

App. 1

**United States Court of Appeals
for the Fifth Circuit**

No. 18-70030

ROBERT GENE WILL, II,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of
Criminal Justice, Correctional Institutions
Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:07-CV-1000

(Filed October 22, 2020)

ON PETITION FOR REHEARING

Before OWEN, *Chief Judge*, and WILLETT and HO,
Circuit Judges.

DON R. WILLETT, *Circuit Judge:*

The petition for panel rehearing is GRANTED.
We withdraw our prior opinion,

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970 F.3d 566 (5th Cir. 2020), and substitute the following.

Robert Gene Will II was sentenced to death by a Texas jury for the murder of Harris County Sheriff's Deputy Barrett Hill. After his failed direct appeal and state habeas petitions, Will pursued federal habeas relief. His claims for ineffective assistance of counsel and inherent trial prejudice were denied—the former as procedurally defaulted and the latter on the merits. Will attempted to contest the procedural-default holding through a Rule 60(b) motion, but the district court concluded that it lacked jurisdiction because the motion constituted a successive habeas petition. We agree that Will's Rule 60(b) motion was a successive habeas petition, and we affirm the district court. We also affirm the denial of Will's inherent-prejudice claim, as Will fails to overcome the arduous standard of review in the Anti-Terrorism and Effective Death Penalty Act.

I

Will was found guilty of capital murder in Texas state court and sentenced to death.¹ Will appealed directly to the Texas Court of Criminal Appeals, arguing that the presence of uniformed officers in the courtroom impermissibly prejudiced the jury,

¹ For full treatment of Will's previous proceedings, see *Will v. Thaler*, No. H-07-CV-1000, 2010 WL 2179680, at *1–6 (S.D. Tex. May 25, 2010).

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but the court disagreed.² Will then filed a state habeas petition with the same court on the same grounds. The CCA reached the same conclusion and denied relief.³

Will then filed a federal habeas petition, maintaining his argument about impermissible trial prejudice and adding an argument based on ineffective assistance of trial counsel (and one based on actual innocence claim, not pursued in this appeal).⁴ The district court stayed Will's federal proceedings so he could exhaust the new claims in state court. Will filed a second state habeas petition raising the new claims, which the CCA denied on procedural grounds.

Back in federal court, the district court denied Will's petition because (1) the IATC claim was procedurally defaulted and failed on its merits

² *Will v. State*, No. 74,306, 2004 WL 3093238, at *4 (Tex. Crim. App. April 21, 2004) (unpublished).

³ *Ex parte Will*, No. 63,590-01, 2006 WL 832456, at *1 (Tex. Crim. App. March 29, 2006) (per curiam) (unpublished).

⁴ We note that Will's state habeas counsel had Parkinson's disease at the time he filed this petition. A reviewing doctor testified that "it is probable that [counsel] was mentally impaired by the affects [] of Parkinson's disease to the degree that it made him unfit to serve in the capacity as habeas counsel for a capital appeal."

regardless, and (2) the state court did not err in denying the trial-prejudice claim on the merits.⁵

Will filed a Rule 59 motion for a new trial and to alter the district court's judgment; this motion was denied. Will then filed a Rule 60(b) motion for relief from the district court's judgment. The motion focused on the ineffective assistance of both his trial counsel and state habeas counsel, urging that the latter should excuse the procedural default of his claim about the former. The district court found, however, that Will's Rule 60(b) motion challenging the procedural-default ruling necessarily implied a challenge to the merits ruling, meaning that the motion was a successive habeas petition. Accordingly, the court denied it for lack of jurisdiction.⁶ Will appealed this denial to us.⁷

But, before we could rule, the Supreme Court decided *Martinez v. Ryan*, holding that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.”⁸ So we remanded Will's appeal

⁵ *Will*, 2010 WL 2179680, at *14–24.

⁶ *Will v. Thaler*, No. CIV.A. H-07-1000, 2012 WL 948409, at *2 (S.D. Tex. Mar. 19, 2012), *order clarified sub nom. Will v. Davis*, No. H-07-CV-1000, 2018 WL 4621170 (S.D. Tex. Sept. 26, 2018).

⁷ *Will v. Davis*, No. H-07-CV-1000, 2018 WL 4621170, at *1 (S.D. Tex. Sept. 26, 2018).

⁸ 566 U.S. 1, 9, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). A year later *Trevino v. Thaler* came down, applying the *Martinez* rule

to the district court for (1) reconsideration of the Rule 60(b) motion dismissal in light of this new precedent, and (2) clarification on whether a certificate of appealability should issue on Will's claims.

The district court again denied Will's Rule 60(b) motion, reasoning that, regardless of *Martinez*, it "is a successive habeas petition which the [c]ourt has no jurisdiction to consider under [AEDPA]." ⁹ But it also granted Will a COA on two issues: his dismissed Rule 60(b) motion and his denied trial-prejudice claim. ¹⁰ Will pursues these claims now, arguing that (1) the Rule 60(b) motion is not an impermissible successive habeas petition because it only attacked the "integrity of the [underlying] federal habeas proceeding," and (2) he should be granted habeas relief from the adverse trial-prejudice ruling because the CCA misapplied clearly established federal law or its holding was based on unreasonable factual determinations.

II

As to Will's first argument, we review de novo "[t]he district court's determination that a purported

to cases from Texas state courts. 569 U.S. 413, 417, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013).

⁹ *Will*, 2018 WL 4621170, at *1.

¹⁰ *Id.* at *3.

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Rule 60(b) motion constitutes a successive § 2254 habeas petition.”¹¹

As to Will’s second argument, our review of the CCA’s trial-prejudice decision is narrow: we only consider whether the decision was “contrary to, or an unreasonable application of, clearly established Federal law” or “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”¹²

III

A

Will proceeds under our statutorily prescribed and exactly applied habeas framework. Normally, “Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under” extraordinary circumstances.¹³ But in the habeas context, Will’s Rule 60(b) motion runs headlong into AEDPA’s restriction on successive habeas applications. Why? Because we—the federal judiciary—are concerned that petitioners will use Rule 60(b) motions to subvert the statutory framework and get an impermissible second look at

¹¹ *Gilkers v. Vannoy*, 904 F.3d 336, 342 (5th Cir. 2018), *cert. denied*, — U.S. —, 139 S. Ct. 1192, 203 L.Ed.2d 223 (2019).

¹² 28 U.S.C. § 2254(d).

¹³ *Gonzalez v. Crosby*, 545 U.S. 524, 528, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005).

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their denied habeas claims.¹⁴ So, we must ask, was Will's Rule 60(b) motion actually an impermissible successive habeas petition in disguise? The answer: yes, *if* his Rule 60(b) motion contains one or more previously presented habeas claims.¹⁵

A habeas claim “is an asserted federal basis for relief from a state court’s judgment of conviction.”¹⁶ “In most cases, determining whether a Rule 60(b) motion advances one or more ‘claims’ will be

¹⁴ *Gilkers*, 904 F.3d at 343 (“To ensure that habeas petitioners do not circumvent these statutory requirements by filing Rule 60(b) motions that are the functional equivalent of unauthorized successive § 2254 petitions, the Supreme Court set forth several guidelines ... for determining the circumstances under which a district court may properly consider a Rule 60(b) motion in a § 2254 habeas proceeding.”); *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641 (“[A]lleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.”); *see also* *Leal Garcia v. Quarterman*, 573 F.3d 214, 220 (5th Cir. 2009) (stating that AEDPA serves as a “gate-keeper by preventing the repeated filing of habeas petitions that attack the prisoner’s underlying conviction”).

