No. 19-8850
No. 19A1069

IN THE
Supreme Court of the United States

BILLY JOE WARDLOW,
Petitioner,

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Application for a Stay of Execution

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Is a Rule 60(b) attack on a district court's careful and considered alternative merits adjudication a second-or-successive petition?

2. Should certiorari be granted on an illusory circuit conflict founded upon nothing but a movant's belief in judicial fatalism?

3. Should a federal court interfere with the execution of a valid state court conviction and sentence when the convicted has failed to demonstrate a likelihood of success and has failed to act diligently?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

Petitioner, Billy Joe Wardlow, is scheduled to be executed on July 8, 2020, for the callous murder of eighty-two-year-old Carl Cole during a robbery. Wardlow previously and unsuccessfully challenged the constitutionality of his Texas capital murder conviction and death sentence in both the state and federal courts, thrice receiving collateral merits review. During federal habeas review, the district court and Fifth Circuit found that Wardlow's claims were procedurally barred due to the dismissal of his initial state habeas application by the Texas Court of Criminal Appeals (CCA) and, alternatively, they were without merit. More than a month after federal habeas review terminated, Wardlow returned to the CCA to suggest that the court, on its own motion, reconsider its prior dismissal and review his claims on the merits. The CCA did so, making it the fourth court to review the merits of his claims.

Nearly two months later—and with less than three weeks remaining before his scheduled execution—Wardlow filed a motion, purportedly under Federal Rule of Civil Procedure 60(b), in the court below, seeking to reopen the lower court's previous judgment for a *fifth* full merits review of his claims. Wardlow asserted that the CCA's reconsideration of his claims undermined the court's previous procedural-default determination, a determination which, Wardlow argued, prejudiced the court's alternative merits analysis. The

district court construed Wardlow's putative motion for relief from judgment as a successive habeas petition, over which it lacked jurisdiction, and transferred it to the Fifth Circuit. The Fifth Circuit affirmed the district court's determination, denied authorization to file a second habeas petition, and denied his request for a stay of execution. Pet'r App. 1, at 7; *In re Wardlow*, No. 20-40445, 2020 WL 3708659 (5th Cir. July 6, 2020) (unpublished).

Wardlow now petitions this Court for a writ of certiorari from the Fifth Circuit's decision, complaining primarily that both lower courts erred in treating his purported Rule 60(b) motion as a successive petition. He also asks this Court to stay his execution. But Wardlow provides no compelling reason that this Court should exercise its discretion to review the lower courts' straightforward, and correct, application of the law governing successive petitions. Thus, neither certiorari review nor a stay of execution is appropriate under the circumstances, and both his requests should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit summarized the facts of Wardlow's capital murder as follows:

> Wardlow shot and killed Carl Cole while committing a robbery at Cole's home in the small east Texas town of Cason. When he was in jail awaiting trial, Wardlow wrote a confession to the sheriff investigating the murder. The State relied on that letter to prove the intent element required for a capital murder conviction. The

letter stated that Wardlaw went to Cole's house, intending to steal a truck. Once inside the house, Wardlow said that he pulled a gun on Cole. Wardlow added:

> Being younger and stronger, I just pushed him off and shot him right between the eyes. Just because he pissed me off. He was shot like an executioner would have done it. He fell to the ground lifeless and didn't even wiggle a hair.

Wardlow testified and confirmed he killed Cole but gave a different reason for doing so. He told the jury that he did not intend to kill Cole when he went to his house; instead, he and his girlfriend Tonya Fulfer only intended to rob Cole and steal his truck. When Wardlow brought out the gun and told Cole to go back inside the house, Cole lunged at Wardlow and grabbed his arm and the gun, attempting to push Wardlow away. Wardlow testified that Cole was stronger than he expected, so he was caught off balance and began falling backwards. Wardlow said he shot the gun without aiming, hoping it would get Cole off him. The bullet hit Cole right between the eyes.

The state countered Wardlow's claim about his intent by noting inconsistencies in his story and testimony from a medical examiner inconsistent with the gunshot occurring during a struggle.

Wardlow v. Davis, 750 F. App'x 374, 375 (5th Cir. 2018) (unpublished).

II. Course of State and Federal Proceedings

Wardlow was convicted and sentenced to death in 1995 for the murder of eighty-two-year-old Carl Cole, in the course of committing a robbery. ROA.1192–95.[1] Wardlow's conviction and sentence were affirmed on direct review to the CCA. ROA.918–37. That same year, Wardlow appeared at a

[1] "ROA" refers to the record on appeal filed in the court below.

hearing before the state trial court and, through counsel, indicated that he did not desire to have counsel appointed for filing a state application for writ of habeas corpus and did not wish to pursue any further appeals. ROA.313. The trial court found that Wardlow was mentally competent, had voluntarily and intelligently waived his right to have counsel appointed, and waived his right to proceed pro se in open court. *Id*.

Wardlow subsequently "entered into a legal representation agreement with attorney Mandy Welch . . . in which she agreed to notify the appropriate courts that [Wardlow] did, in fact, wish to pursue his post-conviction remedies." ROA.115. After receiving confirmation from the trial court that Wardlow did wish to pursue postconviction relief, the CCA appointed Welch to represent Wardlow and ordered that his state habeas application be filed within 180 days. *Id*.

