No. 20-1669

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

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

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

NATALIE D. THOMPSON
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700
Counsel for Respondent

QUESTIONS PRESENTED

1. Did the court of appeals correctly determine that Petitioner's Rule 60(b) motion, which sought a second chance to litigate the ineffective-assistance claim the federal habeas court had already rejected on the merits, was a second-or-successive habeas petition?

2. Did the court of appeals correctly determine that the state courts' rejection of Petitioner's inherent-prejudice claim, which was based on the presence of uniformed sheriff's deputies as spectators observing his trial, neither involved an unreasonable application of clearly established federal law nor was based on an unreasonable factual determination?

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 15.1, Respondent submits this supplemental statement of related proceedings:

State v. Will, No. 086271501010 (114th Dist. Court, Harris County, Texas Jan. 23, 2002).

Will v. State, No. 74,306 (Tex. Crim. App. April 21, 2004).

Ex parte Will, No. 08627150101A-3 (185th Dist. Court, Harris County, Texas, forwarded to Tex. Crim. App. Nov. 15, 2005).

Ex parte Will, No. WR-63,590-01 (Tex. Crim. App. Mar. 29, 2006).

Ex parte Will, No. 08627150101B-3 (185th Dist. Court, Harris County, Texas, forwarded to Tex. Crim. App. May 4, 2007).

Ex parte Will, No. 63,590-02 (Tex. Crim. App. Sept. 12, 2007).

Ex parte Will, No. 08627150101C-3 (185th Dist. Court, Harris County, Texas, forwarded to Tex. Crim. App. Jan. 26, 2015).

Ex parte Will, No. WR–63,590–03 (Tex. Crim. App. Nov. 25, 2015).

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INTRODUCTION

In the early morning hours of December 4, 2000, Harris County Sheriff's Deputy Barrett Hill and his partner caught two men stripping a car for parts. The men fled in opposite directions. Deputy Hill pursued one suspect, and his partner pursued the other. A few minutes later, Deputy Hill radioed that he had a suspect in custody. A few seconds after that, Deputy Hill was dead—shot multiple times in the head, neck, and chest with a .40 Sig Sauer pistol. That pistol—with three .40 rounds in the clip—was taken from the waistband of Petitioner Robert Gene Will, II, when he was arrested later that day driving a hijacked vehicle. A Texas jury convicted Will of capital murder.

Will insists that his accomplice, Michael Alan Rosario, fired the shots that killed Deputy Hill. That theory is based on a handful of hearsay statements in which Rosario supposedly claimed responsibility for the shooting. Will's trial counsel diligently investigated that theory, locating three witnesses who claimed to have heard such statements by Rosario. Although two of those witnesses recanted and refused to testify, trial counsel presented testimony from the third witness to support the theory that "Will was unarmed and that Rosario snuck up behind [Deputy Hill] and shot him." ROA.70 (citing 26.RR.133).[1]

Will now maintains that his trial counsel rendered ineffective assistance for failing to uncover additional evidence to support his theory that Rosario killed Deputy Hill. Will procedurally defaulted that claim by

[1] Citations to "ROA.[XX]" refer to the Fifth Circuit Record on Appeal. Citations to "[Volume].RR.[XX]" refer to the state-court Reporter's Record.

failing to raise it in state court. Despite Will's procedural default, the district court adjudicating Will's first federal habeas petition considered his ineffective-assistance claim on the merits and properly rejected it: the evidence Will faults his trial counsel for failing to present was known but not presented for valid strategic reasons, would not have been available to counsel at the time of trial, or is insufficient to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

When Will filed a Rule 60(b) motion asking for another chance to prove ineffective assistance of trial counsel, the district court properly dismissed it as an impermissible second-or-successive habeas petition under *Gonzalez v. Crosby*, 545 U.S. 524 (2005). The motion pressed Will's habeas claim to ineffective assistance, not a "defect in the integrity of the federal habeas proceedings." *Id.* at 532. That was a straightforward application of this Court's precedent. Will insists there is conflict in the lower courts about how to apply *Gonzalez*, but even if that were so—and it is not—Will's Rule 60(b) motion would be treated as a successive habeas petition under any test.

Will's federal habeas petition also raised a fair-trial claim. That claim was rejected on the merits by the Texas courts. Will asks this Court to hold that the presence of uniformed sheriff's deputies observing his capital murder trial was inherently prejudicial. But no decision of this Court has found inherent prejudice based on the presence of spectators, and this Court has expressly rejected the claim that the presence of armed, uniformed officers creates inherent prejudice. The state court's rejection of Will's claim on the merits was therefore not an unreasonable application of clearly established federal law as determined by this Court.

Because Will's fair-trial claim is subject to AEDPA's relitigation bar, this would be a poor vehicle for considering its merits.

The petition for a writ of certiorari should be denied.

STATEMENT

I. Deputy Hill's Murder

Just after 6:30 a.m. on December 4, 2000, Petitioner Robert Gene Will, II killed Harris County Sheriff's Deputy Barrett Hill. Deputy Hill and his partner, Deputy Warren Kelly responded to a report that four men were breaking into a vehicle on Dunson Glen Road in northwest Harris County. 19.RR.31-32. When Hill and Kelly arrived, they saw two men stand up between two cars in an apartment complex parking lot. 19.RR.34. When the officers got out of their patrol car, the men ran in different directions. 19.RR.35-36.