¹⁵ *Gonzalez*, 545 U.S. at 530, 125 S.Ct. 2641 (stating that § 2254’s successive petition bar only applies to a petitioner’s Rule 60(b) motion if it is an “application for habeas relief”; a motion applies for habeas relief if it “contains one or more ‘claims’ ” (citations omitted)); *Williams v. Thaler*, 602 F.3d 291, 301 (5th Cir. 2010) (“AEDPA instructs us to dismiss any claim presented in a second or successive petition if a petitioner presented the claim in a previous application.” (citation omitted)).

¹⁶ *Gonzalez*, 545 U.S. at 531, 125 S.Ct. 2641.

relatively simple”: the motion advances a claim “if it attacks the federal court’s previous resolution of a claim *on the merits*.”¹⁷ But, as we said in *Gilkers*, “there are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a ‘defect in the integrity of the federal habeas proceeding’ or (2) the motion attacks a procedural ruling that precluded a merits determination.”¹⁸ “If the purported Rule 60(b) motion satisfies one of these circumstances,” the motion does not present a habeas claim, and “the district court may then properly consider [it] under Rule 60(b).”¹⁹

This means that we must assess two of the district court’s orders: the order denying Will’s Rule 60(b) motion challenging the denial of habeas relief, plus the denial of habeas relief itself.²⁰

Will’s Rule 60(b) motion attempted to request relief only on the grounds that the district court had erroneously concluded that his IATC claim was procedurally defaulted (procedural default being a proper 60(b) topic, such a request might dodge § 2244’s jurisdictional bar on second or successive habeas petitions). But the district court ascertained that a review of the procedural-default conclusion in

¹⁷ *Id.* at 532, 125 S.Ct. 2641.

¹⁸ 904 F.3d at 344.

¹⁹ *Id.* (citation omitted).

²⁰ *Will*, 2018 WL 4621170, at *1, *14–18.

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this case would be fruitless without a review of the order's other conclusion—that, alternatively, the IATC claim failed on the merits. And a review of the merits would constitute a second or successive habeas petition, beyond the purview of Rule 60(b), and beyond the district court's jurisdiction under § 2244.²¹ The district court therefore denied Will's motion as “a successive habeas petition which the [c]ourt has no jurisdiction to consider under AEDPA.”²²

On appeal, Will's briefing predominantly tracks the first circumstance *Gilkers* discussed, *Gonzalez's* “defect in integrity” prong. Because of the erroneous procedural-default ruling, he argues, the court only briefly addressed the merits of Will's IATC claim instead of giving it full substantive treatment. Thus, Will argues, his Rule 60(b) motion's “attack on the district court's decisionmaking process was procedural,” not merits based, [and] his [] motion is [therefore] not a successive petition.” The State disagrees: Will's motion impermissibly attacked “the

²¹ *Will*, 2010 WL 2179680, at *18 (“Even if this Court could consider the substance of Will's ineffective-assistance claim, he has not shown *Strickland* prejudice. The Court alternatively denies his *Strickland* claim on the merits.”); *Will*, 2018 WL 4621170 (“[T]he Court alternatively ruled on the merits of the claims in Will's federal petition.”).

²² *Will*, 2018 WL 4621170, at *1–3.

federal court’s previous resolution of a claim on the merits” no matter how you frame it.

Will’s “defect in integrity” argument is unavailing: The merits analysis was four pages long and analytically robust.²³

The closer question is the second circumstance *Gilkers* discussed, whether Will’s motion attacks a procedural ruling that precluded a merits determination.²⁴ Here, the district court disposed of Will’s IATC claim on procedural-default grounds, a procedural ruling; but it also reasoned, in the alternative, that Will’s IATC claim failed on the merits.²⁵

The crux of our inquiry is simple—is a merits analysis *in the alternative* a merits *determination*? If so, the district court’s procedural disposition did not preclude a merits determination and, in turn, Will’s Rule 60(b) motion presents a habeas claim. Because we hold that a full merits analysis in the alternative is a merits determination, the court’s procedural

²³ See, e.g., *Will*, 2010 WL 2179680, at *14–18.

²⁴ *Gilkers*, 904 F.3d at 344. Though Will did not focus on this argument, his comprehensive briefing presented this contention, and we review it. With multiple pages of development, record cites, and case examples, the briefing was not so cursory that Will forfeited the argument. See *Claimant ID 100217021 v. BP Expl. & Prod., Inc.*, 693 F. App’x 272, 276 n.4 (5th Cir. 2017) (citing *Cinel v. Connick*, 15 F.3d 1338, 1342–45 (5th Cir. 1994)).

²⁵ *Will*, 2010 WL 2179680, at *14–18.

disposition did not “preclude[] a merits determination.”²⁶ Therefore, Will’s Rule 60(b) motion—attacking a procedural ruling paired with a merits determination in the alternative—is a successive habeas petition that we lack jurisdiction to consider.

Consider *Gonzalez*. In that seminal case, Justice Scalia reasoned that a motion only presents a habeas claim if, among other things, the motion “attacks the federal court’s previous resolution of a claim *on the merits*.”²⁷ “[O]n the merits” means “a *determination* that there exist or do not exist grounds entitling a petitioner to habeas corpus relief.”²⁸ And a merits analysis in the alternative makes this substantive *determination*, even if such determination was not the basis for the court’s holding.²⁹ So, when a court order analyzes whether “there exist or do not exist grounds entitling a petitioner” to habeas relief—in other words, makes a merits determination—a Rule 60(b) motion contesting this order (even on procedural grounds) necessarily presents a successive habeas claim.³⁰ After all, if a petitioner succeeds on a procedural

²⁶ See *Gilkers*, 904 F.3d at 344.

²⁷ 545 U.S. at 532, 125 S.Ct. 2641 (emphasis in original).

²⁸ *Id.* at 531–32 n.4, 125 S.Ct. 2641 (emphasis added).

