No. _____

IN THE

Supreme Court of the United States

ROBERT GENE WILL, II,
Petitioner,

v.

BOBBY LUMPKIN,
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 A WRIT OF CERTIORARI

Jason Ewart
Karen Otto
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001

Samy Khalil
Khalil Law PLLC
River Oaks Bank Building
2001 Kirby Drive, Suite 1002
Houston, Texas 77019

Charles R. Flores
Counsel of Record
Beck Redden LLP
1221 McKinney Street,
Suite 4500
Houston, Texas 77010
(713) 951-6236
cflores@beckredden.com

Adam M. Dinnell
Schiffer Hicks Johnson, PLLC
700 Louisiana Street, Suite 2650
Houston, Texas 77002

QUESTIONS PRESENTED — CAPITAL CASE

1. In the federal habeas context, *Gonzalez v. Crosby*, 545 U.S. 524 (2005), held that a post-judgment motion for relief under Federal Rule of Civil Procedure 60(b) does *not* constitute a "second or successive" petition under 28 U.S.C. § 2244 that district courts lack jurisdiction to consider if the motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532. Circuits apply this test often and are in disarray. The first question is:

   Whether a habeas petitioner makes a valid Rule 60(b) motion by arguing that, due to an incorrect procedural-default ruling, the district court (1) only briefly addressed a claim's merits and/or (2) made more restrictive discovery decisions than it would have otherwise.

2. During Petitioner's trial for the murder of a law enforcement officer, a cadre of uniformed deputies who had no role whatever in the litigation sat next to the jury, looming coercively. Petitioner challenged this as unconstitutional, to no avail in state court. The second question is:

   Whether the Fifth Circuit was wrong to conclude that the Texas Court of Criminal Appeals' decision concerning Petitioner's right to a fair trial was a reasonable application of clearly established Federal law and a reasonable determination of the facts.

RELATED PROCEEDINGS

Will v. Lumpkin, No. 18-70030 (5th Cir.)

Will v. Davis, No. 18-70022 (5th Cir.)

Will v. Lumpkin, No. 18-70007 (5th Cir.)

In re Will, No. 18-20604 (5th Cir.)

Will v. Davis, No. 4:15-cv-03474 (S.D. Tex.)

Will v. Davis, No. 4:07-cv-01000 (S.D. Tex.)

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Robert Gene Will, II petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's opinion is reported at 978 F.3d 933 and reprinted at App. 1. The Fifth Circuit's order denying Petitioner's petition for rehearing en banc is unreported and reprinted at App. 46. The Southern District of Texas's decision is unreported and reprinted at App. 39.

JURISDICTION

28 U.S.C. § 1254(1) confers jurisdiction on this Court. The United States Court of Appeals for the Fifth Circuit entered the judgment at issue on October 22, 2020, and entered an order denying rehearing en banc on December 28, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment of the Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the Constitution provides in Section 1 as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Civil Procedure 60(b) provides in relevant part:

> 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

This is a capital case. App. 2. The judgment below rests upon decisions about (1) the scope of relief made available by Federal Rule of Civil Procedure 60 in the habeas context, and (2) unfair courtroom practices to which precedent directs the application of "close judicial scrutiny." *Estelle v. Williams*, 425 U.S. 501, 503-06 (1976). For good reasons, the district court's final order implored the judicial system to pay close attention to this matter's "extraordinarily significant issues":

> This technical ruling [denying a motion for relief under Federal Rule of Civil Procedure 60] should not serve, however, to obscure the *extraordinarily significant issues* that the Court of Appeals—unlike this Court—can properly consider. [I]n light of *Martinez*, the Court of Appeals should carefully review the evident misfeasance of Will's state habeas counsel.
>
> . . . .

> . . . With fewer constraints, the Court of Appeals can perhaps give these issues the time and attention that they merit.

App. 44 (emphasis added) (footnote omitted).

I. Trial

Rob Will did not murder Harris County Sheriff Deputy Barret Hill. Michael Rosario did. Evidence of Mr. Will's innocence existed at the time of trial, and since his conviction more proof has surfaced.[1] But due to the ineffective assistance of counsel and other grave errors, he was convicted nonetheless.

On October 15, 2001, jury selection began in Mr. Will's capital murder trial for the killing of Deputy Hill. This marked only 34 days following the terrorist attacks of September 11, 2001. Trial began shortly after the holidays in January 2002.

The trial drew considerable interest. The Harris County Deputies Organization, a public entity, issued a "reminder for as many uniformed deputies, that can be there, [to] attend." R. 165. Numerous deputies heeded the group's request and arrived in court wearing their official uniforms. Many also wore blue ribbons on their uniforms in support of the slain deputy. Tr. Vol. 17 at 14, 18.