Deputy Hill chased Will, who cut through the apartments and ran straight into the wooded area. Deputy Kelly chased Rosario, who ran through the apartments, turned east along Dunson Glen, 21.RR.18, then ran north onto a concrete pad extending into the area between Dunson Glen and a bayou, or drainage ditch. 19.RR.43-44, 50. Kelly had temporarily lost contact with Hill, but as Kelly and Rosario paused to catch their breath, Deputy Hill radioed that he had Will in custody. 19.RR.47.

Kelly then lost sight of Rosario, who "disappear[ed] around a tree" and went east into the trees and brush between the bayou right-of-way and Dunson Glen. 19.RR.48; 21.RR.21-22, 25, 33-34. Kelly continued north to a clearing along the bayou and looked east toward a bridge that crossed the bayou. 19.RR.49, 72; 21.RR.22. Kelly told his dispatcher that he had lost sight of the suspect. 19.RR.72. At trial, Kelly testified that he would

have seen anyone who crossed through the area again, 21.RR.38-39, particularly given that Rosario was wearing noisy boots. 21.RR.53.

Kelly started to walk back toward the tree where he had lost sight of Rosario when he "started hearing gunshots"—first one, then a pause, then "four, five, six more." 19.RR.49. Unsure where the shots came from, Kelly looked toward the apartments, then back to the west, where he saw petitioner running north "down into the bayou, back up the bank and then towards [an] apartment complex" on Sun Prairie Road. 19.RR.50. Kelly chased Will across the bayou toward the Sun Prairie apartments. As he came out of the bayou, he saw a car "suddenly lurch out of a parking space" at the apartments and speed east. 19.RR.52.

II. Will's Flight and Arrest

When Deputy Kelly arrived at the Sun Prairie apartments, Cassandra Wilson told him that a man with a gun had just pulled her out of her car and stolen it. 19.RR.53-54. Wilson testified at trial that the man who stole her car told her "he had just shot a policeman," 21.RR.74, or "I just shot a police officer," 21.RR.90. Wilson later identified Will as the man who hijacked her car, first in a photo spread on the date of the murder, and again when she testified at trial. 21.RR.77, 82-83. Kelly reported the make and model of the stolen car over the radio. 19.RR.53-54.

Kelly called for Deputy Hill on the radio and started back toward his patrol car as other units began to arrive, 19.RR.55-56. Officers scoured the area for nearly thirty minutes before they found Deputy Hill's body. 18.RR.97, 114-15; 19.RR.59-60, 179. They recovered seven empty shell casings and two bullet fragments from the area around Deputy Hill's body. 17.RR.73.

Meanwhile, Will drove west in Cassandra Wilson's stolen car. Just after 10:00 A.M., Washington County Sheriff's Deputy Donald Wass saw the car and noticed that it matched the description of the car stolen after Deputy Hill was shot. 22.RR.107-08. When Deputy Wass determined that the license plates had been taken from another vehicle, he followed it around the back of a Tractor Supply Company store. 22.RR.73-75. Will got out of the car and ran toward Deputy Wass, who drew his gun and ordered Will to the ground. 22.RR.79-80. At the time, Will was bleeding from a deep wound on the back of his left hand. 22.RR.85-86.

Deputy Wass took a .40 caliber Sig Sauer pistol from Will's waistband. 22.RR.122-23. That pistol was later determined to be the murder weapon. 25.RR.94-110. Blood from Will's wounded hand matched a blood sample taken from Deputy Hill's right shoe. 24.RR.24-25.

After being questioned the night of the murder, Rosario gave a statement to the police, and was ultimately charged with auto theft. 22.RR.18-19.

III. Trial

At Will's capital murder trial, the State presented physical evidence of the crime and testimony from multiple officers involved in the events of December 4, 2000. The State also played a recording of the radio traffic from the time of the murder and introduced a time-stamped transcript showing, among other things, when Deputies Hill and Kelly began to pursue Will and Rosario and when the shots were fired. *See* ROA.1458-69.

Defense counsel argued that "Will was unarmed and that Rosario snuck up behind the officer and shot him." ROA.70 (citing 26.RR.133). In addition to questioning the State's witnesses about the physical evidence,

counsel presented the testimony of Victor Coronado, who testified that Rosario had claimed responsibility for Deputy Hill's murder while they were incarcerated together. ROA.1943-45.

While investigating the case, counsel identified two more witnesses who claimed to have heard Rosario confess to the murder while incarcerated. But both recanted at the courthouse, so defense counsel did not call them. ROA.1943-44. Counsel similarly declined to call Will's then-girlfriend, Brenda Venegas, because counsel determined her testimony would undermine the defense theory. ROA.1911-15; ROA.1967-70; ROA.1991. One of Will's trial counsel later explained he "didn't want her anywhere near the witness stand." ROA.1913; *see* ROA.1933; ROA.1979; ROA.1986.

The jury found Will guilty of capital murder. Based on the jury's answers to the special sentencing issues prescribed by Texas law, the trial court sentenced Will to death. ROA.398-99.