²⁹ *Id.*

³⁰ *Id.*

claim, the court’s merits determination in the alternative will control.³¹

Here, the district court found Will’s claim procedurally barred. But it went on to analyze Will’s substantive contentions, “alternatively den[ying] his *Strickland* claim on the merits.”³² Will filed a Rule 60(b) motion for relief from this judgment, urging that the procedural-bar ruling was erroneous. Let’s assume Will’s motion is granted—what happens next? The district court’s alternative determination will preclude any habeas relief on the merits.³³ In turn, because the court made a substantive habeas ruling in the alternative, it cannot be said that Will’s Rule 60(b) motion is “merely assert[ing] that a previous ruling ... precluded a merits determination.”³⁴ The court’s merits determination was not precluded; it was merely layered below a procedural disposition. Therefore, when a court order disposes of a habeas claim on procedural and, in the alternative, substantive grounds, a Rule 60(b)

³¹ See, e.g., *Gallegos-Hernandez v. United States*, 688 F.3d 190, 196 (5th Cir. 2012) (analyzing a district court’s alternative holding after it overruled its primary holding); *United States v. Minjarez*, 540 F. App’x 349, 350 (5th Cir. 2013) (unpublished) (affirming a district court based on its alternative holding); *Giles v. City of Dallas*, 539 F. App’x 537, 542 (5th Cir. 2013) (unpublished) (same).

³² *Will*, 2010 WL 2179680, at *18.

³³ *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641; see also *supra* note 31.

³⁴ *Id.*

motion contesting this order inherently presents a successive habeas petition.

This conclusion finds support in *Gonzalez*. As we've discussed, the *Gonzalez* Court was concerned with preventing habeas petitioners from using Rule 60(b) motions to circumvent AEDPA's "successive-petition bar."³⁵ And our ruling today respects the Court's expressed concern, recently reexpressed in *Bannister v. Davis*: "A Rule 60(b) motion ... threatens serial habeas litigation; indeed, without rules suppressing abuse, a prisoner could bring such a motion endlessly."³⁶ Moreover, giving due weight to a district court's alternative reasoning on the merits tracks this circuit's "rule that alternative holdings are binding precedent and not obiter dictum."³⁷

In sum, Will's Rule 60(b) motion—facially challenging a procedural ruling and implicitly challenging a merits determination—presents a habeas claim.³⁸ Accordingly, we affirm the district

³⁵ *Id.*

³⁶ — U.S. —, 140 S. Ct. 1698, 1710, 207 L.Ed.2d 58 (2020).

³⁷ *Texas v. United States*, 809 F.3d 134, 178 (5th Cir. 2015), *as revised* (Nov. 25, 2015) (internal quotations omitted).

³⁸ Will's Rule 60(b) motion also argues that the district court's proceeding was defective because it made its IATC 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)

court's holding that "Will's 60(b) Motion is a successive habeas petition which the Court has no jurisdiction to consider under AEDPA."³⁹

B

Will next contends the CCA's holding that "the mere presence of uniformed officers in the courtroom [did not] create[] an atmosphere that 'inherently lacked due process' " was in error; therefore, he insists, this habeas claim should have been granted.⁴⁰ Because the CCA rejected Will's inherent-prejudice claim on the merits, its holding is subject to AEDPA's relitigation bar.⁴¹ Attempting to hurdle this bar, Will urges the state court's decision was an unreasonable application of clearly established Supreme Court precedent—namely *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986)—and was "based on an

motion, requesting relief because her counsel did not present certain evidence, was barred as a successive habeas petition).

³⁹ This outcome is predicated on the comprehensive nature of the district court's substantive merits determination in the alternative. *Will*, 2010 WL 2179680, at *14–18. Our holding today would not apply with equal force in a future case with an unduly cursory alternative merits analysis.

⁴⁰ *Will*, 2004 WL 3093238, at *4 (cleaned up).

⁴¹ § 2254(d).

unreasonable determination of the facts.” We disagree on both fronts.

A state court unreasonably applies clearly established Supreme Court precedent when it improperly identifies the governing legal principle, unreasonably extends (or refuses to extend) a legal principle to a new context, or when it gets the principle right but “applies it unreasonably to the facts of a particular prisoner’s case.”⁴² But the Supreme Court has only clearly established precedent if it has “broken sufficient legal ground to establish an asked-for constitutional principle.”⁴³ To Will, 12–18 uniformed officers seated in the

⁴² *Williams v. Taylor*, 529 U.S. 362, 407–08, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); see also *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (stating that relitigation is only permitted “where there is no possibility fair[-]minded jurists could disagree that the state court’s decision conflicts with [Supreme] Court[] precedent[]”).

⁴³ *Taylor*, 529 U.S. at 380–82, 120 S.Ct. 1495 (“[T]he lower federal courts cannot themselves establish such a principle.”); see, e.g., *Pierre v. Vannoy*, 891 F.3d 224, 228 (5th Cir.), as revised (June 7, 2018), cert. denied, — U.S. —, 139 S. Ct. 379, 202 L.Ed.2d 290 (2018) (“Without a Supreme Court case holding that the State’s unknowing use of false testimony violates the Due Process Clause, Pierre cannot show that the Louisiana Supreme Court unreasonably applied clearly established federal law as determined by the Supreme Court of the United States.”); *Woodward v. Epps*, 580 F.3d 318, 332 (5th Cir. 2009) (“Given the lack of a clear Supreme Court holding that a defendant is entitled to independent psychiatric assistance and the different circuit interpretations of *Ake* on this point, the decision of the Mississippi Supreme Court was not ‘contrary to’ or an ‘unreasonable application of’ clearly established federal law.”).

courtroom gallery near the jury inherently prejudiced him in violation of *Flynn*, and the CCA's decision otherwise was an unreasonable application of this clearly established precedent.

Will's argument is well made, but not well taken. Neither *Flynn*, nor any other Supreme Court precedent, clearly establishes when uniformed, off-duty officers in the courtroom gallery generate inherent prejudice.⁴⁴ Because this necessary predicate is not met, Will's argument is a non-starter under our deferential standard of review.⁴⁵

Next, Will admonishes that habeas relief is separately warranted because the state court's

⁴⁴ *Flynn*, 475 U.S. at 572, 106 S.Ct. 1340; *Jones v. Davis*, 890 F.3d 559, 568 (5th Cir. 2018), *cert. denied*, — U.S. —, 139 S. Ct. 795, 202 L.Ed.2d 587 (2019) (finding that off-duty uniformed police officers in the gallery present “neither clearly private nor clearly state action” and noting that the Supreme Court has never considered *Flynn*'s applicability to these quasi-state spectators); *Carey v. Musladin*, 549 U.S. 70, 76, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006) (“In contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of [private spectator conduct] is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial.”).

⁴⁵ Put simply, the Supreme Court has hindered Will's claim by not affirmatively “establish[ing]” the “asked-for constitutional principle.” *Taylor*, 529 U.S. at 380–82, 120 S.Ct. 1495; *Carey*, 549 U.S. at 76, 127 S.Ct. 649 (“Given the lack of holdings from this Court regarding the potentially prejudicial effect of [private] spectators' courtroom conduct ..., it cannot be said that the state court ‘unreasonably applied clearly established Federal law.’ ” (cleaned up)). In *Jones*, we acknowledged the lack of Supreme Court direction on this issue but nonetheless

decision was based on an “unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”⁴⁶ Will trains his sights on the CCA’s “erroneous” finding that Will’s case is distinguishable from *Woods v. Dugger*,⁴⁷ “because, among other things, there is no evidence that any of [Will’s] jurors had close ties to law enforcement.”⁴⁸ But the CCA’s factual findings are “entitled to a presumption of correctness,” and Will can only overcome that presumption “by clear

reviewed a similar claim on the merits, analyzing whether the “police presence intimidated the jury or disrupted the fact-finding process in any way.” 890 F.3d at 571. We do not take a similar course here because our review is hemmed in by § 2254(d), as in *Carey*, 549 U.S. at 76, 127 S.Ct. 649; in contrast, *Jones*’s review was de novo. 890 F.3d at 567.