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[1] *See In re Will*, 970 F.3d 536 (5th Cir. 2020) (authorizing the filing of a "second or successive" habeas petition raising claims of prosecutorial misconduct by the State of Texas in suppressing evidence under *Brady v. Maryland*, 373 U.S. 83 (1963)).

None of these deputies were testifying witnesses, nor were they assigned to the courtroom for security purposes. Tr. Vol. 17 at 14-15. Nonetheless, the deputies were cloaked in the official sign of State authority. This was despite the fact that the Harris County Sheriff's Office Department Manual states, "The Sheriff's Office Uniform may be worn by personnel only when on-duty, when working authorized extra employment, or when specifically authorized by their supervisor." R. 164.

Mr. Will's trial counsel immediately expressed concern that the overwhelming presence of uniformed deputies could create a hostile atmosphere and put Mr. Will's right to a fair trial at risk. *See* R.393. After jury selection, but before the trial began, Mr. Will's trial counsel moved "to limit the nontestifying Harris County deputies from attending in their uniform just because of the intimidating nature that it can have with respect to a jury." Tr. Vol. 17 at 15; *accord Will v. State*, No. 74,306, 2004 WL 3093238, at *3 (Tex. Crim. App. Apr. 21, 2004).

Rather than seeking exclusion, Mr. Will's trial counsel sought the least restrictive remedy available. He asked the trial court to require any non-testifying and non-security-related deputies attending the trial to wear non-official-uniform clothing. This would have "ensure[d] their presence [did not] unduly interfere with the juror's ability to be fair and impartial," Tr. Vol. 17 at 18, and helped guarantee a verdict based on the evidence presented—not the coercive effect of an excessive number of uniformed law enforcement officers. As Mr. Will's trial counsel contemporaneously observed:

> There are a number of uniformed Harris County deputy sheriffs in the courtroom . . . . We are concerned . . . there are a number of nontestifying, noncourtroom security uniformed Harris County deputies in the courtroom, because . . . . we believe that allowing them to come sit in their uniforms can be an intimidating factor for the jury.

Tr. Vol. 17 at 14-15.

The trial court denied Mr. Will's motion to prohibit an excessive number of uniformed deputies from attending the trial. *Will v. State*, 2004 WL 3093238, at *3. Mr. Will renewed his motion on multiple occasions throughout the. trial. Before opening statements, Mr. Will urged the trial court to remedy the situation, making a record that there were no less than 12 uniformed deputies sitting in the part of the courtroom closest to the jury. *Id.* As Mr. Will's trial counsel explained at the time:

> Consistent with my earlier motion, asking that the uniformed officers nontestifying be excused . . . I'd like the record to reflect . . . there are at least 13 uniformed officers in the courtroom and I'd like especially the record to reflect that on the right side of the courtroom on the right side of the aisle, there are 12 uniformed Harris County deputy sheriffs sitting in that part of the courtroom closest to the jury. And we would renew our motion.

Tr. Vol. 17 at 26.

Again, Mr. Will's motion was denied. Tr. Vol. 17 at 27. Days later, Mr. Will's trial counsel re-urged his motion, this time making a record that there were "what appear[ed] to be nontestifying uniformed Harris County deputy sheriffs in [the] courtroom." The motion was denied. Tr. Vol. 19 at 75-76; *accord Will v. State*, 2004 WL 3093238, at *3.

The presence of a large number of uniformed deputies was significant enough that Mr. Will's trial counsel felt compelled to address the issue, yet again, during closing argument of the punishment phase, remarking, "And try as we might, we look out here, we see all these officers and they're good officers. Try as we might, they've lost a friend, a confidant and one of theirs, we can't bring [Deputy] Hill back." Tr. Vol. 31 at 91; *Will v. State*, 2004 WL 3093238, at *3.

At the conclusion of trial, Mr. Will was convicted of capital murder and sentenced to death. App. 2.

II. State habeas

The injustice Mr. Will suffered at trial was compounded by his state habeas counsel, Leslie Ribnik. *See* App. 2-4. Instead of uncovering the evidence of Mr. Will's innocence available at trial or examining the record for trial counsel's deficiencies, Mr. Ribnik—who was sick with a debilitating mental disease—cut and pasted a petition from a previous client that raised none of the serious issues in Mr. Will's case. App. 2-4; R. 1394.

Specifically, Mr. Ribnik was appointed as Mr. Will's state habeas counsel in 2002 and filed a state

post-conviction writ on his behalf on October 19, 2003. *See id.* ***Two-thirds of the brief Mr. Ribnik submitted was word-for-word identical, including capitalization errors, to one that he had filed for another Texas death row inmate, Angel Maturino Resendiz***. *See id.* And in that copied brief, Mr. Ribnik raised only two issues: one concerning the burden of proof with respect to mitigation at capital sentencing, and the other claiming a First Amendment violation based on inferences of gang affiliation at trial. Because both of these claims were record-based, they were not cognizable in habeas court as stand-alone claims.