IV. Direct Appeal and State Habeas

On direct appeal, Will claimed, among other things, that he was deprived of a fair trial by the presence of uniformed sheriff's deputies who attended the trial as spectators. The Texas Court of Criminal Appeals ("CCA") rejected that claim. *Will v. State*, No. 74,306, 2004 WL 3093238, at *4 (Tex. Crim. App. Apr. 21, 2004). The CCA later denied Will's state habeas application. *Ex parte Will*, No. WR-63,590-01, 2006 WL 832456, at *1 (Tex. Crim. App. Mar. 29, 2006) (per curiam). At no time on direct appeal or during state post-conviction proceedings did Will complain about the performance of his trial counsel.

V. Federal Habeas

a. Will filed his first federal habeas petition and a motion to stay and abate on March 26, 2007. ROA.18-64. The district court granted the motion to stay, allowing Will to return to state court. ROA.65. The CCA dismissed Will's second state habeas application as an abuse of the writ. ROA.83-84.

b. Will filed an amended federal habeas petition on September 24, 2007, ROA.66, raising three claims: (1) a claim of actual innocence under the Eighth Amendment, ROA.71-73; (2) a claim that trial counsel rendered ineffective assistance by "failing to interview many potential witnesses" who "could have provided testimony which cumulatively would have bolstered counsel's trial strategy" by "demonstrating that he did not kill or intend to kill Deputy Hill," ROA.74-75; and (3) a claim that the presence of uniformed sheriff's deputies as spectators deprived Will of his due-process right to a fair trial, ROA.75-81. Will's first and second federal habeas claims had not been presented in state court. ROA.402.

The district court denied Will's federal habeas petition on May 25, 2010. ROA.392-435. The court treated Will's actual-innocence claim as a procedural vehicle to excuse the procedural default of his ineffective-assistance claim. ROA.416. The district court concluded that Will failed to show the fundamental miscarriage of justice required to overcome the procedural bar. ROA.416. Nevertheless, the court allowed Will to introduce new evidence never offered to the state courts, ROA.401, and adjudicated Will's ineffective-assistance claim on the merits, ROA.416. The district court concluded that Will failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). ROA.423-24. The court

also denied relief on Will's fair-trial claim because the state court's decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. ROA.433. The district court denied the habeas petition, declined to issue a certificate of appealability, ROA.434, and entered final judgment, ROA.436.

c. Will then filed a motion for new trial and to alter the judgment under Rules 59(b) and (e) based on an affidavit by Brenda Venegas, Will's girlfriend at the time of the murder. ROA.437. In her affidavit, Venegas stated that Rosario had confessed to shooting Deputy Hill on the day of the murder. The district court ordered an evidentiary hearing to determine (1) whether Ms. Venegas's account "is a credible basis for reopening these proceedings", and (2) whether arguments pertaining to "Venegas' affidavit could, and should, have been made before the entry of judgment." ROA.652-53. Six witnesses testified at the hearing, including Venegas, ROA.1697-1805, petitioner, ROA.1807-61, and petitioner's trial attorneys, ROA.1898-1948, ROA.1950-91.

Although it had "allowed liberal exploration of Will's various arguments," ROA.769, the district court concluded that the newly developed evidence did not justify reopening the judgment, ROA.769-70. The district court denied Will's Rule 59 motion. While on its face Venegas's declaration tended to support Will's claim of actual innocence, ROA.760, the court found her testimony "neither reliable nor credible," ROA.764. Will's trial counsel testified that at the time Venegas relayed Rosario's statements that he had run in a different direction from Will, heard several "bang[s]," thought Will had been shot, and fled the scene. ROA.763.

The hearing also revealed that Venegas' testimony was not "newly discovered," as required by Rule 59(e): trial counsel was aware of Venegas as a witness but "wanted her nowhere near the courthouse" because her testimony would be "radioactive." ROA.766-68; *see* ROA.1933; ROA.1979; ROA.1986.

d. Represented by new federal habeas counsel, Will decided to try again—this time using a motion for relief under Federal Rule of Civil Procedure 60(b). ROA.790. Relying on Rule 60(b)(6), Will requested that the district court (1) vacate its final judgment and order denying relief under Rule 59 to allow him to return to state court and further develop his claims, including his claim of ineffective assistance of trial counsel, ROA.813; (2) vacate its final judgment and order on the Rule 59 motion "to further develop his claims" in the district court; or (3) issue a certificate of appealability, ROA.814. The motion centered on the argument that Will received ineffective assistance of state habeas counsel, which could excuse the procedural default of his ineffective-assistance-of-trial-counsel claim. ROA.794-801. He also presented additional evidence relating to the merits of his ineffective-assistance claim. ROA.801-11.

The district court explained that it lacked jurisdiction to consider the evidence and arguments raised in Will's Rule 60(b) motion because it contained habeas claims. *See Gonzalez*, 545 U.S. at 532 & n.4. It was therefore a second-or-successive habeas petition under *Gonzalez*. *Id.* Although Will maintained that his Rule 60(b) motion challenged only the court's ruling on procedural default, the district court recognized that the motion raised "new claims as to IAC itself, such as the failure of trial counsel to present inconsistent statements by Rosario to the jury and to examine forensic evidence on Will's jacket."