Eighteen days before Wardlow's filing deadline, Wardlow wrote another letter to the CCA again expressing a desire to waive all further appeals. *Id*. The CCA granted Wardlow's request, based on the trial court's prior hearing. *Id*. Despite this order, Welch filed a state habeas application in the trial court on the 180th day after her appointment. ROA.7473–539. The state trial court issued findings of fact and conclusions of law, recommending denial of habeas relief, which were forwarded to the CCA. ROA.7437–56. However, the CCA dismissed Wardlow's application, declining to review the merits of his claims

based on its prior order granting Wardlow's request to abandon further appeals. ROA.7460–61.

Wardlow then filed a petition for habeas relief in federal court, which the court denied, finding that the claims were procedurally defaulted and, alternatively, without merit. ROA.707–774. The Fifth Circuit denied Wardlow's application for a certificate of appealability (COA), *Wardlow*, 750 F. App'x at 375, and this Court denied Wardlow's petition for writ of certiorari. *Wardlow v. Davis*, 140 S. Ct. 390 (2019).

III. Litigation Related to Wardlow's Scheduled Execution

Eight days after this Court denied Wardlow's petition for writ of certiorari, Wardlow filed a subsequent state habeas application, raising two new claims for relief. Two days after that, the state trial court entered an order setting Wardlow's execution for April 29, 2020. Execution Order, *State v. Wardlow*, No. CR12764 (76th Dist. Ct., Titus County, Tex. Oct. 24, 2019). More than a month later, Wardlow filed in the CCA a suggestion that the court, on its own motion, reconsider its dismissal of Wardlow's initial habeas application, along with a motion to allow him to withdraw his previous waiver of state habeas proceedings.

On March 12, 2020, Wardlow filed in the CCA a motion to stay his execution, pending disposition of the subsequent application and suggestion to reconsider. Soon thereafter, Wardlow filed a supplemental motion for stay of

execution, citing primarily the then-recent COVID-19 pandemic. On April 3, 2020, the State moved to modify Wardlow's April 29 execution date, citing recent decisions by the CCA staying executions due to the pandemic. That same day, the state trial court granted the State's motion and reset Wardlow's execution date for July 8, 2020. Execution Order, *State v. Wardlow*, No. CR12764 (76th Dist. Ct., Titus County, Tex. Apr. 3, 2020).

On April 29, 2020, the CCA issued a single order disposing of all Wardlow's pending proceedings. *Ex parte Wardlow*, Nos. WR-58,548-01, WR-58,548-02, 2020 WL 2059742 (Tex. Crim. App. Apr. 29, 2020) (unpublished). First, it reconsidered its dismissal of Wardlow's initial state habeas application and denied it on the merits. *Id.* at *1. Second, it dismissed Wardlow's subsequent habeas reviewing the merits of the claims raised. *Id.* at *2. Third, it denied Wardlow's motions for stay of execution. *Id.*

Nearly two months later, Wardlow filed an alleged Rule 60(b) motion and accompanying request for stay of execution in the district court, arguing that the CCA's procedural bar reconsideration and its merits adjudication of his initial habeas application warranted reopening the lower court's judgment denying federal habeas relief. ROA.828–63. The district court determined that Wardlow's motion actually challenged the substance of its alternative merits review and was therefore an impermissible second-or-successive habeas petition over which it did not have jurisdiction. ROA.911–13. The court also

found that, because it lacked jurisdiction over Wardlow's disguised Rule 60(b) motion, it also lacked jurisdiction over Wardlow's motion to stay his execution. ROA.913. The court transferred both motions to the Fifth Circuit so that Wardlow could seek authorization to file his successive petition. *Id*.

Wardlow appealed the district court's transfer order but declined to seek authorization to file a successive petition. *See* ROA.914; Pet.–Appellant's Br. 2, *In re Wardlow*, No. 20-40445, 2020 WL 3708659 (5th Cir. July 6, 2020) (unpublished). The Fifth Circuit affirmed the district court's transfer order and denied authorization to file a second habeas application. Pet'r App. 1, at 7. The Fifth Circuit also found that, having rejected Wardlow's sole ground for relief, a stay of his execution was not warranted. *Id*. This proceeding follows.[2]

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[2] In addition to these proceedings, Wardlow has also filed two other petitions for writ of certiorari in this Court accompanied by motions to stay his execution. In the first, he seeks this Court's review of the CCA's dismissal of his subsequent state habeas application. *See Wardlow v. State*, No. 19-7812. In the second, he seeks review of the CCA's reconsideration and denial of the merits of his initial state habeas application. *See Wardlow v. State*, No. 19-8835. Both proceedings are still pending. Further, he has sought a stay of execution in the CCA based on COVID-19, which the court denied on July 1, 2020, *Ex parte Wardlow*, No. WR-58,548-02 (Tex. Crim. App. July 1, 2020), and he asked the state trial court to withdraw his execution date, which the court also denied, *State v. Wardlow*, No. CR12764 (76th Dist. Ct., Titus County, Tex. July 6, 2020). Wardlow's attorneys have also moved for mandamus relief in the Texas Supreme Court from the trial court's denial of the motion to withdraw the execution date. *See In re Burr, Welch, et al.*, No. 20-0516 (Tex. July 7, 2020). This proceeding is still pending.