The Court of Criminal Appeals denied Mr. Will's application on March 29, 2006. *Ex parte Will*, WR-63,590-01, 2006 WL 832456 (Tex. Crim. App. Mar. 29, 2006). In August 2006, Mr. Ribnik's neurologist diagnosed him with "intermediate stage" Parkinson's disease and concluded that the disease's onset began in at least 2000 or 2001—before he was appointed in 2002 to work on Mr. Will's state habeas petition. R. 1394; *see also* R. 1403 (Affidavit of Michael G. Adelberg, M.D. discussing Mr. Ribnik's appointment in another habeas case: "It is my professional opinion that, as of the appointment date of October 14, 1999, it is probable that Mr. Ribnik was mentally impaired by the affects [*sic*] of Parkinson's disease to the degree that it made him unfit to serve in the capacity as habeas counsel for a capital appeal."). Later in 2006, the Texas Court of Criminal Appeals removed Mr. Ribnik from the list of attorneys approved to handle state habeas death penalty cases. R. 1440.

III. Federal habeas

After unsuccessfully availing himself of Texas's appellate and habeas remedies, Mr. Will sought federal habeas corpus review of his conviction and sentence. App. 3. Mr. Ribnik's "evident misfeasance," as described by the district court, App. 42, and the new evidence amassed since trial led the district court to reiterate its "deep concern for the factually complex insinuations that Will may be innocent" and emphasize that it continues to be "particularly sensitive to the absence of any direct evidence of Will's guilt, and the number of witnesses who aver that another man confessed to the underlying murder" of Deputy Hill. R. 43, 1644.

Despite its deep concerns about this case, the district court found that it had no jurisdiction "to explore the troubling concerns that plague Will's capital conviction." App. 44. It reached this conclusion (long after it had "briefly" considered the merits of the underlying IATC claim) even though there is now an "abundance" of evidence that "trial counsel did not present" which "should have been gathered by a competent, zealous attorney in the first round of state habeas review." App. 42. The district court determined that it lacked jurisdiction to reconsider the constitutional deficiencies of counsel through Mr. Will's Rule 60(b) motion. App. 44-45.

IV. Decision below

The Fifth Circuit panel resolved the appeal with two opinions – an original opinion and then a new opinion issued on rehearing. An extraordinary, inexplicable flip-flop occurred.

The Fifth Circuit's original opinion was issued on August 17, 2020. App. 20. There the Fifth Circuit got the key Rule 60 issue half right. Although it erred in holding that one of the Rule 60 motion's arguments was a "second or successive" petition under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), it nonetheless correctly held that the other argument did *not* constitute a "second or successive" petition under *Gonzalez* and was therefore a proper subject of Rule 60 relief. App. 32 n.38. The key holding in Mr. Will's favor occurred in footnote 38, which held that "the district court may consider (and rectify) whether, if at all, an erroneous procedural ruling truncated the necessary discovery":

> Will's Rule 60(b) motion also argues that the district court's proceeding was defective because it made its IAC determination "with the benefit of too little evidence" and therefore his motion presenting such evidence isn't successive. But these substantive contentions are squarely successive, and improper, under our precedent. *In re Coleman*, 768 F.3d 367, 371–72 (5th Cir. 2014) (finding that petitioner's Rule 60(b) motion, requesting relief because her counsel did not present certain evidence, was barred

> as a successive habeas petition). We have no jurisdiction over this contention and only consider Will's Rule 60(b) motion to the extent it attacks an allegedly erroneous procedural ruling that precluded a merits determination. Cf. id. at 373. However, ***on remand, the district court may consider (and rectify) whether, if at all, an erroneous procedural ruling truncated the necessary discovery.***

App. 32 n.38 (emphasis added).

Mr. Will then sought panel rehearing. The petition said that, as to footnote 38's conclusion that one of Mr. Will's Rule 60 arguments was valid and should be addressed by the district court on remand, the panel *opinion* was correct. Pet. for Panel Rehearing at 1. But the *judgment* was inconsistent. The petition for panel rehearing contended that, "[e]ven though the Court's opinion necessitate[d] reversal and remand, the Court's judgment orders that 'the judgment of the District Court is AFFIRMED.'" *Id.* at 1-2. In other words, the petition for panel rehearing contended that "[w]hat the opinion otherwise holds must happen next — a 'remand' for the district court to 'consider' whether 'an erroneous procedural ruling truncated the necessary discovery' — ha[d] been mistakenly foreclosed by a judgment that leaves open no such possibility." *Id.* at 2. So Mr. Will asked the Fifth Circuit to "issue a judgment that, instead of affirming, reverses and remands for further proceedings not inconsistent with the Court's opinion." *Id.* at 2.