⁴⁶ *Taylor*, 529 U.S. at 386, 120 S.Ct. 1495 (cleaned up).

⁴⁷ 923 F.2d 1454, 1459–60 (11th Cir. 1991) (finding that the presence of uniformed prison guards filling over half the gallery, disruptive spectators, the small juror pool, and extensive pre-trial publicity created “an unacceptable risk [of] impermissible factors coming into play”).

⁴⁸ *Will*, 2004 WL 3093238, at *4. Will also takes issue with the state court’s assertion that “appellant objected to the officers’ uniforms on only two occasions during a two and one-half week trial consisting of 12 days of testimony.” But Will’s issue is more with the state court’s implicit finding that the lack of objections demonstrated the record was too scant to depict inherent prejudice. However, this argument is curtailed by our standard of review—it erroneously takes issue with how the state court *applied the law to the record*, which we cannot review, rather than the reasonableness of the court’s factual determinations.

and convincing evidence.”⁴⁹ Though Will’s claim is not frivolous, we ultimately disagree—the CCA’s decision wasn’t *based* on an unreasonable factual determination.

We agree with Will at the outset: The CCA’s conclusion that there was no evidence Will’s jurors “had close ties to law enforcement” was unreasonable considering the evidence before it. The juror questionnaires and trial transcript clearly and convincingly establish that at least three jurors actually had “close ties” to police officers. But we disagree with Will’s conclusion. The CCA’s no-inherent-prejudice decision was not *based* on this unreasonable determination. Rather, its holding was founded on the lack of evidence of “some type of state action.”⁵⁰ Its citation to “no evidence” of law enforcement ties merely bolstered the conclusion it had *already* reached.⁵¹ In other words, even if the CCA had gotten this factual determination right, its conclusion wouldn’t have changed. As we stated in *Jones*, whether jurors have close ties to law enforcement officers is irrelevant to an inherent-prejudice claim; such ties only move the needle for

⁴⁹ *Leal v. Dretke*, 428 F.3d 543, 548 (5th Cir. 2005).

⁵⁰ *Will*, 2004 WL 3093238, at *4 (“Here, the presence of the uniformed officers in the courtroom merely showed their solidarity and support for a fellow slain officer.”).

⁵¹ *Id.* (“Also, this case is distinguishable from appellant’s cited [non-binding] case of *Woods v. Dugger* because, among other things, there is no evidence that any of appellant’s jurors had close ties to law enforcement.” (emphases added)).

actual prejudice.⁵² Because the “state court’s ruling on the [inherent-prejudice] claim ... was [not] so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement,” habeas relief under our deferential AEDPA standard is improper.⁵³

Will identifies no clearly established law that the CCA misapplied, nor any unreasonable factual determinations on which the court based its holding. Because Will has not met the statutory prerequisites, his habeas claim for inherent prejudice fails here as it did below.

IV

We AFFIRM the district court across the board.

⁵² *Jones*, 890 F.3d at 571 (“We note that the record does not fully support the district court’s assertion that no jurors had friends of relatives who were officers; however, this discrepancy does not change the outcome of this case because only inherent prejudice has been alleged.”).

⁵³ *Bobby v. Dixon*, 565 U.S. 23, 24, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011) (citation omitted).

App. 20

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DON R. WILLETT, *Circuit Judge:*

Robert Gene Will II was sentenced to death by a Texas jury for the murder of Harris County Sheriff's Deputy Barrett Hill. After his failed direct appeal and state habeas petitions, Will pursued federal habeas relief. His claims for ineffective assistance of counsel and inherent trial prejudice were denied—

the former as procedurally defaulted and the latter on the merits. Will attempted to contest the procedural-default holding through a Rule 60(b) motion, but the district court concluded that it lacked jurisdiction because the motion constituted a successive habeas petition. We agree that Will's Rule 60(b) motion was a successive habeas petition, and we affirm the district court. We also affirm the denial of Will's inherent-prejudice claim, as Will fails to overcome the arduous standard of review in the Anti-Terrorism and Effective Death Penalty Act.

I

Will was found guilty of capital murder in Texas state court and sentenced to death.¹ Will appealed directly to the Texas Court of Criminal Appeals, arguing that the presence of uniformed officers in the courtroom impermissibly prejudiced the jury, but the court disagreed.² Will then filed a state habeas petition with the same court on the same

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² *Will v. State*, No. 74,306, 2004 WL 3093238, at *4 (Tex. Crim. App. April 21, 2004) (unpublished).

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³ *Ex parte Will*, No. 63,590-01, 2006 WL 832456, at *1 (Tex. Crim. App. March 29, 2006) (per curiam) (unpublished).

⁴ We note that Will's state habeas counsel had Parkinson's disease at the time he filed this petition. A reviewing doctor testified that "it is probable that [counsel] was mentally impaired by the affects [] of Parkinson's disease to the degree that it made him unfit to serve in the capacity as habeas counsel for a capital appeal."

⁵ *Will*, 2010 WL 2179680, at *14-24.

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But, before we could rule, the Supreme Court decided *Martinez v. Ryan*, holding that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.”⁸ So we remanded Will’s appeal to the district court for (1) reconsideration of the Rule 60(b) motion dismissal in light of this new precedent, and (2) clarification on whether a

⁶ *Will v. Thaler*, No. CIV.A. H-07-1000, 2012 WL 948409, at *2 (S.D. Tex. Mar. 19, 2012), *order clarified sub nom. Will v. Davis*, No. H-07-CV-1000, 2018 WL 4621170 (S.D. Tex. Sept. 26, 2018).

⁷ *Will v. Davis*, No. H-07-CV-1000, 2018 WL 4621170, at *1 (S.D. Tex. Sept. 26, 2018).

⁸ 566 U.S. 1, 9, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). A year later *Trevino v. Thaler* came down, applying the *Martinez* rule to cases from Texas state courts. 569 U.S. 413, 417, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013).

certificate of appealability should issue on Will's claims.

The district court again denied Will's Rule 60(b) motion, reasoning that, regardless of *Martinez*, it "is a successive habeas petition which the [c]ourt has no jurisdiction to consider under [AEDPA]." ⁹ But it also granted Will a COA on two issues: his dismissed Rule 60(b) motion and his denied trial-prejudice claim. ¹⁰ Will pursues these claims now, arguing that (1) the Rule 60(b) motion is not an impermissible successive habeas petition because it only attacked the "integrity of the [underlying] federal habeas proceeding," and (2) he should be granted habeas relief from the adverse trial-prejudice ruling because the CCA misapplied clearly established federal law or its holding was based on unreasonable factual determinations.

