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,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY

Two manifest errors in the decision below leave Petitioner sentenced to death for a crime he did not commit and was not validly convicted of committing. Both warrant granting the petition.

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

Martinez v. Ryan, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), hold that procedural default is excused where, as here, state habeas counsel was ineffective. That made the district court's original ruling on procedural default erroneous *and* affected the integrity of the district court's original merits disposition, since the erroneous procedural default ruling caused the district court to only "briefly address" the merits of Mr. Will's ineffective assistance of trial counsel claim and caused it to make more restrictive discovery decisions than it would have otherwise. In light of this case's extraordinary circumstances, the district court should have granted Mr. Will's Rule 60 motion and vacated the judgment denying his petition.

Instead of considering any of those issues in substance, the district court felt constrained to not exercise jurisdiction over Mr. Will's Rule 60 motion by employing the bar on successive habeas petitions. But the bar on successive habeas petitions does not apply where the Rule 60 motion's arguments relate to the integrity of the federal habeas proceeding and not the integrity of the state criminal trial. This threshold error requires both reversal and a remand so that the district court can consider the Rule 60 motion in the first instance.

A. The decision below is clearly wrong.

The State does not deny this question's importance, both in standard cases and especially this capital case. Nor does the State deny its recurrence nationwide. The State instead says that review is unnecessary because the court of appeals got the right result. But of course that is just an argument for how the Court should decide the case—not whether the petition should be granted—and in any event it is wrong.

On the merits, the State's "second chance" reasoning proves far too much. The State thinks that, if a motion seeks *any* "second chance" at habeas relief, it is a "second or successive" petition and not a proper request for Rule 60 relief. But this blunt logic would mean that *no* valid Rule 60 motions exist. The State's sweeping rule runs headlong into *Gonzalez* itself, where the petitioner succeeded despite seeking a "second chance." There must be some set of motions that seek a "second chance" and are allowable uses of Rule 60, and this is one of them.

Gonzalez itself supplies the critical distinction between a ruling's substance and its procedure. Every ruling that a district court issues—be it on a claim's merits, procedural default, the statute of limitations, etc.—has both substantive and procedural components. But nowhere does *Gonzalez* hold that an attack on the procedure used to resolve a claim triggers the bar on successive petitions. To the contrary, *Gonzalez* holds that a Rule 60(b) motion triggers the bar on successive petitions only if it

"attacks . . . the *substance* of the federal court's resolution of a claim on the merits." 545 U.S. at 532 (emphasis added).

To determine what is substance and what is procedure, *Gonzalez* provides a test: A bar on successive petitions applies whenever a Rule 60(b) motion "alleg[es] that the movant is, *under the substantive provisions of the statutes*, entitled to habeas relief." *Id.* (emphasis added). By definition, procedural attacks do not fit that mold.

Unlike a successful *substantive* attack, a successful *procedural* attack does not mean that the petitioner is "entitled to habeas relief." A successful procedural attack just yields relief from an existing judgment that is afflicted by a defect in the integrity of its proceedings. But when it comes time for the district court to enter a new judgment (free from defects in the integrity of its proceedings), Rule 60 arguments about the prior judgment's procedural faults do not control the new judgment's outcome.

Each key facet of Petitioner's attack was procedural, not substantive. For example, Petitioner's complaint that the court only "briefly address[ed]" his IATC claim was not substantive; it goes only to the defect in the court's decisional process. And the complaint that there was too little discovery is also not substantive for the same reasons.

To succeed with either of these complaints, Petitioner need not "relitigate the merits" of his IATC claim, as the State suggests. All that he needs to relitigate is the procedure used to adjudicate his

claim. And if Petitioner relitigates those procedural attacks successfully, he is not automatically entitled to habeas relief — he is entitled only to a new decision on the merits that is not infected with the defective premise that his claims were procedurally barred.

Because Petitioner's attack on the district court's decisionmaking process was procedural, his Rule 60 motion was not a successive petition.[1] The district court therefore should have exercised jurisdiction and decided the motion on its merits, and the Fifth Circuit should have corrected its refusal to do so.

Questions about *how* to exercise that jurisdiction are beyond this petition's scope. The Court need not and should not go past the question presented to determine whether the motion's Rule 60 arguments warrant relief. It instead should do as the Fifth Circuit should have and remand for the district court to make those determinations in the first instance.

B. There are no vehicle problems.

The State's first vehicle argument suggests a problem regarding preservation. It says (at 17) that 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." But there is no preservation problem because the district court expressly decided that Petitioner had the right to make the arguments

[1] Even if *parts* of a filing do not meet the test for valid Rule 60 submissions, other parts that do meet the test cannot be disregarded and must be judged by Rule 60.

at issue during post-remand briefing. ROA.1324-25; *see* ROA.1643 ("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.").