REASONS FOR DENYING THE WRIT

I. Wardlow Provides No Compelling Reason to Expend Limited Judicial Resources on This Case.

The questions Wardlow presents for review are unworthy of the Court's attention. Wardlow has failed to provide a single "compelling reason" to grant review. *See* Sup. Ct. R. 10. Here, the Fifth Circuit applied this Court's settled precedent in holding that attempts to relitigate prior claims under the guise of a Rule 60(b) motion circumvent the Anti-Terrorism and Effective Death Penalty Act of 1996's (AEDPA) restrictions on successive petitions and, thus, are successive petitions. Pet'r App. 1, at 4–6. Because Wardlow's Rule 60(b) motion clearly attempted to attack the district court's adjudication of his claims on the merits, the Fifth Circuit's ruling was correct. Wardlow's protestations to the contrary are no more than mere disagreement with the outcome, which is, at best, simply a request for error correction. This Court's limited resources are better spent elsewhere. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law."); *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring) (questioning why certiorari was granted when the opinion decided "no novel or undecided question of federal law" and merely "recanvasse[d] the same material already canvassed by the Court of Appeals"). And that is because "[e]rror correction is

'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)).

Wardlow's attempts to manufacture a circuit split similarly fail. *See* Sup. Ct. R. 10(a). Wardlow argues that a circuit split exists because the Tenth Circuit permits what he alleges the Fifth Circuit and this Court do not—an attack on the merits adjudication of a claim vis-à-vis an alleged procedural defect. But Wardlow is incorrect because this Court has pointed out that "[v]irtually every Court of Appeals to consider the question has held that such a pleading [containing claims], although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). Indeed, as addressed below, the Tenth Circuit and Fifth Circuit are in agreement, not conflict, about how a motion such as Wardlow's—which uses nothing more than gross speculation to cast doubt on the district court's denial of his claims on the merits—is truly a successive petition under this Court's holding in *Gonzalez*.

Ultimately, Wardlow's argument amounts to a disagreement with the lower court's decision. He fails to demonstrate any misapplication of the law. Thus, no special or important reason exists to merit certiorari review, and his request should be denied.

II. *Gonzalez* Compels the Fifth Circuit's Decision that Wardlow's Purported Rule 60(b) Motion was Successive.

AEDPA provides that "a state prisoner always gets one chance to bring a federal habeas challenge to his conviction . . . [b]ut after that, the road gets rockier." *Banister v. Davis*, 140 S. Ct. 1698, 1704 (2020) (citing *Magwood v. Patterson*, 561 U.S. 320, 333–34 (2010)). While a Rule 60(b)(6) allows a district court to grant relief "from a final judgment, order or proceeding" for "any . . . reason that justifies relief," Fed. R. Civ. Pro. 60(b)(6), the rule must be construed within the limitations on successive petitions that AEDPA sets out. *See* 28 U.S.C. § 2244(b); *see Gonzalez*, 545 U.S. at 531–32. Indeed, Rule 60(b) motions often "undermin[e] AEDPA's scheme to prevent delay and protect finality." *Banister*, 140 S. Ct. at 1710. As such, this Court has explained that courts must be wary of allowing the rule to be used to circumvent AEDPA's second-or-successive petition bar. *Gonzalez*, 545 U.S. at 531–32.

A Rule 60(b) motion is proper if it alleges a *non*-merits-based defect in the district court's adjudication of the federal habeas petition. *Id.* at 532. That is, a Rule 60(b) motion is a "true" Rule 60(b) motion when it is directed towards rectifying defects that *prevent* a ruling on the merits. *Id.* at 532 n.4, 538 ("A motion that, like petitioner's challenges *only* the District Court's failure to *reach* the merits does not warrant [being treated as successive]." (emphasis

added)). *Gonzalez* provided several examples of defect-allegations that should be considered true Rule 60(b) motions.

For one, in *Gonzalez* itself the district court did not reach the merits of an inmate's claims on federal habeas review because, under then-existing law, the habeas petition was untimely. 545 U.S. at 527, 538. Months later, this Court issued an opinion that arguably rendered the time-bar ruling incorrect. *Id.* at 537. The Court found that petitioner's motion "confine[d] itself not only to the first federal habeas petition, but to a *nonmerits* aspect of the first federal habeas proceeding." *Id.* at 534 (emphasis added). And "[b]ecause petitioner's Rule 60(b) motion challenges only the District Court's previous ruling on the AEDPA statute of limitations, it is not the equivalent of a successive habeas petition." *Id.* at 535–36. Similarly, the Court cited to fraud on the federal habeas court as another example of a defect that is properly considered in a Rule 60(b) motion. *Id.* at 532 n.5 (citing *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001)). The Fifth Circuit has provided other such legitimate defects, including an allegation that federal habeas counsel labored under a conflict of interest. *Clark v. Davis*, 850 F.3d 770, 784 (5th Cir. 2017) (finding that an allegation of conflicted federal habeas counsel *alone* is not considered successive); *see also In re Paredes*, 587 F. App'x 805, 812–14, 822–23 (5th Cir. 2014) (unpublished) (same).