ROA.912; *see* ROA.792-93. And the district court noted that Will's Rule 60(b) motion would be futile "if Will did not contest this Court's IAC ruling" on the merits because that ruling "forecloses the one substantive challenge to his conviction." ROA.912. Because the motion necessarily constituted a successive petition, the district court dismissed the motion for lack of jurisdiction under 28 U.S.C. section 2244(b). ROA.913. Will immediately appealed this dismissal. ROA.916-18.

e. Shortly after Will appealed, this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), which held that deficient performance by state habeas counsel may furnish cause to excuse the procedural default of a claim for ineffective assistance of trial counsel. The Fifth Circuit stayed Will's appeal and remanded with instructions to determine the effect of *Martinez* on Will's Rule 60(b) motion and to clarify whether a COA should issue. ROA.1643.

After considering additional briefing, ROA.1332-1538, ROA.1550-90, ROA.1610-39, the district court again concluded that "Will's 60(b) motion is a successive habeas petition which the Court has no jurisdiction to consider under AEDPA. *Martinez* did not affect AEDPA, and *Martinez* did not augment the limited jurisdiction that this Court has to consider habeas petitions." ROA.1643-44. The district court therefore confirmed the denial of Will's Rule 60(b) motion. It determined, however, that a COA was warranted on "(1) issues arising from his Rule 60(b) motion and (2) the third ground for habeas relief in Will's federal petition." ROA.1645.

f. Will again appealed to the Fifth Circuit, *see* ROA.1647, which affirmed the denial of habeas relief. The court agreed with the district court that Will's Rule

60(b) motion was a second-or-successive habeas petition under *Gonzalez*. Pet. App. 31-33. Although a finding of procedural default *can* be the proper subject of a Rule 60(b) motion, *see Gonzalez*, 545 U.S. at 532 n.4, Will's motion was not because it challenged the district court's alternative merits denial. Pet. App. 31-33. The Fifth Circuit explained its holding was "predicated on the comprehensive nature of the district court's substantive merits determination in the alternative," leaving open the possibility that "a future case with an unduly cursory alternative merits analysis" might come out differently. *Id.* at 33 n.39.

The Fifth Circuit also rejected Will's claim that the presence of uniformed sheriff's deputies observing his trial caused inherent prejudice in violation of his Due Process rights. *Id.* at 940-41. The CCA neither unreasonably applied this Court's precedent, the Fifth Circuit explained, nor based its ruling on any unreasonable determination of fact. *Id.* at 941-42. The Fifth Circuit therefore affirmed the denial of habeas relief. *Id.* at 942.

REASONS FOR DENYING THE PETITION

I. This Case Involves a Routine Application of *Gonzalez v. Crosby*.

Adopting Will's reading of *Gonzalez*'s "defects in the integrity" principle would allow any habeas petitioner to use Rule 60(b) to ask for a second chance at habeas relief. Contrary to Will's contention, there is no conflict between the Fifth Circuit's decision and the decisions of other courts applying *Gonzalez*. And even if there were, this would be a poor case to resolve it because Will's Rule 60(b) motion "assert[ed]" "that there exist . . . grounds entitling [Will] to habeas corpus relief," *Gonzalez*, 545

U.S. at 532 n.4, so it contained habeas claims under any circuit's application of *Gonzalez*.

A. Will's Rule 60(b) impermissibly sought to relitigate the merits of his ineffective-assistance claim.

Will's Rule 60(b) motion was a second or successive petition because it sought to relitigate the district court's previous rejection of his ineffective-assistance claim. A filing contains a habeas "claim" if it "asserts" "that there exist . . . grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Gonzalez*, 545 U.S. at 532 n.4. As the Court explained in *Gonzalez*, "[w]hen a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim." *Id.* The Court held that a petitioner may not use of Rule 60(b) "to present new claims for relief from a state court's judgment of conviction" and thereby "circumvent[] AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531 (citing 28 U.S.C. § 2244(b)(2)). The same principle prevents a federal habeas petitioner from using a Rule 60(b) motion to "present[] new evidence in support of a claim already litigated." *Id.* Will's Rule 60(b) motion did precisely that.

In his Rule 60(b) motion, Will maintained that the district court was wrong to reject his ineffective-assistance claim on the merits, and that it should reconsider that claim based on additional evidence. ROA.790-814. Specifically, the motion argued for the first time that trial counsel failed to analyze "blood on the back of the jacket" worn by Will on the morning of the murder, as well as "examine[], analyze[], or test[] the

apparent bullet graze across the back." ROA.807. The motion also contended trial counsel failed to elicit certain inculpatory statements made by Rosario. ROA.801-04. At bottom, it asked for another chance to develop and prove ineffective assistance of trial counsel. ROA.813 (asking the district court to "vacate its final judgment"); *see also* ROA.1379 (arguing "Rule 60(b) relief [is] appropriate with respect to the Court's conclusions about the merits").

That is a habeas claim barred by *Gonzalez*. "[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." *Gonzalez*, 545 U.S. at 532. Because Will's Rule 60(b) motion re-raised the ineffective-assistance claim that was presented in his prior habeas application, the district court had no choice but to dismiss. *See* 28 U.S.C. § 2244(b)(1).