II

As to Will's first argument, we review de novo "[t]he district court's determination that a purported Rule 60(b) motion constitutes a successive § 2254 habeas petition." ¹¹

As to Will's second argument, our review of the CCA's trial-prejudice decision is narrow: we only

⁹ *Will*, 2018 WL 4621170, at *1.

¹⁰ *Id.* at *3.

¹¹ *Gilkers v. Vannoy*, 904 F.3d 336, 342 (5th Cir. 2018), *cert. denied*, — U.S. —, 139 S. Ct. 1192, 203 L.Ed.2d 223 (2019).

consider whether the decision was “contrary to, or an unreasonable application of, clearly established Federal law” or “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”¹²

III

A

Will proceeds under our statutorily prescribed and exactly applied habeas framework. Normally, “Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under” extraordinary circumstances.¹³ But in the habeas context, Will’s Rule 60(b) motion runs headlong into AEDPA’s restriction on successive habeas applications. Why? Because we—the federal judiciary—are concerned that petitioners will use Rule 60(b) motions to subvert the statutory framework and get an impermissible second look at their denied habeas claims.¹⁴ So, we must ask, was

¹² 28 U.S.C. § 2254(d).

¹³ *Gonzalez v. Crosby*, 545 U.S. 524, 528, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005).

¹⁴ *Gilkers*, 904 F.3d at 343 (“To ensure that habeas petitioners do not circumvent these statutory requirements by filing Rule 60(b) motions that are the functional equivalent of unauthorized successive § 2254 petitions, the Supreme Court set forth several guidelines ... for determining the circumstances under which a district court may properly consider a Rule 60(b) motion in a § 2254 habeas proceeding.”); *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641 (“[A]lleging that the court erred in denying habeas relief on the merits is effectively

Will's Rule 60(b) motion actually an impermissible successive habeas petition in disguise? The answer: yes, *if* his Rule 60(b) motion contains one or more previously presented habeas claims.¹⁵

A habeas claim “is an asserted federal basis for relief from a state court’s judgment of conviction.”¹⁶ “In most cases, determining whether a Rule 60(b) motion advances one or more ‘claims’ will be relatively simple”: the motion advances a claim “if it attacks the federal court’s previous resolution of a claim *on the merits*.”¹⁷ But, as we said in *Gilkers*, “there are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a ‘defect in the integrity of the federal habeas proceeding’ or

indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief.”); *see also Leal Garcia v. Quarterman*, 573 F.3d 214, 220 (5th Cir. 2009) (stating that AEDPA serves as a “gate-keeper by preventing the repeated filing of habeas petitions that attack the prisoner’s underlying conviction”).

¹⁵ *Gonzalez*, 545 U.S. at 530, 125 S.Ct. 2641 (stating that § 2254’s successive petition bar only applies to a petitioner’s Rule 60(b) motion if it is an “application for habeas relief”; a motion applies for habeas relief if it “contains one or more ‘claims’ ” (citations omitted)); *Williams v. Thaler*, 602 F.3d 291, 301 (5th Cir. 2010) (“AEDPA instructs us to dismiss any claim presented in a second or successive petition if a petitioner presented the claim in a previous application.” (citation omitted)).

¹⁶ *Gonzalez*, 545 U.S. at 531, 125 S.Ct. 2641.

¹⁷ *Id.* at 532, 125 S.Ct. 2641.

(2) the motion attacks a procedural ruling that precluded a merits determination.”¹⁸ “If the purported Rule 60(b) motion satisfies one of these circumstances,” the motion does not present a habeas claim, and “the district court may then properly consider [it] under Rule 60(b).”¹⁹

This means that we must assess two of the district court’s orders: the order denying Will’s Rule 60(b) motion challenging the denial of habeas relief, plus the denial of habeas relief itself.²⁰

Will’s Rule 60(b) motion attempted to request relief only on the grounds that the district court had erroneously concluded that his IATC claim was procedurally defaulted (procedural default being a proper 60(b) topic, such a request might dodge § 2244’s jurisdictional bar on second or successive habeas petitions). But the district court ascertained that a review of the procedural-default conclusion in this case would be fruitless without a review of the order’s other conclusion—that, alternatively, the IATC claim failed on the merits. And a review of the merits would constitute a second or successive habeas petition, beyond the purview of Rule 60(b), and beyond the district court’s jurisdiction under § 2244.²¹ The district court therefore denied Will’s

¹⁸ 904 F.3d at 344.

¹⁹ *Id.* (citation omitted).

²⁰ *Will*, 2018 WL 4621170, at *1, *14–18.

²¹ *Will*, 2010 WL 2179680, at *18 (“Even if this Court could consider the substance of Will’s ineffective-assistance claim, he

motion as “a successive habeas petition which the [c]ourt has no jurisdiction to consider under AEDPA.”²²

On appeal, Will’s briefing predominantly tracks the first circumstance *Gilkers* discussed, *Gonzalez*’s “defect in integrity” prong. Because of the erroneous procedural-default ruling, he argues, the court only briefly addressed the merits of Will’s IATC claim instead of giving it full substantive treatment. Thus, Will argues, his Rule 60(b) motion’s “attack on the district court’s decisionmaking process was procedural,” not merits based, [and] his [] motion is [therefore] not a successive petition.” The State disagrees: Will’s motion impermissibly attacked “the federal court’s previous resolution of a claim on the merits” no matter how you frame it.

Will’s “defect in integrity” argument is unavailing: The merits analysis was four pages long and analytically robust.²³

The closer question is the second circumstance *Gilkers* discussed, whether Will’s motion attacks a procedural ruling that precluded a merits

has not shown *Strickland* prejudice. The Court alternatively denies his *Strickland* claim on the merits.”); *Will*, 2018 WL 4621170 (“[T]he Court alternatively ruled on the merits of the claims in Will’s federal petition.”).

²² *Will*, 2018 WL 4621170, at *1–3.

²³ *See, e.g., Will*, 2010 WL 2179680, at *14–18.

determination.²⁴ Here, the district court disposed of Will’s IATC claim on procedural-default grounds, a procedural ruling; but it also reasoned, in the alternative, that Will’s IATC claim failed on the merits.²⁵

The crux of our inquiry is simple—is a merits analysis *in the alternative* a merits *determination*? If so, the district court’s procedural disposition did not preclude a merits determination and, in turn, Will’s Rule 60(b) motion presents a habeas claim. Because we hold that a full merits analysis in the alternative is a merits determination, the court’s procedural disposition did not “preclude[] a merits determination.”²⁶ Therefore, Will’s Rule 60(b) motion—attacking a procedural ruling paired with a merits determination in the alternative—is a successive habeas petition that we lack jurisdiction to consider.

Consider *Gonzalez*. In that seminal case, Justice Scalia reasoned that a motion only presents a habeas claim if, among other things, the motion

²⁴ *Gilkers*, 904 F.3d at 344. Though Will did not focus on this argument, his comprehensive briefing presented this contention, and we review it. With multiple pages of development, record cites, and case examples, the briefing was not so cursory that Will forfeited the argument. *See Claimant ID 100217021 v. BP Expl. & Prod., Inc.*, 693 F. App’x 272, 276 n.4 (5th Cir. 2017) (citing *Cinel v. Connick*, 15 F.3d 1338, 1342–45 (5th Cir. 1994)).