But neither this Court nor any other have held that such allegations serve as carte blanche to attack an underlying merits adjudication. Indeed, this Court has made clear that the operative question in determining whether a purported Rule 60(b) motion is successive is whether it "advances one or more 'claims.'" *Gonzalez*, 545 U.S. at 532. And determining whether a motion advances a claim can often be, but is not always, a "relatively simple" endeavor. *Id.* For example, "[a] motion that seeks to add a new ground for relief . . . will of course qualify." *Id.* Or if a motion "attacks the federal court's previous resolution of a claim *on the merits*," it will also qualify, "since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is . . . entitled to habeas relief." *Id.* The Court has defined what it means by "on the merits":

> The term "on the merits" has multiple usages. We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d). When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim. He is not doing so when he merely asserts that a previous ruling which *precluded* a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.

Id. at 532 n.4 (internal citations omitted) (emphasis added). Thus, *Gonzalez* makes a "distinction between merits-based motions and integrity-based motions" in determining whether a purported Rule 60(b) motion is actually a

second-or-successive petition. *Banister*, 140 S. Ct. at 1709 n.7. "If *neither* the motion itself *nor* the federal judgment from which it seeks relief *substantively* addresses federal grounds for setting aside the movant's state conviction," it is not a successive petition. *Gonzalez*, 545 U.S. at 533 (emphasis added).

A. The Fifth Circuit correctly determined that Wardlow's motion was successive.

This Court's precedent is not the blurry line that Wardlow believes exists. Indeed, despite his protestations to the contrary, Wardlow's motion was clearly a merits-based, not an integrity-based, one. Wardlow's briefing in this Court lays bare his intent to relitigate the merits of his already-denied claims. In his question presented, he characterizes the conflict between the Fifth and Tenth Circuits as one of disagreement about whether an allegation that the procedural defect "affected the district court's determination *of the merits* of the claims" is a true Rule 60(b) motion. Petition i. His primary complaint about the Fifth Circuit's decision is that, by determining his motion was successive, it wholly disregarded "the *impact* the procedural bar holding may have had on the [lower court's] determination *of the merits*." *Id.* at 3. And he characterizes his own argument as one asserting that "the district court's *merits review* was tainted by the procedural bar determination[.]" *Id.* at 4. Moreover, he believes that, for movants like Wardlow, it is in fact "*necessary* to include some discussion of the claims . . . to show the impact of the procedural defect on the

habeas proceeding." *Id.* at 5–6. Wardlow concededly argues *exactly* what he is prohibited from arguing in a Rule 60(b) motion—he attacks the district court's *merits resolution* of his claims.

However Wardlow frames it, his express purpose is to reopen his proceeding so that he can relitigate his denied-on-the-merits claims. To be sure, while it may be true that had Wardlow confined his motion to the alleged incorrectness of the procedural default, the lower court would have had jurisdiction to consider it, but he did not do so. *See, e.g.*, *Gonzalez*, 545 U.S. at 534 ("The motion here . . . confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas proceeding."); *see also Crutsinger v. Davis*, 929 F.3d 259, 265 (5th Cir. 2019) ("[Crutsinger's motion] does not present a revisitation of the merits of the [ineffectiveness assistance of counsel] claim. It is confined to the federal district court's denial of funding in the first federal habeas proceeding."). Indeed, as the district court properly noted, ROA.911, fifteen pages of his twenty-six-page motion—well over half—was nothing more than a recitation of the merits of his previously-barred claims and his disagreement with the lower court's resolution of them as an alternative matter. *See* ROA.841–56. As the district court recognized, ROA.911, his only argument for extraordinary circumstances was a cynical assertion that its alternative merits analysis was essentially fraudulent, preordained as it was by the then-proper imposition of a procedural bar. *See*

ROA.841 (arguing that "there is reason to doubt 'the quality, extensiveness or fairness' of the Court's consideration of the merits of the claims presented by Mr. Wardlow"). And even his argument that the court erroneously denied him an evidentiary hearing is a merits-based attack. *See United States v. Vialva*, 904 F.3d 356, 362 (5th Cir. 2018). In other words, *both* his motion *and* the federal judgment from which he seeks relief substantively addressed the merits of his claim, and such a motion is precisely what *Gonzalez* deems successive. 545 U.S. at 533.

It is clear Wardlow believes that simply because the lower court's prior procedural determination was superseded by the CCA's later act of grace, he is free to attack the lower court's resolution of his claims on the merits. *See, e.g.*, Petition 6 ("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)." (emphasis added)). But while the CCA's reconsideration could have served as a conduit for changing the court's prior *procedural* determination, had the lower court not reviewed the merits in the alternative, it does not allow a petitioner to escape AEDPA's bar on successive petitions. *See*, *e.g.*, *Gonzalez*, 545 U.S. at 538 (a motion that challenges only a district court's *failure to reach* the merits does not warrant being treated as a successive petition). The remedy for a procedural determination that *precluded* a merits review is a merits review. *Cf. Gonzalez*,

545 U.S. at 532 n.4 ("[A movant] is not [making a habeas claim] when he merely asserts that a previous ruling which precluded a merits determination was in error[.]"). Wardlow has already received that. All he is left with then, and indeed all he relies on, is an attack on that *merits* review. But that he is prohibited from doing.