B. Will's motion did not raise a defect in the integrity of the federal habeas proceedings.

Will cannot avoid that conclusion by recasting his motion as a challenge to defects in the integrity of the federal habeas proceedings. In *Gonzalez*, the Court held that a Rule 60(b) motion was not a successive habeas petition because it alleged only "that the federal courts misapplied the federal statute of limitations." 545 U.S. at 533. There, the petitioner's motion did not present a habeas "claim" because "neither the motion itself nor the federal judgment from which it [sought] relief substantively addresse[d] federal grounds for setting aside the movant's state conviction." *Id.*; *see also id.* at 527, 532 n.4. Unlike *Gonzalez*, both the motion and the judgment from which Will sought relief addressed the

merits of his ineffective-assistance claim. *See* ROA.791; ROA.1379.[2]

Will contends (at 19-20) that his Rule 60(b) motion attacked the integrity of the federal proceedings because he argued the district court improperly considered his IATC claim "only briefly." Will does not say what else the district court should have included in its "analytically robust" discussion rejecting his ineffective-assistance claim. Pet. App. 28; *id.* at 10. If all a habeas petitioner must do to avoid the second-or-successive bar is demand that the district court provide lengthier analysis, *Gonzalez*'s respect for AEDPA would fall away.

Indeed, Will's argument stretches "integrity of the federal habeas proceedings" past its breaking point. It is not difficult to recast a substantive argument for habeas relief as an attack on the federal district court's methodology. A petitioner can argue the court failed to consider a case cited, characterized his theory incorrectly, or should have addressed a cited piece of record evidence in its analysis. If such an argument is made in conjunction with a request to vacate the court's judgment—as was Will's—it "in effect asks for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5. That makes it a habeas "claim." *See id.* at 532 n.4.

Will revealed the true object of his Rule 60(b) motion when he complained (at ROA.1379) that purported

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[2] Will does not ask this Court to grant certiorari on whether the district court had jurisdiction to consider excusing his procedural default under *Martinez*. *See* Appellant's Br. 23-24. For good reason: even assuming *Martinez* would excuse the claim's procedural default, that would merely have allowed the district court to reach the merits, which it had already done. *See* Pet. App. 29-30 (citing *Gonzalez*, 545 U.S. at 532 n.4).

restrictions on discovery "deprived the [district] [c]ourt of evidence that its merits analysis should have accounted for": to relitigate the district court's merits analysis based on new evidence. But *Gonzalez* held that "a motion . . . seek[ing] leave to present newly discovered evidence in support of a claim previously denied" is a successive habeas petition. *Gonzalez*, 545 U.S. at 531 (citation omitted).

C. There is no inter-circuit conflict requiring this Court's intervention.

Even if the Fifth Circuit's ruling were incorrect, there is no need to address it at this time because Will posits (at most) a 1-1 conflict between the Tenth and Fifth Circuits. Instead, Will relies primarily on a supposed intra-circuit conflict that should be addressed—if it existed—by the Fifth Circuit sitting en banc. Moreover, because his Rule 60(b) motion would be barred under any cited test, this would be a poor case to resolve the alleged conflict.

The Fifth Circuit's decision does not conflict with the Tenth Circuit's rule allowing a Rule 60(b) motion that argues the court "fail[ed] to consider a claim altogether." Pet. 22 (citing, *inter alia*, *Spitznas v. Boone*, 464 F.3d 1213, 1225 (10th Cir. 2006)). Will's Rule 60(b) motion did not make such an argument. And even if he were correct that the Tenth Circuit's rule should be extended to "a judgment that errantly fails to *fully* consider a claim," Pet. 22 (emphasis added), the Fifth Circuit left open that possibility in "a future case with an unduly cursory alternative merits analysis." Pet. App. 33 n.39. Will's Rule 60(b) motion did not merely ask the district court to "fully consider" his claim—it asked the court to vacate its judgment and give Will "a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532

n.5. The Fifth Circuit's conclusion that Will's motion raised a habeas claim is entirely consistent with the Tenth Circuit decisions cited in the petition.

Will also posits there is conflict within the Fifth Circuit. Again, no such conflict exists. In *Uranga v. Davis*, 893 F.3d 282 (5th Cir. 2018), the petitioner filed a Rule 59(e) motion arguing that the district court denied his existing application "prematurely" because it did so without ruling on his pending motion to amend. *Id.* at 284.[3] This Court expressly noted that Uranga's motion, unlike Will's Rule 60(b) motion, "did not seek to add a new ground for relief, nor did he attack the district court's previous resolution of a claim on the merits." *Id.* As for *United States v. Nkuku*, 602 F. App'x 183 (5th Cir. 2015) (per curiam), the petitioner's Rule 60(b) motion "did not contend that the district court erred on the merits of his claim, but instead asserted that the district court erred by failing to articulate its rationale for the summary dismissal of his § 2255 motion." *Id.* at 185. Will, by contrast, asked the district court to reconsider the merits of his ineffective-assistance claim, not merely to provide an explanation for rejecting it. ROA.791; ROA.1377-79.

Even if the conflicts that Will posit exist—and they do not—resolving 1-1 circuit splits or inconsistencies in Fifth Circuit precedent is far from the most valuable use of this Court's limited docket space. *See, e.g.*, STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 250-55 (10th ed. 2013).