On rehearing, the Fifth Circuit issued a new panel opinion on October 22, 2020, App. 1. But the Fifth Circuit did *not* correct the judgment to make it consistent with footnote 38's holding. Instead, it deleted the footnote 38 holding altogether. *Compare* App. 32 n.38. *with* App. 13-14 n.38.

The Fifth Circuit's opinion on rehearing matched the original opinion in all material respects save one – footnote 38's treatment of the argument about truncated discovery. *Id.* Whereas the original opinion had held that Mr. Will's argument regarding truncated discovery was a *valid* Rule 60 issue that warranted reversal and remand, the new opinion flip flopped completely by deleting footnote 38's last sentences altogether. *Id.* A redline of the opinions would show as follows:

> Will's Rule 60(b) motion also argues that the district court's proceeding was defective because it made its IAC determination "with the benefit of too little evidence" and therefore his motion presenting such evidence isn't successive. But these substantive contentions are squarely successive, and improper, under our precedent. *In re Coleman*, 768 F.3d 367, 371–72 (5th Cir. 2014) (finding that petitioner's Rule 60(b) motion, requesting relief because her counsel did not present certain evidence, was barred as a successive habeas petition). ~~We have no jurisdiction over this contention and only consider Will's Rule 60(b) motion to~~

> ~~the extent it attacks an allegedly erroneous procedural ruling that precluded a merits determination. *Cf. id.* at 373. However, on remand, the district court may consider (and rectify) whether, if at all, an erroneous procedural ruling truncated the necessary discovery.~~

See id. In this way, the Fifth Circuit went from awarding Mr. Will a partial victory to awarding him total defeat. It ended up affirming the district court "across the board." App. 19.

REASONS FOR GRANTING THE PETITION

I. The question about Rule 60 and *Gonzalez v. Crosby*, 545 U.S. 524 (2005), warrants review.

The Court should grant review to decide how to distinguish a proper Federal Rule of Civil Procedure 60(b) motion over which district courts must exercise jurisdiction from a "second or successive" habeas petition over which they cannot. That is an important and frequently recurring question that the judicial system should be sure to answer correctly in all instances. It especially important to do so in this capital case, which is a perfect vehicle for the establishment of a correct nationwide rule.

Gonzalez v. Crosby, 545 U.S. 524 (2005), held that a Rule 60(b) motion does *not* constitute a "second or successive" petition "when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532. The Fifth Circuit should have held that *both* of this petitioner's two key arguments passed that test. At first the Fifth Circuit got the case half right by holding that one of this motion's argument passed the test (and erred by holding that the other argument did not pass the test.). But on rehearing, the Fifth Circuit changed its mind and deleted the second holding. Instead of holding that this second argument passed the test, the Fifth Circuit held that none did.

The Fifth Circuit's inexplicable course reversal is indicative of a very serious error. The decision that *none* of Mr. Will's arguments is a valid Rule 60 point contradicts *Gonzalez* and multiple circuit precedents,

causing both serious injustice to the litigants at hand and disarray among the circuits. A uniform rule should be established now. This is an optimal vehicle with which the Court can do so.

A. The issue is extraordinarily important.

In the habeas context, post-judgment motions for relief under Federal Rule of Civil Procedure 60(b) may or may not constitute "second or successive" petitions under 28 U.S.C. § 2244 that district courts lack jurisdiction to consider. The question arises often and almost always with very high stakes, as this case illustrates.

The test used to make the critical distinction—between valid Rule 60(b) motions that district courts must exercise jurisdiction over and "second or successive" habeas petitions that district court's lack jurisdiction over—is a nuanced one requiring substantial elaboration via precedent. *See Banister v. Davis*, 140 S. Ct. 1698, 1709 n.7 (2020) ("The need for a habeas court" to distinguish between "merits-based motions" and "integrity-based motions" is a "not-always-easy threshold determination."). After *Gonzalez* set forth a general rule for courts to follow, the Fifth Circuit and others have struggled to apply it in a manner that is both principled and administrable. And in the decision below, the Fifth Circuit construed Rule 60 so erroneously as to render it virtually useless.

B. The Fifth Circuit's rule contradicts *Gonzalez*.

Gonzalez v. Crosby, 545 U.S. 524 (2005), held that a Rule 60(b) motion does *not* constitute a "second or successive" petition "when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532. Accordingly, Mr. Will used Rule 60(b) to make two arguments about the district court's resolution of his claim on the merits. Neither argument concerned the *substance* of the district court's merits determination. Both concerned *defects in the integrity* of the district court's merits determination.