Recognizing the hurdle the district court's alternative merits analysis presents, Wardlow offers two reasons—one jurisdictional and one speculative—why he believes the alternative analysis should pose no barrier to consideration of his motion. Petition 8–10. Neither, however, allows him to escape the successive-petition bar. Turning first to the jurisdictional, Wardlow attempts to circumvent *the fact* of a merits adjudication by arguing that, once the district court found his claims to be procedurally barred, it lacked jurisdiction to review the merits in the alternative. *Id.* at 9–10 (citing *Coleman v. Thompson*, 501 U.S. 722 (1991); *Lambrix v. Singletary*, 520 U.S. 518 (1997)). He presumably does so in order to establish that the lower court's procedural determination did, as a matter of law if not as a matter of fact, *preclude* merits review.

But, as found by the Fifth Circuit, Pet'r App. 1, at 5–6, Wardlow misinterprets the effect of a procedural determination. Indeed, the federal courts, especially in capital cases, routinely address the alternative merits of a procedurally defaulted claim. *See, e.g.*, Pet'r App. 1, at 6 (finding that courts,

including the Fifth Circuit, often make alternative holdings and even hold such rulings out to be binding precedent (quoting *Pruitt v. Levi Strauss & Co.*, 932 F.3d 458, 465 (5th Cir. 1991))).[3] This is because a procedural bar is an equitable bar, not a jurisdictional one. *Cf. Granberry v. Greer*, 481 U.S. 129, 131 (1987) ("We have already decided that the failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application."). To be sure, AEDPA expressly allows a federal district court to deny a habeas petition on the merits, notwithstanding a failure to exhaust state court remedies. 28 U.S.C. § 2254(b)(2).

And while it is true that an independent and adequate state bar deprives this Court of jurisdiction to review a claim on direct review, that is due to the unique jurisdictional statute of the Court. *See* 28 U.S.C. § 1257 (vesting the Court with jurisdiction to directly review state court *judgments* where a federal constitutional question is involved); *see* Pet'r App. 1, at 5 n.1. *Coleman* recognized, however, that "[i]n the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism," not jurisdiction. *See* 501 U.S. at 731. "That is why a

[3] To be sure, given the frequency with which courts in this circuit conduct these alternative merits analyses, Wardlow's rule—that such determinations are *always* preordained by the antecedent procedural determination and therefore are always appropriate for Rule 60(b) motions—would open the floodgates of relitigation and directly contravene this Court's intent in *Gonzalez*.

state can forfeit its procedural default defense, and a court is not required to raise it *sua sponte*." Pet'r App. 1, at 5 (citing *Trest v. Cain*, 522 U.S. 87, 89 (1997)).

Case in point: in *Buck v. Davis*, this Court effectively granted relief on a defaulted ineffective-assistance-of-trial-counsel claim. *See* 1387 S. Ct. 759, 770–71 (2017). Had the procedural bar been jurisdictional, this Court could not have even reached the merits of the claim, much less dictated the grant of relief. Simply put, if the question is whether a federal court *can* address the alternative merits of a claim on federal habeas, this Court has made clear that it invariably can. Thus, Wardlow's attempts to retroactively deprive the district court of jurisdiction and, thus, to deprive it of the alternative merits review it so carefully conducted, fail.

Wardlow's second reason justifying ignoring the merits determination similarly fails. Wardlow asserts that the court's procedural determination necessarily *tainted* its determination on the merits. *See* Petition 4. That is, Wardlow suggests that, though the district court may have, behind closed doors, believed there was merit to his claims, its hands were so tied by its procedural bar that it had to *find a way* to make his claims meritless, to assuage either itself or perhaps Wardlow. *See, e.g.*, Petition 10 ("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."

(emphasis in original)); ROA.11 ("[I]f all a court can do in such circumstances is to determine that the claims have no merit, the question becomes, whose interest is being served? Is it to reassure the petitioner that he would have lost anyway?").

But not only was Wardlow's assertion "pure speculation,"[4] Pet'r App. 1, at 6, it was unnecessarily fatalistic and offensive. Certainly, district courts can, and have, expressed their belief in the merit of a claim—where such exists—even if there is a procedural default at play. *See, e.g.*, *Wood v. Dretke*, 386 F. Supp. 2d 820, 845 (W.D. Tex. 2005) (holding that "petitioner would arguably have been entitled to a presumption of prejudice with regard to his trial counsel's performance at the punishment phase of [] trial had petitioner *not* procedurally defaulted on that contention by failing to present" it to the state court (emphasis added)); *Miller v. Johnson*, No. H-99-0405, 2004 U.S. Dist. LEXIS 28941, at *21–41 (S.D. Tex. Jan. 30, 2004) (granting relief on procedurally defaulted claim). That the district court did not do so here is not evidence of bad faith, it is evidence of bad claims. Indeed, the Fifth Circuit also

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[4] Wardlow asserts that the Fifth Circuit "acknowledged" that Wardlow had made a non-merits-based attack when he asserted that the district court's merits analysis was skewed by its procedural determination. Petition 3. That is not true. After rejecting Wardlow's jurisdictional argument, the Fifth Circuit addressed his speculative one, in which he "*trie[d]* to portray his motion as a non-merits-based attack by" impugning the district court's alternative merits analysis. Pet'r App. 1, at 6. Just as Wardlow tried to disguise a successive petition as a Rule 60(b) motion, he also tried to disguise a merits-based argument as an integrity-based one. The Fifth Circuit merely uncovered both disguises.

found that his claims lack merit (and if the district court's merits denial was in bad faith, then, under Wardlow's logic, so too were the decisions of three other federal judges). *Wardlow*, 750 F. App'x at 377 ("Even if Wardlow could show that the procedural bar is debatable, he would not be entitled to appeal for the additional reason that the merits of his claim are not debatable."). As the lower court held, if these alternative holdings show anything, it is the court's "conscientious treatment of Wardlow's case, not its neglect." Pet'r App. 1, at 6.