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[3] The Court has now held that a Rule 59(e) motion is not subject to the second-or-successive bar. *See Banister v. Davis*, 140 S. Ct. 1698, 1710-11 (2020).

D. This case is a poor vehicle to address the outer bounds of *Gonzalez*.

Finally, even if there were disagreement among the lower courts about whether a Rule 60(b) motion seeking additional analysis of a petitioner's claim or additional discovery could properly avoid the second-or-successive bar, this would be a poor case to consider the issue for at least two reasons.

First, Will's argument that the district court's analysis was insufficiently detailed was raised only in his post-remand supplemental brief addressing *Martinez*, not in the original Rule 60(b) motion itself. *Compare* ROA.790-814, *with* ROA.1377-78. It is doubtful that additional arguments raised in the post-remand briefing could properly be grafted onto the original motion in order to transform it from a second-or-successive habeas petition to a defects-in-the-integrity motion.

Second, Will was already provided significant discovery and allowed to present new evidence in support of his ineffective-assistance claim. AEDPA bars consideration of new evidence introduced for the first time in federal court. 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 428 (2000).[4] The district court nonetheless authorized liberal discovery and a live hearing with testimony from multiple witnesses, including Will himself. *See* ROA.753. Will does not explain how the liberal discovery permitted by the district court should have been expanded. Pet. 19; *see* ROA.1378. That he was allowed such discovery makes

[4] Section 2254(e)(2) applies even if procedural default is excused under *Martinez*. *See Jones v. Shinn*, 971 F.3d 1133, 1138-44 (9th Cir. 2020) (Collins, J., dissenting from denial of rehearing en banc). The Court has granted certiorari to review the Ninth Circuit's contrary conclusion in *Shinn v. Ramirez*, No. 20-1009.

this a poor vehicle to determine when *Gonzalez* allows a Rule 60(b) motion seeking discovery or an evidentiary hearing.

II. Section 2254(d)'s Relitigation Bar Makes This a Poor Vehicle to Address Will's Inherent-Prejudice Argument.

Equally unworthy of this Court's attention is petitioner's claim (at 23) that he was deprived of a fair trial by the presence of "an excessive number of non-testifying, non-courtroom-security uniformed deputies seated near the jury." The Texas Court of Criminal Appeals rejected that claim, so it cannot be relitigated de novo in a federal habeas court. As such, this would be a poor case to consider whether the inherent-prejudice holdings of *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), extend to spectators in a courtroom. *Cf. Carey v. Musladin*, 549 U.S. 70, 76 (2006) (noting the Court has never applied *Williams* or *Flynn* to spectators' conduct). Even if Will's claim could be reviewed de novo, it would fail: considering the circumstances, there was no inherent prejudice caused by sheriff's deputies observing Will's trial from the gallery. The Court should deny the petition as to the second question presented.

A. Will's inherent-prejudice claim is subject to AEDPA's relitigation bar.

Because the CCA rejected Will's inherent-prejudice claim on the merits, *Will*, 2004 WL 3093238, at *4, the claim is subject to AEDPA's relitigation bar. 28 U.S.C. § 2254(d). That precludes federal habeas relief unless the state courts' "adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States," *id.* § 2254(d)(1), or was "based on an unreasonable determination of the facts," *id.* § 2254(d)(2). Will contends the CCA's decision was an unreasonable application of *Williams* and *Flynn* and that it was based on an unreasonable determination of the facts. Pet. 23. Neither is correct.

1. The CCA's decision did not involve an unreasonable application of this Court's precedent.

Because this Court has never addressed the type of inherent-prejudice claim raised by Will here, the Texas court could not have unreasonably applied federal law under AEDPA. The statutory phrase "'clearly established Federal law' in § 2254(d)(1) 'refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision.'" *Musladin*, 549 U.S. at 74 (quoting *Williams*, 529 U.S. at 412). Section 2254(d)(1) "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," but it permits relitigation of such claims only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Applying this bar is key to AEDPA's central purpose: limiting the extent to which federal habeas relief impinges upon the States' "sovereignty over criminal matters" and their "interest in finality." *Fry v. Pliler*, 551 U.S. 112, 117 (2007) (internal quotation marks omitted).

A state court's decision qualifies as an "unreasonable application" under section 2254(d)(1) "if the state court identifies the correct governing legal principle from [the

Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. This is a narrow exception to AEDPA's general rule against relitigation of constitutional claims.

And "an unreasonable application of federal law is different from an incorrect application of federal law." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations and internal quotation marks omitted). This "highly deferential standard for evaluating state-court rulings," *id.*, requires Will to show that the state court's determination is "so lacking in justification" that it is "beyond any possibility for fairminded disagreement," *Richter*, 562 U.S. at 103; *see also Renico*, 559 U.S. at 773 (emphasizing that the state court must be "given the benefit of the doubt"). In other words, Will must show that the state court's determination was not merely wrong, but so wrong that no fairminded jurist could think it was right. *See Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) ("The term 'unreasonable' refers not to ordinary error or even to circumstances where the petitioner offers a strong case for relief, but rather to extreme malfunctions in the state criminal justice system."); *Bell v. Cone*, 535 U.S. 685, 699 (2002) ("[I]t is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied [Supreme Court precedent] incorrectly."). Will cannot meet that standard here.

a. The CCA's decision could not "involve[] an unreasonable application of" this Court's precedent. 28 U.S.C. § 2254(d)(1). No holding from this Court addresses the specific question here: whether the mere presence of uniformed officers in the courtroom as

spectators is so inherently prejudicial that it necessarily deprives a defendant of a fair trial.