Each of the Rule 60 arguments at issue stems from a common core: the district court's reliance upon procedural default. Originally, the district court's judgment faulted Mr. Will for having committed procedural default in his state habeas proceedings. But in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), such faults are not attributable to Mr. Will because they result from the ineffective assistance of counsel. Thus, Mr. Will's Rule 60 motion argued that a "defect in the integrity of these proceedings pertain[ed] to the procedural-default holding itself: *Martinez* and *Trevino* establish that procedural default is excused where, as here, state habeas counsel was ineffective because he wholly abandoned Mr. Will." R. 1344.

It is true that the district court, after basing its judgment on rulings about procedural default, went on to express views about the merits of Mr. Will's

claim of ineffective assistance of trial counsel. R. 406-407, 416-424. Hence Mr. Will's argument to the district court below and to the Fifth Circuit: The *Martinez* and *Trevino* change in law did not just reveal the defect of an erroneous procedural default ruling. It also revealed two defects in the integrity of the district court's alternative merits determination.

Specifically, Mr. Will's Rule 60 motion articulated this by making the two arguments now at issue: "Because of the erroneous procedural-default ruling, the [district court] [1] only 'briefly address[ed]' the merits of Mr. Will's IATC claim (because full consideration was unnecessary to the outcome of that claim), and [2] the Court made more restrictive discovery decisions than it would have otherwise." R. 1344. As to these two Rule 60 arguments, the Fifth Circuit's first opinion reached contradictory conclusions that cannot be reconciled.

With respect to the argument about discovery limitations, the Fifth Circuit opinion's first result—the one rendered originally, before rehearing—was correct. The original opinion's footnote 38 correctly held that the argument concerning discovery constituted a true Rule 60(b) argument over which the district court had jurisdiction—not a "second or successive" petition over which jurisdiction was lacking. It expressly held that "on remand, the district court may consider (and rectify) whether, if at all, an erroneous procedural ruling truncated the necessary discovery":

> Will's Rule 60(b) motion also argues that the district court's proceeding was defective because it made its IAC determination "with the benefit of too little evidence" and therefore his motion presenting such evidence isn't successive. But these substantive contentions are squarely successive, and improper, under our precedent. *In re Coleman*, 768 F.3d 367, 371–72 (5th Cir. 2014) (finding that petitioner's Rule 60(b) motion, requesting relief because her counsel did not present certain evidence, was barred as a successive habeas petition). We have no jurisdiction over this contention and only consider Will's Rule 60(b) motion to the extent it attacks an allegedly erroneous procedural ruling that precluded a merits determination. Cf. id. at 373. However, ***on remand, the district court may consider (and rectify) whether, if at all, an erroneous procedural ruling truncated the necessary discovery.***

App. 13-14 n.38 (emphasis added).

That conclusion correctly applies the Rule 60 test. Nowhere does *Gonzalez v. Crosby*, 545 U.S. 524, say that *procedural* rulings are the only possible victims of a "defect in the integrity of the federal habeas proceedings." *Id.* at 532. If that were so, the Court in *Gonzalez* could not have gone so far as to validate Rule 60(b) arguments about fraud on the habeas court (e.g.,

misconduct in evidence procurement) *regardless of which holding—merits or non-merits—the fraud pertained to*. *Id* at 532 & nn.4-5. For merits and non-merits holdings alike, *Gonzalez* holds that Rule 60(b) is such a defect argument's proper vehicle because it "relate[s] to the integrity of the federal habeas proceeding, not to the integrity of the state criminal trial." *Id.* at 532 n.5; *see Rodriguez v. Mitchell*, 252 F.3d 191 (2d Cir. 2001) (approved of by *Gonzalez*, 545 U.S. at 532 nn.4-5).

Mr. Will's argument about discovery limitations adhered to *Gonzalez*. *See generally* Br. of Appellant. Even though it involved the district court's merits determination, its logic pertained solely to the integrity of the federal habeas proceeding below. The Fifth Circuit's original opinion therefore reached the correct result by holding that this aspect of Mr. Will's motion was a valid use of Rule 60(b) over which the district court must exercise jurisdiction in the first instance on remand.

On rehearing, the Fifth Circuit reversed course and deleted the footnote 38 holding without explanation. App. 13-14 & n.38. The state certainly did not supply one, as it did not respond to the petition for rehearing. And the Fifth Circuit's revised opinion did not explain the shift in disposition either. That the change lacks explanation is a strong sign of what first principles show. The Fifth Circuit was right about the discovery argument at first, and is now wrong.