In the end, *Gonzalez* compels the conclusion that Wardlow's alleged Rule 60(b) motion was a successive petition, and the Fifth Circuit was correct to so find. Because Wardlow received alternative merits adjudication of his claims and because his current motion expressly seeks to relitigate the merits denial of those claims, the lower courts correctly decided that his purported Rule 60(b) motion must be dismissed as second or successive. This Court should, in turn, deny Wardlow certiorari review.

B. Wardlow's claim of circuit split is illusory.

Wardlow points to *In re Pickard*, 681 F.3d 1201 (10th Cir. 2012), as evidence of a circuit split between the Tenth and Fifth Circuits. Petition 6–8. But he is wrong—the circuits have faithfully applied *Gonzalez* in reaching each conclusion and are in agreement, not discord, as to how handle disguised successive petitions such as Wardlow's.

In *Pickard*, the § 2255 movants sought to reopen the federal district court's judgment on two bases: 1) that the court should reconsider its denial of claims under *Brady/Giglio*[5] and prosecutorial misconduct in light of newly discovered evidence discovered as a result of a post-habeas Freedom of Information Act (FOIA) request; and 2) the prosecutor committed fraud on the court during the § 2255 proceedings because it falsely stated that no other federal agencies aside from the Drug Enforcement Agency (DEA) were involved in investigation of the defendant's trial when the FOIA request showed otherwise. 681 F.3d at 1203–04. The district court had relied on the prosecutor's statements in denying movants' discovery request, seeking to require the government to identify any non-DEA federal agencies that participated in the investigation. *Id.* at 1203.

The Tenth Circuit found that the first claim related to *Brady* violations at trial was "certainly second-or-successive . . . because [it] assert[ed] a basis for relief from the underlying convictions." *Id.* at 1205. With respect to the second claim, the court held that a claim "that the prosecutor *committed fraud* in the § 2255 proceedings that prevented Defendants from obtaining discovery to establish their § 2255 claims" was *not* a successive claim. *Id.* at 1205–06 (emphasis added). To be sure, "[i]f Defendants' claim of prosecutorial deceit

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[5] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

during the § 2255 proceedings must be treated as a second-or-successive . . . , then the government's alleged misconduct during that proceeding could compound a substantial injustice to Defendants." *Id.* at 1207 (emphasis added).

But aside from noting that movants' argument was that the prosecutor's false statements prevented their discovery, which, in turn, prevented them from "showing that those agencies had additional information about [the witness] that could have been used to impeach him at trial[,]" the Tenth Circuit made no discussion of the district court's merits adjudication, much less the alleged defect's impact on the *substance* of that adjudication, in arriving at that conclusion. Rather, the Tenth Circuit straightforwardly applied a defect that this Court has already expressly designated as one—a fraud on the court. *See Gonzalez*, 545 U.S. at 532 n.5. The court did not rely on a daisy-chain of impact—i.e., the false statement's precise impact on discovery and then the precise impact of discovery on the merits adjudication—to reach its determination, but rather on the fact that a party's fraud on the court *literally* goes to the true integrity of the proceedings. The ultimate merits adjudication was of no moment because the process was inherently flawed. And, importantly, to the extent the movants *did* reach the merits of a claim, the court found that successive. *See id.* at 1205.

Pickard presents no conflict with the Fifth Circuit's decision or approach because Wardlow merely, and unsuccessfully, attempted to transform a

merits-based defect into a procedural-based one. But Wardlow did not allege a fraud on the court (except for perhaps the court's own apparent fraud on itself), and his allegation that the integrity of the proceeding was compromised was baseless. *See* Argument II.A, *supra*. The movants in *Pickard* did "not present a revisitation *of the merits*" of their *Brady* claim. *See Gonzalez*, 545 U.S. at 534. Wardlow did. Thus, if his claim is like any part of *Pickard*, it is the part that found the movants' attempt to press the *Brady* claim anew successive. In this, the circuits are in agreement. Beyond that, Wardlow's claim is nothing like that presented in *Pickard*, and a case that is wholly distinguishable and inapposite does not a conflict make.

Wardlow focuses on language in *Pickard* in which the Tenth Circuit attempts to reconcile its decision therein with "dictum" in its prior precedent that stated a Rule 60(b) motion was a true motion if it "'challenges a defect in the integrity of the federal habeas proceeding, *provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition*." 681 F.3d at 1206 (emphasis in original) (quoting *Spitznas v. Boone*, 464 F.3d 1213 (10th Cir. 2006)). The court clarified:

> The words *lead inextricably* should not be read too expansively. They certainly should not be read to say that a motion is an improper Rule 60(b) motion if success on the motion would ultimately lead to a claim for relief under § 2255. What else could be the purpose of a 60(b) motion? The movant is always seeking in the end to obtain § 2255 relief. The movant in a true Rule 60(b) motion is simply asserting that he did not get a fair shot in the

> original § 2255 proceeding because its integrity was marred by a flaw that must be repaired in further proceedings.