²⁵ *Will*, 2010 WL 2179680, at *14–18.

²⁶ *See Gilkers*, 904 F.3d at 344.

“attacks the federal court’s previous resolution of a claim *on the merits*.”²⁷ “[O]n the merits” means “a *determination* that there exist or do not exist grounds entitling a petitioner to habeas corpus relief.”²⁸ And a merits analysis in the alternative makes this substantive *determination*, even if such determination was not the basis for the court’s holding.²⁹ So, when a court order analyzes whether “there exist or do not exist grounds entitling a petitioner” to habeas relief—in other words, makes a merits determination—a Rule 60(b) motion contesting this order (even on procedural grounds) necessarily presents a successive habeas claim.³⁰ After all, if a petitioner succeeds on a procedural claim, the court’s merits determination in the alternative will control.³¹

Here, the district court found Will’s claim procedurally barred. But it went on to analyze Will’s substantive contentions, “alternatively den[ying] his

²⁷ 545 U.S. at 532, 125 S.Ct. 2641 (emphasis in original).

²⁸ *Id.* at 531–32 n.4, 125 S.Ct. 2641 (emphasis added).

²⁹ *Id.*

³⁰ *Id.*

³¹ See, e.g., *Gallegos-Hernandez v. United States*, 688 F.3d 190, 196 (5th Cir. 2012) (analyzing a district court’s alternative holding after it overruled its primary holding); *United States v. Minjarez*, 540 F. App’x 349, 350 (5th Cir. 2013) (unpublished) (affirming a district court based on its alternative holding); *Giles v. City of Dallas*, 539 F. App’x 537, 542 (5th Cir. 2013) (unpublished) (same).

Strickland claim on the merits.”³² Will filed a Rule 60(b) motion for relief from this judgment, urging that the procedural-bar ruling was erroneous. Let’s assume Will’s motion is granted—what happens next? The district court’s alternative determination will preclude any habeas relief on the merits.³³ In turn, because the court made a substantive habeas ruling in the alternative, it cannot be said that Will’s Rule 60(b) motion is “merely assert[ing] that a previous ruling ... precluded a merits determination.”³⁴ The court’s merits determination was not precluded; it was merely layered below a procedural disposition. Therefore, when a court order disposes of a habeas claim on procedural and, in the alternative, substantive grounds, a Rule 60(b) motion contesting this order inherently presents a successive habeas petition.

This conclusion finds support in *Gonzalez*. As we’ve discussed, the *Gonzalez* Court was concerned with preventing habeas petitioners from using Rule 60(b) motions to circumvent AEDPA’s “successive-petition bar.”³⁵ And our ruling today respects the Court’s expressed concern, recently reexpressed in *Bannister v. Davis*: “A Rule 60(b) motion ...

³² *Will*, 2010 WL 2179680, at *18.

³³ *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641; *see also supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

threatens serial habeas litigation; indeed, without rules suppressing abuse, a prisoner could bring such a motion endlessly.”³⁶ Moreover, giving due weight to a district court’s alternative reasoning on the merits tracks this circuit’s “rule that alternative holdings are binding precedent and not obiter dictum.”³⁷

In sum, Will’s Rule 60(b) motion—facially challenging a procedural ruling and implicitly challenging a merits determination—presents a habeas claim.³⁸ Accordingly, we affirm the district court’s holding that “Will’s 60(b) Motion is a

³⁶ — U.S. —, 140 S. Ct. 1698, 1710, 207 L.Ed.2d 58 (2020).

³⁷ *Texas v. United States*, 809 F.3d 134, 178 (5th Cir. 2015), *as revised* (Nov. 25, 2015) (internal quotations omitted).

³⁸ Will’s Rule 60(b) motion also argues that the district court’s proceeding was defective because it made its IATC 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.

successive habeas petition which the Court has no jurisdiction to consider under AEDPA.”³⁹

B

Will next contends the CCA’s holding that “the mere presence of uniformed officers in the courtroom [did not] create[] an atmosphere that ‘inherently lacked due process’ ” was in error; therefore, he insists, this habeas claim should have been granted.⁴⁰ Because the CCA rejected Will’s inherent-prejudice claim on the merits, its holding is subject to AEDPA’s relitigation bar.⁴¹ Attempting to hurdle this bar, Will urges the state court’s decision was an unreasonable application of clearly established Supreme Court precedent—namely *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986)—and was “based on an unreasonable determination of the facts.” We disagree on both fronts.

A state court unreasonably applies clearly established Supreme Court precedent when it improperly identifies the governing legal principle, unreasonably extends (or refuses to extend) a legal

³⁹ This outcome is predicated on the comprehensive nature of the district court’s substantive merits determination in the alternative. *Will*, 2010 WL 2179680, at *14–18. Our holding today would not apply with equal force in a future case with an unduly cursory alternative merits analysis.

⁴⁰ *Will*, 2004 WL 3093238, at *4 (cleaned up).

⁴¹ § 2254(d).

principle to a new context, or when it gets the principle right but “applies it unreasonably to the facts of a particular prisoner’s case.”⁴² But the Supreme Court has only clearly established precedent if it has “broken sufficient legal ground to establish an asked-for constitutional principle.”⁴³ To Will, 12–18 uniformed officers seated in the courtroom gallery near the jury inherently prejudiced him in violation of *Flynn*, and the CCA’s decision otherwise was an unreasonable application of this clearly established precedent.

Will’s argument is well made, but not well taken. Neither *Flynn*, nor any other Supreme Court

⁴² *Williams v. Taylor*, 529 U.S. 362, 407–08, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); see also *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (stating that relitigation is only permitted “where there is no possibility fair[-]minded jurists could disagree that the state court’s decision conflicts with [Supreme] Court[] precedent[]”).

⁴³ *Taylor*, 529 U.S. at 380–82, 120 S.Ct. 1495 (“[T]he lower federal courts cannot themselves establish such a principle.”); see, e.g., *Pierre v. Vannoy*, 891 F.3d 224, 228 (5th Cir.), as revised (June 7, 2018), cert. denied, — U.S. —, 139 S. Ct. 379, 202 L.Ed.2d 290 (2018) (“Without a Supreme Court case holding that the State’s unknowing use of false testimony violates the Due Process Clause, Pierre cannot show that the Louisiana Supreme Court unreasonably applied clearly established federal law as determined by the Supreme Court of the United States.”); *Woodward v. Epps*, 580 F.3d 318, 332 (5th Cir. 2009) (“Given the lack of a clear Supreme Court holding that a defendant is entitled to independent psychiatric assistance and the different circuit interpretations of *Ake* on this point, the decision of the Mississippi Supreme Court was not ‘contrary to’ or an ‘unreasonable application of’ clearly established federal law.”).

precedent, clearly establishes when uniformed, off-duty officers in the courtroom gallery generate inherent prejudice.⁴⁴ Because this necessary predicate is not met, Will’s argument is a non-starter under our deferential standard of review.⁴⁵

Next, Will admonishes that habeas relief is separately warranted because the state court’s decision was based on an “unreasonable

⁴⁴ *Flynn*, 475 U.S. at 572, 106 S.Ct. 1340; *Jones v. Davis*, 890 F.3d 559, 568 (5th Cir. 2018), *cert. denied*, — U.S. —, 139 S. Ct. 795, 202 L.Ed.2d 587 (2019) (finding that off-duty uniformed police officers in the gallery present “neither clearly private nor clearly state action” and noting that the Supreme Court has never considered *Flynn*’s applicability to these quasi-state spectators); *Carey v. Musladin*, 549 U.S. 70, 76, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006) (“In contrast to state-sponsored courtroom practices, the effect on a defendant’s fair-trial rights of [private spectator conduct] is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial.”).