Will attempts to overcome the limitations of section 2254(d)(1) based on the general principle that "certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial." *Musladin*, 549 U.S. at 72. This Court has, however, repeatedly warned that AEDPA's relitigation bar cannot be applied at that high level of generality. *See, e.g.*, *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam); *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam).

The Court has never applied the limited inherent-prejudice principle in circumstances analogous to this one. It has deemed *other* specific practices inherently prejudicial; for example, forcing a defendant to attend trial in prison clothing, *Williams*, 425 U.S. at 512-13, and forcing a defendant to appear before the jury bound and gagged, *Illinois v. Allen*, 397 U.S. 337, 344 (1970). But this Court has expressly rejected the claim that the presence of armed, uniformed officers in the courtroom is inherently prejudicial, even when those officers' presence is procured by the State to provide courtroom security. *Holbrook*, 475 U.S. at 569.

b. Will next contends the CCA failed to conduct "an objective assessment of the courtroom scene on a case-by-case basis, considering the totality of the circumstances." Pet. 24. That is belied by the CCA's thorough opinion: the CCA discussed the officers' presence, including defense counsel's statements on the record that at one time there were up to 18 officers observing the trial and that officers were sitting near the jury; as well as counsel's request that deputies be ordered to appear out of uniform. 2004 WL 3093238, at *4. Will's contention that the CCA "failed to consider

facts and circumstances that it had taken the trouble to recite strains credulity." *Early v. Packer*, 537 U.S. 3, 9 (2002) (internal quotation marks omitted).

c. In the same vein, Will says the CCA "suggested that *all* scenes featuring uniformed law enforcement in the courtroom are *per se* non-prejudicial." Pet. 27. It did no such thing. After discussing the very "courtroom scene" Will describes, Pet. 27, the CCA concluded that "[h]ere, the presence of the uniformed officers in the courtroom merely showed their solidarity and support for a fellow slain officer." 2004 WL 3093238, at *4. That was case-specific analysis resulting in a case-specific conclusion.

Musladin shows the reasonableness of the state court's decision denying Will's inherent-prejudice claim. In *Musladin*, the defendant in a murder case claimed that he was deprived of a fair trial because family members sat in the front row of the courtroom gallery wearing buttons with the victim's photograph. 549 U.S. at 72. The trial court denied his motion to order the family members not to wear the buttons, and the state court of appeals affirmed. *Id.* at 72-73, 76-77. On federal habeas review, the Ninth Circuit held that the state court's decision was contrary to, and constituted an unreasonable application of, clearly established law governing inherent-prejudice claims. *Id.* at 73-74, 76-77.

This Court reversed, noting that it had "never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial" and that it had never applied the inherent-prejudice test articulated in *Estelle v. Williams* and *Holbrook v. Flynn* to spectators' conduct. *Id.* at 76. The Court noted that part of the inherent-prejudice test—"whether the practices furthered an essential *state*

interest—suggests that those cases apply only to state-sponsored practices." *Id.* It concluded, based on the lack of holdings addressing spectator conduct, that "[n]o holding of this Court required the [State court] to apply the test of *Williams* and *Flynn* to the spectators' conduct here," thus precluding a finding that its decision was contrary to or an unreasonable application of clearly established federal law. *Id.* at 77.

Here, the CCA conclusion was not an unreasonable application of this Court's case law. The CCA's description of the likely impact of the deputies' presence is entirely consistent with the conclusion in *Musladin*—which this Court found reasonable—that "[t]he simple photograph of [the victim] was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member." 549 U.S. at 73. And the attendance of the officers falls outside cases involving state-sponsored conduct—including shackling a defendant or providing courtroom security. There is no evidence that the deputies' attendance as spectators—as opposed to as courtroom security—was compelled, or even encouraged, by the State. The district court was therefore right to acknowledge that ruling in Will's favor would necessarily create new law contrary to *Teague v. Lane*, 489 U.S. 288 (1989). *See* ROA.431-32.

At the very least, reasonable jurists could disagree on that question. It was no secret that Will was on trial for murdering a Harris County Sheriff's Deputy. And it would have been clear to a minimally attentive juror that the State and the Harris County Sheriff favored a conviction. Considering that more than a dozen law enforcement officers testified at trial, the attendance of uniformed officers in the audience would not have added substantially to the law-enforcement presence in the

courtroom. Indeed, under the circumstances the officers' attendance in support of a fallen officer and his bereaved family would hardly have been remarkable. *Cf. Musladin*, 549 U.S. at 73.