Id. The court found that "the proviso [in *Spitznas*] 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.* Wardlow argues that this language illustrates the Tenth Circuit's conflict with the Fifth's. Petition 7. But he is wrong for several reasons.

First, this discussion *followed* the court's determination that the movants' motions were not successive and were therefore themselves dictum. Dictum discussion of prior dictum cannot make a conflict. Second, to the extent the Tenth Circuit finds that Rule 60(b) motions necessarily always lead to a claim for relief, the Tenth and Fifth Circuits are also in agreement that this fact alone does not render a Rule 60(b) motion successive. *See, e.g.*, *Vialva*, 904 F.3d at 361 (noting that "Rule 60(b) motions can legitimately ask a court to reevaluate already-decided claims—as long as the motion credibly alleges a *non*-merits-based defect in the prior habeas proceedings" (emphasis added)). Indeed, the Fifth Circuit has noted that "the question . . . is not whether Rule 60(b) motions can reopen proceedings—they certainly can—but whether [movants] have *actually alleged* procedural defects cognizable under Rule 60(b)." *Id.* (emphasis added). Movants in *Pickard* did; Wardlow did not.

Finally, even under the Tenth Circuit's iteration of the distinction between a proper Rule 60(b) motion and a successive one, the outcome is no different. Indeed, Wardlow argues that the success of his motion, like that in *Pickard*, "did not 'depend[] on a determination that the district court incorrectly ruled on the merits in the habeas proceeding.'" Petition 7–8 (citing *Pickard*, 681 F.3d at 1206. Rather, Wardlow asserts, his motion simply "depended on the district court's determination whether the procedural bar ruling had an effect on, and indeed, led to a 'perfunctory consideration' [] of the merits of Wardlow's claims." *Id.* at 8. In other words, Wardlow claims that all he is asking for is *consideration* of whether the merits might be wrong, but not a *determination* that the merits were in fact wrong. This circular logic exposes the true nature of his request—that success of his motion *necessarily* turns on whether the district court's merits-adjudication was wrong.

Wardlow tries to make difficult what is simple: an attack on the district court's merits-adjudication is a second-or-successive petition. Both the Fifth and the Tenth Circuits agree, and Wardlow's supposed circuit split is artificial. This Court should deny Wardlow certiorari review.

III. Wardlow Is Not Entitled to a Stay of Execution.

A stay of execution is an equitable remedy and "is not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). A "party requesting a stay bears the burden of showing that the circumstances justify

an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). In utilizing that discretion, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). "The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be better than negligible." *Id*. The first factor is met, in this context, by showing "a reasonable probability that four Justices consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). If the "applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435. "These factors merge when the [State] is the opposing party" and "courts must be mindful that the [State's] role as the respondent in every . . . proceeding does not make the public interest in each individual one negligible." *Id*.

"Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence" and courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue

interference from the federal courts." *Hill*, 547 U.S. at 584. Thus, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Indeed, "[t]he federal courts can and should protect States from dilatory or speculative suits." *Id.* at 585.

Wardlow utterly fails to prove likely success on the merits. While he claims otherwise, his briefing on the point is conclusory, Mot. Stay Exec. 2, and he is wrong. If Wardlow succeeded at reopening his case for the limited purpose of unbarring his previously defaulted claims, it would be a hollow victory. After setting aside the default, any attack on the lower court's merits resolution of his claims constitutes a second or successive petition that the court lacks jurisdiction to consider. *See* Argument II, *supra*. If the court cannot reach Wardlow's claims, there can be no likely success on their merits.

Setting aside the jurisdictional impediment, Wardlow still falls short of showing likely success. If the procedural default were lifted, Wardlow's claims would be considered under the deferential standard of review imposed by 28 U.S.C. § 2254(d) because they have now been adjudicated on the merits in state court. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 100 (2011). But the claims already failed under de novo review (with, of course, deference to state court

factual findings), so they necessarily fail under § 2254(d). The CCA was not unreasonable for denying claims that have no merit. All Wardlow would accomplish by unbarring his claims is adding an additional impediment to garnering federal habeas relief. Making relief more *unlikely* is the opposite of what Wardlow must show to obtain a stay.

Ultimately, the lower courts have carefully considered Wardlow's claims and found them without merit. Those prior determinations "[are], effectively, dispositive of the motion for stay." *Crutsinger v. Davis*, 930 F.3d 705, 707 (5th Cir. 2019). But they are also effectively determinative of whether the case should be reopened because there must be a "'a good claim or defense'" or "Rule 60(b)(6) relief would be inappropriate." *Buck*, 137 S. Ct. at 780 (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2857 (3d ed. 2012)). So, whether it is likely success on reopening the case or likely success on the merits of his claims, Wardlow fails to show what is necessary to stay his execution.

