardlow's recent filing asks only that the district court reconsider the same claims he made in his initial habeas petition. He does not rely on one of the two acceptable bases for a successive petition: a new rule of constitutional law retroactively applicable to habeas cases or newly discovered facts that show innocence. *See* 28 U.S.C.

§ 2244(b)(2). Because the district court already adjudicated Wardlow's claims, he is not entitled to reconsideration of that ruling via a second habeas motion.

* * *

We AFFIRM the district court's ruling that the self-styled Rule 60 motion should be transferred to this court as a request for authorization to file a successive habeas application. We DENY authorization to file a second habeas application. Having rejected Wardlow's sole ground for relief, we also DENY his request for a stay of execution. *See In re Edwards*, 865 F.3d at 209.

United States Court of Appeals

FIFTH CIRCUIT
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July 06, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

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

No. 20-40445 c/w 20-70012 In re: Billy Wardlow
USDC No. 4:04-CV-408

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.

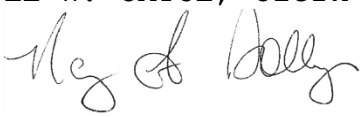
Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise,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



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Richard H. Burr III
Ms. Gwendolyn Suzanne Vindell

Appendix 2

Cause No. CR12764

STATE OF TEXAS	§	IN THE 76TH DISTRICT COURT
	§	
v.	§	OF
	§	
BILLY JOE WARDLOW	§	TITUS COUNTY, TEXAS

EXECUTION ORDER

You, BILLY JOE WARDLOW, were indicted by the Grand Jury of Morris County, Texas, and charged with the offense of capital murder in cause numbers 6989, 7127, and 7130. After venue was transferred to Titus County, Texas, a jury in this Court returned a verdict finding you guilty of the offense of capital murder on February 8, 1995, in cause number 12,764. On February 11, 1995, the same jury in this Court returned answers to the special issues, submitted to the jury at punishment pursuant to Article 37.071 of the Texas Code of Criminal Procedure, and this Court, in accordance with the jury's findings at punishment, assessed your punishment at death. The judgment of this Court was reviewed by the Texas Court of Criminal Appeals on direct appeal and it was affirmed by that court on April 2, 1997, with mandate issued on August 18, 1997. Subsequently, on September 15, 2004, the Court of Criminal Appeals dismissed your initial application for writ of habeas corpus. Thereafter, the District Court for the Eastern District of Texas, Sherman Division, denied your federal petition for writ of habeas corpus on August 21, 2017, and the United States Court of Appeals for the Fifth Circuit denied your application for a Certificate of Appealability on October 22, 2018. Afterwards, the United States Supreme Court denied your petition for writ of certiorari on October 15, 2019. A previous execution date was set by this Court for April 29, 2020. This Court now proceeds to modify your prior execution date and now enters the following order.

IT IS HEREBY ORDERED by this Court that the prior execution warrant of October 25, 2019, setting an April 29, 2020 execution date for BILLY JOE WARDLOW, is RECALLED.

IT IS HEREBY ORDERED by this Court that you, BILLY JOE WARDLOW, having been adjudged guilty of capital murder and having been assessed punishment at death, in accordance with the findings of the jury and the judgment of this Court, shall at some time after the hour of 6:00 p.m. on the 8th day of July, 2020, be put to death by an executioner designated by the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, who shall cause a substance or substances in a lethal quantity to be intravenously injected into your body sufficient to cause your death and until your death, such execution procedure to be determined and supervised by the said Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.

It is ORDERED that the Clerk of this Court shall issue a death warrant, in accordance with this sentence, to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, and shall deliver such warrant to the Sheriff of Titus County, Texas to be delivered by him to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice together with the defendant, BILLY JOE WARDLOW, if not previously delivered.

The Defendant, BILLY JOE WARDLOW, is hereby remanded to the custody of the Sheriff of Titus County, Texas, to await transfer to Huntsville, Texas, if not previously delivered, and the execution of this sentence of death.

DONE AND ENTERED this 3rd day of April, 2020.

Angela Saucier

ANGELA SAUCIER
Presiding Judge
76th District Court
Titus County, Texas