With respect to the point about the district court having only "briefly" addressed the merits, the Fifth Circuit's decision was consistent in both the original and revised opinions. In both instances, the Fifth Circuit held that this argument *was* a "second or successive" petition over which the district court lacked jurisdiction. Op. at 7-8 & n.23. That result is wrong in two principal respects.

First, the Fifth Circuit's "successive" labeling of this argument is an incorrect application of *Gonzalez*. Just like the point about discovery limitations, the point about the district court having only "briefly" addressed the merits related solely to the integrity of the federal district court's habeas proceedings below—not to the integrity of the criminal trial. *See* Br. of Appellant at 42 ("Because *Martinez* and *Trevino* had not yet been decided, the district court did not conduct a full analysis of the IATC claim's merits. Under the erroneous assumption that Mr. Will's procedural-default errors 'frustrated judicial consideration' of his claim, R. 754, the court addressed the merits only 'briefly,' R. 416."). So just like the issue of discovery limitations, the Fifth Circuit should have held that Mr. Will's point about the district court having only "briefly" addressed the merits (due to its erroneous procedural–default ruling) was a proper use of Rule 60(b) over which the district court had jurisdiction.

Second, the Fifth Circuit's decision (about the district court having "briefly" addressed the merits) errantly conflates two questions that ought to be distinct: (1) whether a Rule 60 motion's point is "successive" and therefore beyond a district court's jurisdiction, and (2) whether a legitimate Rule 60

point is meritorious. So long as a Rule 60 point is not a "second or successive" petition, the district court in the first instance must decide whether it is meritorious. That a Rule 60 point might fail on the *merits* is no reason to reject it for lack of *jurisdiction*. Yet the Fifth Circuit's decision did just that.

The Fifth Circuit's decision deemed the point at issue "second or successive" and beyond the district court's *jurisdiction because* the Fifth Circuit itself viewed it as *not meritorious*. Op. at 7-8 & n.23. The Fifth Circuit's only basis for rejecting this point was *not* that it was the wrong *species* of argument. The Fifth Circuit's only basis for rejecting this point was that it was unconvincing. Whereas Mr. Will's motion had argued that the district court's "brief" consideration of the merits was a defect in the integrity of the habeas proceedings below and consequential enough to constitute Rule 60 "extraordinary circumstances," *see* Br. of Appellant at 34-44, the Fifth Circuit's decision held that it was no defect at all. It held that the "contention is a non-starter" because "the merits analysis was four pages long and analytically robust." Op. at 7-8 & n.23. That method is wrong as a matter of law.

Given that the only issue presented was one of jurisdiction—whether Mr. Will's argument was the right species of Rule 60(b) contention under *Gonzalez*—and given that the district court never opined on the point's merits because it felt jurisdictionally barred from doing so, the Fifth Circuit should never have ventured into the point's merits either. It instead should have held, just as it originally did for the point about discovery

limitations, that the district court has jurisdiction and is obligated to address the argument's merits – *i.e.*, whether Rule 60 "extraordinary circumstances" exist – in the first instance on remand.

C. Circuits are in conflict.

The Fifth Circuit's decision entails a conflict not just with the Supreme Court precedent, but with circuit precedent as well. Courts across the nation facing this same issue resolve it with disarray. Authoritative guidance is needed, and capital cases such as this one cannot await any more percolation.

In conflict with the Fifth Circuit here, the Tenth Circuit rightly holds that if a judgment fails to consider a claim altogether, a "defect in the integrity of the federal habeas proceedings" has occurred and Rule 60(b) provides relief from that judgment. *See, e.g.*, *Spitznas v. Boone*, 464 F.3d 1213, 1225 (10th Cir. 2006); *see also In re Pickard*, 681 F.3d 1201, 1206 (10th Cir. 2012); *United States v. Altamirano-Quintero*, 504 F. App'x 761, 765 (10th Cir. 2012); *Peach v. United States*, 468 F.3d 1269, 1271 (10th Cir. 2006). By this same logic, Rule 60(b) authorizes relief from a judgment that errantly fails to fully consider a claim. After all, the difference between no adjudication and incomplete adjudication is one of degree—not kind. This makes the district court's "brief," "frustrated judicial consideration" of the merits here a valid ground for Rule 60(b) relief.

Additional conflicts exist as well. *Uranga v. Davis*, 893 F.3d 282 (5th Cir. 2018), approved a post-judgment motion akin to what the Fifth Circuit

disapproved here. The *Uranga* motion argued that the district court had addressed the merits "prematurely," and the Court held that such an argument did *not* make the motion "second or successive." *Id.* at 285. *Uranga* cannot be squared with the Fifth Circuit's treatment of Mr. Will's point about the district court having only "briefly" addressed the merits of the underlying IATC claim. If *Uranga*'s motion sufficed, so does Mr. Will's.