2. Petitioner has not shown the CCA's factual findings to be unreasonable by clear and convincing evidence.

Will also cannot surmount the relitigation bar by relying on section 2254(d)(2) because the CCA's decision was not "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

A. Will first argues "[t]he [CCA's] 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." Pet. 28 (quoting 2004 WL 3093238, at *4). Even if incorrect, that cannot overcome the relitigation bar because it was not the basis for the CCA's decision. *See* 28 U.S.C. § 2254(d)(2). Rather, the CCA referred to "ties to law enforcement" in distinguishing a case cited by Will, and only after independently rejecting his claim. 2004 WL 3093238, at *4. It noted: "[a]lso, this case is distinguishable from appellant's cited 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." *Id.* As the Fifth Circuit correctly explained, the CCA's "citation to 'no evidence' of law enforcement ties merely bolstered the conclusion it had *already* reached." Pet. App. 18 & n.51. That the CCA took the trouble to distinguish non-binding precedent does not deprive it of the deference required by section 2254(d)(2).

B. Will's other factual arguments are not really about factfinding at all. The CCA accepted Will's statements about the presence and number of Harris County

deputies who observed the trial. But Will contends the CCA incorrectly concluded "that Petitioner's objections and motions concerning the number of uniformed deputies in the courtroom were 'too scant' to be sufficient." Pet. 27 (quoting App. 36 n.48). That is an argument that the CCA misapplied Texas law regarding error preservation, not that it erred in its factual conclusions. Such an error (even if it existed) is not cognizable in federal habeas. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). And in any event, this too was not the basis for the CCA's decision. After describing Will's objections at trial as "scant," the CCA went on to consider and reject the inherent-prejudice claim on the merits. *See* 2004 WL 3093238, at *4.

Similarly, Will says the CCA ignored *its own* precedent stating that inherent prejudice might be shown if there were "some indication that the law-enforcement contingency gravitated toward the jury." Pet. 29 (quoting *Howard v. State*, 941 S.W.2d 102, 118 (Tex. Crim. App. 1996)). That theory also cannot overcome section 2254(d)(2). The CCA did not reject counsel's statement as a factual matter: it concluded the facts shown did not create inherent prejudice as a legal matter. And even assuming it misapplied its own precedent by failing to follow the dicta from *Howard v. State*, that is a state-law question on which federal habeas relief is unavailable.

Will cannot overcome the relitigation bar by dressing up alleged errors of Texas law as factual findings. Section 2254(d)(2) does not allow him to clear the relitigation bar.

B. Will's inherent-prejudice claim fails even if reviewed de novo.

Even if Will could surmount AEDPA's relitigation bar, his claim would fail on de novo review. Will argues (at 26) the officers' attendance at trial deprived him of due process because "the apparent purpose of appearing en masse and in uniform was to project the 'unmistakable mark of guilt,'" and "[t]he officers wanted a conviction." That is pure speculation. But in any event, he cites no precedent from this Court to support the notion that the inherent-prejudice test turns on subjective intent. His only authority (at 26) is *Woods v. Dugger*, 923 F.2d 1454 (11th Cir. 1991), a pre-AEDPA case from the Eleventh Circuit.

Even if subjective intent were relevant, Will long ago conceded that "there is no evidence as to whether the officers were on or off duty, whether their superiors encouraged or condoned their actions and the reason that they decided to wear their uniforms in court." ROA.158. There is some evidence indicating that officers were encouraged by their labor union, not the State, to attend the trial to support the slain officer's family, not to intimidate the jury. ROA.165; ROA.424. And the day defense counsel observed 18 deputies in the gallery was the day Deputy Kelly testified. 19.RR.75. Deputy Kelly described for the jury the seemingly routine burglary call that sent his partner to the morgue while he walked away unscathed. It would have been no surprise to see Deputy Kelly's colleagues in attendance to support him in that emotionally weighty task.

Given the jurors' awareness that Will's trial involved the brutal murder of a sheriff's deputy, there was no inherent prejudice. *Flynn* shows that the injury in an inherent-prejudice claim results from a specific risk—

that the jury will view the defendant as dangerous or culpable, thereby undermining the presumption of innocence. 475 U.S. at 569-70. That risk does not arise merely because uniformed deputies observe a trial. To a reasonable juror, the officers' attendance would have reflected not a mark of guilt, but an understandable showing of shared grief and mutual support.

Moreover, there is no evidence to support Will's theory that jurors must have "perceived" the deputies "as agents of the state acting in their official capacity" because internal sheriff's department regulations "required that [deputies] only wear their uniform while on-duty or on official business." Pet. 25. There is no indication the jurors knew or had reason to know about this internal regulation. And in any event, the public is accustomed to seeing uniformed police officers in restaurants, at gas stations, and otherwise conducting ordinary business. There is no reason jurors would interpret attending a trial involving a colleague's murder as official State business any more than it is official State business to order a sandwich at lunchtime.

In *Flynn*, the Court noted that the presence of officers—even of armed guards—would not necessarily brand the defendant with a mark of guilt:

> the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. . . . Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status.

475 U.S. at 569.

* * *

The courts below correctly denied habeas relief, and Will's claims raise no issue necessitating this Court's intervention. The district court properly dismissed Will's Rule 60(b) motion because it pressed a habeas claim that had already been rejected and was therefore an impermissible successive habeas petition. That was a routine application of *Gonzalez v. Crosby*. The CCA considered and rejected Will's inherent prejudice claim on the merits, and Will cannot overcome AEDPA's relitigation bar. As such, this would be a poor vehicle for considering whether such claims can arise from the conduct of spectators.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

NATALIE D. THOMPSON
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

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