⁴⁵ Put simply, the Supreme Court has hindered Will’s claim by not affirmatively “establish[ing]” the “asked-for constitutional principle.” *Taylor*, 529 U.S. at 380–82, 120 S.Ct. 1495; *Carey*, 549 U.S. at 76, 127 S.Ct. 649 (“Given the lack of holdings from this Court regarding the potentially prejudicial effect of [private] spectators’ courtroom conduct ..., it cannot be said that the state court ‘unreasonably applied clearly established Federal law.’ ” (cleaned up)). In *Jones*, we acknowledged the lack of Supreme Court direction on this issue but nonetheless reviewed a similar claim on the merits, analyzing whether the “police presence intimidated the jury or disrupted the fact-finding process in any way.” 890 F.3d at 571. We do not take a similar course here because our review is hemmed in by § 2254(d), as in *Carey*, 549 U.S. at 76, 127 S.Ct. 649; in contrast, *Jones*’s review was de novo. 890 F.3d at 567.

determination of the facts in light of the evidence presented in the State court proceeding.”⁴⁶ Will trains his sights on the CCA’s “erroneous” finding that Will’s case is distinguishable from *Woods v. Dugger*,⁴⁷ “because, among other things, there is no evidence that any of [Will’s] jurors had close ties to law enforcement.”⁴⁸ But the CCA’s factual findings are “entitled to a presumption of correctness,” and Will can only overcome that presumption “by clear and convincing evidence.”⁴⁹ Though Will’s claim is not frivolous, we ultimately disagree—the CCA’s

⁴⁶ *Taylor*, 529 U.S. at 386, 120 S.Ct. 1495 (cleaned up).

⁴⁷ 923 F.2d 1454, 1459–60 (11th Cir. 1991) (finding that the presence of uniformed prison guards filling over half the gallery, disruptive spectators, the small juror pool, and extensive pre-trial publicity created “an unacceptable risk [of] impermissible factors coming into play”).

⁴⁸ *Will*, 2004 WL 3093238, at *4. Will also takes issue with the state court’s assertion that “appellant objected to the officers’ uniforms on only two occasions during a two and one-half week trial consisting of 12 days of testimony.” But Will’s issue is more with the state court’s implicit finding that the lack of objections demonstrated the record was too scant to depict inherent prejudice. However, this argument is curtailed by our standard of review—it erroneously takes issue with how the state court *applied the law to the record*, which we cannot review, rather than the reasonableness of the court’s factual determinations.

⁴⁹ *Leal v. Dretke*, 428 F.3d 543, 548 (5th Cir. 2005).

decision wasn't *based* on an unreasonable factual determination.

We agree with Will at the outset: The CCA's conclusion that there was no evidence Will's jurors "had close ties to law enforcement" was unreasonable considering the evidence before it. The juror questionnaires and trial transcript clearly and convincingly establish that at least three jurors actually had "close ties" to police officers. But we disagree with Will's conclusion. The CCA's no-inherent-prejudice decision was not *based* on this unreasonable determination. Rather, its holding was founded on the lack of evidence of "some type of state action."⁵⁰ Its citation to "no evidence" of law enforcement ties merely bolstered the conclusion it had *already* reached.⁵¹ In other words, even if the CCA had gotten this factual determination right, its conclusion wouldn't have changed. As we stated in *Jones*, whether jurors have close ties to law enforcement officers is irrelevant to an inherent-prejudice claim; such ties only move the needle for actual prejudice.⁵² Because the "state court's ruling

⁵⁰ *Will*, 2004 WL 3093238, at *4 ("Here, the presence of the uniformed officers in the courtroom merely showed their solidarity and support for a fellow slain officer.").

⁵¹ *Id.* ("Also, this case is distinguishable from appellant's cited [non-binding] case of *Woods v. Dugger* because, among other things, there is no evidence that any of appellant's jurors had close ties to law enforcement." (emphases added)).

⁵² *Jones*, 890 F.3d at 571 ("We note that the record does not fully support the district court's assertion that no jurors had friends of relatives who were officers; however, this

on the [inherent-prejudice] claim ... was [not] so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement,” habeas relief under our deferential AEDPA standard is improper.⁵³

Will identifies no clearly established law that the CCA misapplied, nor any unreasonable factual determinations on which the court based its holding. Because Will has not met the statutory prerequisites, his habeas claim for inherent prejudice fails here as it did below.

IV

We AFFIRM the district court across the board.

discrepancy does not change the outcome of this case because only inherent prejudice has been alleged.”).

⁵³ *Bobby v. Dixon*, 565 U.S. 23, 24, 132 S.Ct. 26, 181 L.Ed.2d 328 (2011) (citation omitted).

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ROBERT GENE WILL,	§	
II,	§	
Petitioner,	§	
	§	
v.	§	
	§	H-07-CV-1000
LORIE DAVIS,	§	
Director,	§	
Texas Department of	§	
Criminal Justice,	§	
Correctional	§	
Institutions Division,	§	
Respondent.	§	
	§	

MEMORANDUM AND ORDER

(Filed September 26, 2018)

This case originated as a straightforward habeas corpus petition and has become a procedural imbroglio. That should not, however, obscure the troubling possibility of Petitioner Robert Gene Will's actual innocence.

Previous opinions of the Court cover this case's history in detail,¹ and reference to that history is

¹ See Doc. No. 44 at 2-8, 13-15; Doc. No. 66 at 4-8.

necessary only as it relates to the discrete task now before the Court.

This Court denied Will's petition for a writ of habeas corpus in 2010.² Will subsequently filed an Emergency Motion for Relief from Judgment pursuant to Federal Rules of Civil Procedure 60(b).³ After extensive briefing and argument by counsel for the parties, on March 19, 2012, the Court held that the Rule 60(b) motion actually constituted a successive habeas petition, which the Court had no jurisdiction to consider under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").⁴ Finding itself "powerless to address the merits of the additional claims raised post-judgment, unsettling though they are," and remarking that "[q]uestions as to Will's possible innocence do remain," the Court observed that federal law vested

² Doc. No. 44.