The Fifth Circuit's decision below is also in tension with *United States v. Nkuku*, 602 F. App'x 183 (5th Cir. 2015). *Nkuku*'s motion sufficed (was not "second or successive") because it pressed an "objection . . . with the process, not the substance, of his case's disposition." *Id.* at 185. If the Fifth Circuit here had followed *Nkuku*, both of Mr. Will's Rule 60(b) arguments would have passed muster. But because the panel departed from this process/substance distinction, its adverse holding as to Mr. Will cannot be squared with *Nkuku* or *Gonzalez*.

II. The question about fair trial rights in the courtroom warrants review.

A. The decision below is wrong about the application of critical federal law.

Petitioner is entitled to federal habeas relief because his trial scene, featuring an excessive number of non-testifying, non-courtroom-security uniformed deputies seated near the jury, was inherently prejudicial under this Court's decisions in *Estelle v. Williams*, 425 U.S. 501, 503-06 (1976), and *Holbrook v. Flynn*, 475 U.S. 560, 569-70 (1986). Practices that

pose a threat to a fair trial must be subjected to "close judicial scrutiny." *Williams,* 425 U.S. at 503-506; *Moore v. Dempsey*, 261 U.S. 86, 91 (1923) (trials must be free from a coercive or intimidating atmosphere).

Under *Flynn*, there must be an objective assessment of the courtroom scene on a case-by-case basis, considering the totality of the circumstances. Only then can a court decide whether there was inherent prejudice. *Flynn*, 475 U.S. at 569-70 (while recognizing "the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial," stating there is no substitute for considering the totality of the circumstances when deciding whether there was an unacceptable risk of impermissible factors coming into play).

The Texas Court of Criminal Appeals failed to (1) apply the objective test as required, and (2) consider the totality of the circumstances. The Fifth Circuit then compounded these errors by denying relief.

While on trial for the murder of a law enforcement officer, Petitioner's trial scene featured a large number of uniformed deputies (12-18) that had been encouraged to attend in uniform and sit in the area of the courtroom nearest the jury. *See* App. 15-16. In advance of the trial, the Harris County Deputies Organization, a public entity, had issued a "reminder for as many *uniformed* deputies, that can be there, [to] attend." *See* R.393 (emphasis added).

Jury selection commenced just 34 days after the attacks of September 11, 2001, when public sentiment

towards law enforcement was at an all-time high. *See* R 424. Whether the numerous deputies in attendance were off-duty or not, their own rules and regulations required that they only wear their uniform while on-duty or on official business. This meant that by wearing their uniform, these deputies, whether intended or not, carried the imprimatur of state authority.

As far as the jury was concerned, these uniformed deputies were not mere courtroom spectators; they reasonably could be perceived as agents of the state acting in their official capacity. Petitioner objected to the inherently prejudicial scene and the "intimidating nature that it can have with respect to a jury" on at least three occasions during both phases of trial and at its key moments (including before the trial began and at the time of closing arguments). *See* R. 424. These objections were improperly overruled. Petitioner's counsel even proposed that the deputies in attendance could wear plain clothes to balance the public nature of the proceeding with Petitioner's right to a fair trial, but this request too was denied. *Id.*

By refusing to address the courtroom environment, the trial court failed in its affirmative obligation to protect its "processes from prejudicial outside interference," including interference from law enforcement officers. *See Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

The 12 to 18 deputies could not have been reasonably perceived by the jury as a product of private courtroom conduct. If so, why were they all in uniform? Rather, this amounted to an unacceptable

risk of impermissible factors coming into play. These deputies were not providing security. None of them testified. They were not sitting alongside the family members of the victim; rather, they sat as close as possible to the jury. Far from any essential state policy or interest, the apparent purpose of appearing en masse and in uniform was to project the "unmistakable mark of guilt."

A reasonable juror, upon seeing the number of deputies, their uniforms, and their location in the courtroom near the jury, objectively would have perceived a coercive effort to sway the outcome – a silent extra-evidentiary communication as to what it needed to do.

Just as the Eleventh Circuit described in *Woods v. Dugger*, 932 F.2d 1454, 1459 (11th Cir. 1991), the officers "wanted to communicate a message to the jury . . . The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message."

In such a scenario, where a trial is tainted by an atmosphere of coercion or intimidation, it necessarily lacks due process. *Frank v. Mangum*, 237 U.S. 309, 335 (1915); *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) ("There can be no doubt that [the constitutional safeguards] embrace the fundamental conception of a fair trial, and that they exclude influence or domination by either a hostile or friendly mob.").

This is why, even though the district court denied habeas relief, it emphasized that "the Court of Appeals should examine Will's argument, which has

been part of his habeas petitions from the start, that the presence of numerous uniformed officers at his trial created an unconstitutionally coercive environment for the jury. If this Court had heard such an argument on direct appeal, it would almost certainly have granted relief." App. 23.