Wardlow effectively forfeits argument on the other stay factors by failing to brief them. He argues that he will suffer from irreparable injury because there is "a strong likelihood that he has been denied the protection of the Eighth and Fourteenth Amendments." Mot. Stay Exec. 2. This argument is conclusory, and he cannot show irreparable harm on something that is entirely unexplained. But it is wrong regardless. The harm here is not whether

Wardlow will be executed, but whether he will be executed having not received merits review of his claims, which are no longer barred by a state law procedural ground. But the lower courts have provided him that review, as did the state courts, so he has no harm to complain of, irreparable or otherwise.

And there is harm to the State and the public. As noted above, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Wardlow senselessly executed elderly Carl Cole to steal his truck, something that could have been taken without violence because the keys were in it. Since that murder, he has received more than two decades' worth of review and no constitutional infirmity has been demonstrated. A desire to re-adjudicate claims that have already been found wanting is hardly a reason to delay Wardlow's sentence further. *See Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.").

Finally, Wardlow has failed to exercise due diligence in pursuing this litigation. As also noted above, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650). In the lower court, Wardlow pointed to the CCA's April 29, 2020 decision reconsidering and denying his initial state habeas application on the

merits as the point in time at which he had grounds to make a Rule 60(b) motion. *See* Pet.–Appellant's Br. 13–14, *In re Wardlow*, No. 20-40445, 2020 WL 3708659 (5th Cir. July 6, 2020). But the issue was truly ripe long before that, in a posture that would have in fact undermined any necessity to reopen a final judgment at all. Indeed, in 2008, four years after the CCA dismissed Wardlow's application based on his waiver, the CCA issued its decision in *Ex parte Reynoso*, in which it noted that a state habeas applicant's waiver is not effective until after his deadline for filing an application has passed. 257 S.W.3d 715, 720 n.2 (Tex. Crim. App. 2008). Wardlow was well aware of this case, as he began making extensive argument about it in his supplemental briefing before the district court in 2016. *See* ROA.565–66. And he continued to argue that the CCA's bar was inadequate based on that case in subsequent federal proceedings. *See, e.g.*, Pet.–Appellant App. for COA 15–16, *Wardlow*, 750 F. App'x at 375.

At no point in the fifteen years that his case was pending in federal court, however, did Wardlow ever attempt to stay his federal proceedings to return to state court and ask the CCA to reconsider its dismissal. While Wardlow may argue that the CCA's two-forum rule would have prohibited his filing a suggestion that the court reconsider its decision *while* federal habeas proceedings were pending, *see, e.g.*, Petition 2 ("able to return to the state courts because of the conclusion of the federal proceeding), there is nothing to

indicate that he was prohibited from requesting that those proceedings be stayed. Indeed, the CCA modified its abstention doctrine in 2004—four years before *Reynoso* was decided—to allow consideration of claims in a subsequent application that were also presented in parallel federal proceedings when the federal court stayed those proceedings. *Ex parte Soffar*, 143 S.W.2d 804, 804 (Tex. Crim. App. 2004). And the CCA has in fact granted requests like Wardlow's, i.e., suggestions to reconsider previously dismissed cases on its own initiative, in prior cases. *See, e.g.*, *Ex parte Cathey*, No. WR-55,161-02, 2018 WL 5817199, at *1 (Tex. Crim. App. Nov. 7, 2018) (reconsidering its dismissal of a subsequent application raising a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), after the Supreme Court issued a new opinion on the issue and the federal district court stayed its proceedings to give "'Texas courts an opportunity to decide whether *Moore* requires reconsideration of [Applicant's] *Akins* claim").

While the Director certainly would have opposed an attempt to stay the federal habeas proceedings on this basis, and while the federal courts may have denied a stay, that does not excuse Wardlow from failing to diligently pursue his claim since 2008. *Cf. Engle v. Isaac*, 456 U.S. 107, 130 (1982) (noting that the futility of presenting an objection at trial does not constitute cause for failing to object). Indeed, any argument based on futility is rendered moot by the fact that the CCA *did* in fact reconsider its dismissal based on Wardlow's

pleadings "and the evolution of [Texas Code of Criminal Procedure] Article 11.071 caselaw[.]" *Ex parte Wardlow*, 2020 WL 2059742, at *1. Wardlow's present attempt to reopen these proceedings on a basis that could have been raised, and resolved, long ago is therefore untimely.

But Wardlow was not diligent for other reasons. Indeed, even assuming the denial of certiorari in his initial federal habeas proceedings marked the beginning of the time which he could seek to ask the CCA to reconsider its dismissal, he still waited over one month—all while under the threat of execution—before filing his suggestion in the CCA. *See* Statement of the Case III, *supra*. Importantly, Wardlow waited nearly two months after the CCA reconsidered and denied his initial application—and with less than three weeks left before his modified execution date—before seeking to reopen proceedings in the lower court. Thus, when he succeeded in lifting the procedural bar, he still delayed timely presentation of the issue. Ultimately, Wardlow's complaints "could have been brought [long] ago" and "[t]here is no good reason for this abusive delay." *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam). A stay should be denied.

CONCLUSION

Wardlow fails to present a compelling reason to grant certiorari review. For all the reasons discussed above, the petition for a writ of certiorari and application for stay of execution should be denied.

Respectfully submitted,

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