³ Doc. No. 102. Will had previously moved for reconsideration under Federal Rules of Civil Procedure Rule 59(e). Doc. Nos. 46, 47. After an evidentiary hearing, the Court denied Will's initial post-judgment motions. Doc. No. 88.

⁴ See Doc. No. 144 at 5 (finding that Will's Rule 60(b) Motion was a successive petition); see also 28 U.S.C. § 2244(b); *Gonzalez v. Crosby*, 545 U.S. 524, 526 (2005) (finding that a Rule 60(b) motion for relief from judgment qualifies as a second or successive petition if the motion contains new claims or new evidence in support of prior claims).

“power...exclusively in the Fifth Circuit” to act on his post-judgment arguments.⁵

The day after Will filed his notice of appeal, the Supreme Court issued [Martinez v. Ryan, 566 U.S. 1 \(2012\)](#). *Martinez* held that deficient representation by an attorney in a state habeas proceeding could overcome what would normally be a bar to a federal habeas petitioner’s attempt to raise issues not raised in the state proceeding. *Martinez* could certainly have important implications for this case since the conduct of Will’s original state habeas counsel appears to have been severely compromised by serious health conditions.

The Fifth Circuit stayed the action and remanded the case for two purposes. First, this Court must decide the effect of the Supreme Court’s decision in *Martinez* on the Motion for Relief from Judgment pursuant to [Federal Rule of Civil Procedure 60\(b\)](#) filed by Petitioner Robert Gene Will. Second, the Fifth Circuit asked for clarification on whether a Certificate of Appealability (“COA”) should issue on Will’s claims.⁶

Mindful of the effect *Martinez* may have on Will’s [Rule 60\(b\)](#) motion, the Court again invited and received substantial briefing by the parties. Nonetheless, the Court is forced to circle back to its decision in 2012. Will’s 60(b) Motion is a successive habeas petition which the Court has no jurisdiction to consider under AEDPA. *Martinez* did not affect

⁵ Doc. No. 106 at 5-6.

⁶ *Will v. Thaler*, No. 12-70007 (5th Cir. May 18, 2012).

AEDPA, and *Martinez* did not augment the limited jurisdiction that this Court has to consider habeas petitions.

This technical ruling should not serve, however, to obscure the extraordinarily significant issues that the Court of Appeals – unlike this Court – can properly consider. First, in light of *Martinez*, the Court of Appeals should carefully review the evident misfeasance of Will’s state habeas counsel.⁷ Secondly, 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 law enforcement 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.⁸ With the far more limited jurisdiction afforded to a

⁷ While the Court alternatively ruled on the merits of the claims in Will’s federal petition (Doc. No. 44 at 26-38.), the abundance of information Will has amassed that trial counsel did not present should have been gathered by a competent, zealous attorney in the first round of state habeas review. The Court observes that Respondent urged this Court to grant a COA on issues arising from Will’s [Rule 60\(b\)](#) motion (Doc. No. 106 at 5; Doc. No. 111 at 17), but argued on appeal that a COA on those grounds was invalid.

⁸ See Doc. No. 44 at 33-44 (describing the coercive effect of numerous police officers at Will’s trial).

federal court reviewing a habeas petition, this critical issue has been beyond the Court's reach.

The Court, therefore, finds that a COA is warranted on (1) Will's [Rule 60\(b\)](#) motion and (2) the third ground for habeas relief in Will's habeas petition (involving the presence of uniformed police officers). The Court otherwise finds that well-settled law forecloses any relief in this Court.

This Court has repeatedly expressed deep concern for the factually complex insinuations that Will may be innocent of the crime for which he faces a death sentence. The Court is 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. As this Court has previously observed:

Will has repeatedly and persistently argued that [his co-defendant] Rosario killed Deputy Hill....Will has submitted no less than five witnesses who have stated that Rosario confessed to murdering Deputy Hill....Moreover, as set forth in the Court's Memorandum and Order of May 25, 2010, the presence in the trial courtroom of so many uniformed policemen would have likely justified post-trial relief had the issue arisen on direct appeal rather than in a petition for habeas corpus. (Doc. No. 44 at 33-42.) On top of the considerable evidence supporting Will's innocence and the important errors in the trial court, there must also be addressed the total absence of eyewitness testimony or strongly probative forensic evidence. With facts such as these, and only circumstantial evidence supporting

Will's conviction and death sentence, the Court laments the strict limitations placed upon it.

Within the narrow borders of federal review, this Court has allowed liberal exploration of Will's various arguments. The questions raised during post-judgment factual development about Will's actual innocence create disturbing uncertainties that, under federal habeas jurisprudence, the Court is powerless to address.⁹

Recent pleadings have compounded this Court's concern and discomfort, but have not ameliorated the procedural impediments to full review.

The Court very much wishes it could take up all of these issues without the constraints of habeas review. With fewer constraints, the Court of Appeals can perhaps give these issues the time and attention that they merit. Nevertheless, this Court lacks jurisdiction to explore the troubling concerns that plague Will's capital conviction.

In sum, the Court reconfirms the denial of Will's [Rule 60\(b\)](#) motion and clarifies that a COA is warranted on (1) issues arising from his [Rule 60\(b\)](#)

⁹ Doc. No. 88 at 19.

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motion and (2) the third ground for habeas relief in Will's federal petition.

IT IS SO ORDERED.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this 26th day of September, 2018.

/s/ Keith P. Ellison

Keith P. Ellison

United States District Judge

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**United States Court of Appeals
for the Fifth Circuit**

No. 18-70030

ROBERT GENE WILL, II,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:07-CV-1000

(Filed Dec. 28, 2020)

(Opinion October 22, 2020, 5 Cir., 2020, 978 F.3d
933)

Before Owen, *Chief Judge*, and Willett and Ho,
Circuit Judges.

Per Curiam:

Treating the Petition for Rehearing En Banc as a
Petition for Panel Rehearing, the Petition for Panel
Rehearing is DENIED. No member of the panel nor
judge in regular active service of the court having

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requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

App. 48

**United States Court of Appeals
for the Fifth Circuit**

No. 18-70030

ROBERT GENE WILL, II,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:07-CV-1000

(Filed October 22, 2020)

Before Owen, *Chief Judge*, and Willett and Ho,
Circuit Judges.

Per Curiam:

JUDGMENT ON PETITION FOR REHEARING

This cause was considered on the record on
appeal and the briefs on file.

App. 49

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ROBERT GENE WILL, II,	§	
Petitioner,	§	
	§	
v.	§	
	§	
RICK THALER, Director,	§	H-07-CV-1000
Texas Department of	§	
Criminal Justice,	§	
Correctional Institutions	§	
Division,	§	
Respondent.	§	
	§	
	§	

(Filed May 25, 2010)

FINAL JUDGMENT

The Court DENIES Robert Gene Will's petition for a writ of habeas corpus and DISMISSES this case WITH PREJUDICE.

The Clerk will provide a copy to the parties.

SIGNED at Houston, Texas, on this 25th day of May, 2010.

/s/ Keith Ellison
Keith Ellison
United States District Judge