But by endorsing the Texas Court of Criminal Appeals' decision, the Fifth Circuit missed the mark. The Texas Court of Criminal Appeals failed to apply clearly established federal law under *Flynn*. For example, it failed to conduct a proper case-by-case analysis. It failed to take an objective look at the totality of the circumstances. Rather, it suggested that *all* scenes featuring uniformed law enforcement in the courtroom are *per se* non-prejudicial. App. 16. This is plainly wrong and amounts to an unreasonable application of federal law.

Because the courtroom scene objectively presented a clear and unacceptable risk that impermissible factors would influence the outcome, Petitioner is entitled to habeas relief.

B. The decision below is wrong about the determination of critical facts.

Petitioner is also entitled to habeas relief because the Texas Court of Criminal Appeals made unreasonable factual determinations. First, it found that none of the jurors had close ties to law enforcement; in fact, they did. App. 18. Second, it found that Petitioner's objections and motions concerning the number of uniformed deputies in the courtroom were "too scant" to be sufficient. App. 36.

Each determination was independently unreasonable and warrants habeas relief.

The Texas Court of Criminal Appeals' determination that "there is no evidence that any of appellant's jurors had close ties to law enforcement" was unreasonable in light of the factual record that was before it. At least five of the twelve jurors who were seated had close ties to law enforcement. App. 36. These included a juror whose brother had been a state trooper for twenty-five years, a juror whose father had been a chief of police, and a juror whose stepfather was a retired corrections officer. *See id.* In fact, the Fifth Circuit specifically concluded that the Texas Court of Criminal Appeals' conclusion on close ties to law enforcement was unreasonable. App. 37.

As the Eleventh Circuit concluded in a proper case-by-case analysis under *Flynn*, the mere presence of prison guards in a courtroom can be inherently prejudicial where some of the jurors "had relatives working in the prison system." *Woods*, 923 F.2d at 1459. Similar circumstances were presented here and, as a result, the Fifth Circuit erred by holding that Petitioner had not satisfied the required substantial showing. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000); *Wilson v. Sellers*, 584 U.S. ___, 138 S. Ct. 1188, 1191 (2018).

In its decision, the Texas Court of Criminal Appeals also stated it "cannot agree with [Petitioner's] claim based on a record showing that appellant objected to the officers' uniforms on only two occasions . . . during 12 days of testimony." App. 17. The conclusion that Petitioner's objections were "too

scant" was not only legally unfounded but also constituted an unreasonable determination of facts. *Douglas v. State of Alabama*, 380 U.S. 415, 422-23 (1965) ("No legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected . . .").

Petitioner first moved to prohibit the excessive number of deputies before opening and then followed later with a first renewed motion and second renewed motion. R 425. Petitioner's specific objection included the following: "I'd like especially the record to reflect that on the right side of the courtroom on the right side of the aisle, there are 12 uniformed Harris County deputy sheriffs sitting in that part of the courtroom closest to the jury." *Id.* This is exactly the scenario the Texas Court of Criminal Appeals described in *Howard v. State*, 941 S.W.2d 102 (Tex. Crim. App. 1996) (en banc). There it emphasized that, if the factual record included "some indication that the law-enforcement contingency gravitated toward the jury," there may be a valid basis for an inherent-prejudice claim.

By ignoring the same facts that it had identified as important in *Howard*, and by unreasonably concluding that three separate objections were "too scant" to support relief, the Texas Court of Criminal Appeals' factual determinations must be considered unreasonable in light of the record. The Fifth Circuit should have granted relief in the face of these obvious failures.

As this Court has recognized, the habeas writ exists as a vital "bulwark against convictions that

violate fundamental fairness." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (quotation omitted). And the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987).

The Texas Court of Criminal Appeals unreasonably applied clearly established federal law by failing to apply the case-by-case *Flynn* test, by unreasonably determining facts concerning the prejudice inherent in Petitioner's trial atmosphere, and by refusing to safeguard Petitioner's right to a fair trial. This constitutionally deficient process needs correction.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Charles R. Flores
Counsel of Record
Beck Redden LLP
1221 McKinney Street
Suite 4500
Houston, TX 77010
(713) 951-6236
cflores@beckredden.com

Adam M. Dinnell
Schiffer Hicks Johnson, PLLC
700 Louisiana Street, Suite 2650
Houston, Texas 77002
(713) 357-5150
adinnell@shjlawfirm.com

Samy Khalil
Khalil Law PLLC
River Oaks Bank Building
2001 Kirby Drive
Suite 1002
Houston, Texas 77019
(713) 904-4477
samy@khalil.law

Counsel for Petitioner

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