The State's last argument on this issue says (at 17-18) that "Will was already provided significant discovery and allowed to present new evidence in support of his ineffective-assistance claim." But this is just another assertion about *how* the district court should have adjudicated the motion under Rule 60's merits—not an argument about the actual question presented of whether the court of appeals was right to bar the district court from addressing Rule 60's merits at all.

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

A. AEDPA's relitigation bar does not apply because Petitioner has shown an unreasonable application of clearly established federal law.

Respondent attempts to construct an impossible standard, arguing that because this Court has never considered a fact pattern identical to Petitioner's, there can be no violation of clearly established federal law. But Respondent's view of what is clearly established federal law is far too narrow.

This Court has clearly established that an inherently prejudicial courtroom scene violates a defendant's right to a fair trial. *Estelle v. Williams*,

425 U.S. 501, 503-06 (1976) (emphasizing that practices that pose a threat to a fair trial must be subjected to "close judicial scrutiny"); *see also Moore v. Dempsey*, 261 U.S. 86 (1923) (holding that, as a fundamental principle of due process, trials must be free from a coercive or intimidating atmosphere).

To assess whether a scene violates this standard, a court must make an objective assessment of the scene on a case-by-case basis. *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) ("In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate."). A plain reading of the CCA's decision shows that did not occur. There is no substitute for considering the totality of the circumstances when deciding whether there was an unacceptable risk of impermissible factors coming into play. *Id.* at 570-71. Because Petitioner was never afforded such an analysis, this Court should grant review.

Any reasonable application of *Williams* and *Flynn* must hinge on how the reviewing court answers the following: What did the jurors see and what reasonable inferences might have resulted? Again, this question was never answered. Had it been objectively examined (as required by *Flynn*), the scene went well beyond something that could have been reasonably perceived as part of "an impressive drama," *Flynn*, 475 U.S. at 569, and crossed over into clear constitutional risk.

The uniformed deputies were congregating near the jury, watching the jury members, scrutinizing the

witnesses and lawyers, silently weighing in on Mr. Will's alleged culpability—all the while carrying the imprimatur of the State. They wanted a conviction and wanted to make their desire plain to the jury. A reasonable juror also would likely believe that these deputies were privy to additional extra-record evidence not presented and, amidst that backdrop, were even more susceptible to this form of communication. The trial court could have stopped it. But it did not. *Cf. United States v. Rodriguez*, 585 F.2d 1234, 1243 (5th Cir. 1978), *aff'd in part, rev'd in part on other grounds*, 612 F.2d 906 (5th Cir. 1980) (en banc) (caselaw and rules of professional conduct impose "duty on the prosecutor to be scrupulous in his argument and to avoid all efforts to obtain a conviction by going beyond the evidence before the jury or by putting the sanction of his office behind the testimony of witnesses").

While Respondent contends that the deputies were mere "spectators" and, thus, more akin to the family members in *Carey v. Musladin*, 549 U.S. 70 (2006), such an argument strains credulity. In the eyes of a reasonable juror examining the scene presented, all that could be appreciated was that each and every nearby deputy was clad in his or her official uniform—the most logical assumption being that these deputies were attending on behalf of the State.

There simply is no countervailing State interest for having this number of uniformed law enforcement officers sitting next to the jury in this type of case. Based on a totality of the circumstances, the scene

Petitioner faced at trial was one suggesting coercion and intimidation by state actors communicating their desire for a conviction and, thus, one of inherent prejudice. The Fifth Circuit's failure to act constitutes an unreasonable application of federal law.

B. AEDPA's relitigation bar does not apply because Petitioner has shown an unreasonable determination of facts.

The CCA's conclusion that "there is *no evidence* that any of appellant's jurors had close ties to law enforcement" was wholly unreasonable considering the factual record before the state court. *See Will v. State*, No. 74,306, 2004 WL 3093238, at *4 (Tex. Crim. App. Apr. 21, 2004) (emphasis added). Although a determination that a state court was "unreasonable" requires a substantial showing, *see, e.g., Williams v. Taylor*, 529 U.S. 362, 410 (2000), the CCA's decision fits the bill. *See* 28 U.S.C. § 2254(d)(2); *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018). There is such a showing here.

At least five of the twelve jurors seated to determine Petitioner's guilt or innocence, and ultimately his punishment, had close ties to law enforcement—including a juror whose brother had been a state trooper for twenty-five years, a juror whose father had been a chief of police, and a juror whose stepfather was a retired corrections officer. *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (finding an unreasonable determination of facts where the state appellate court assumed the factual record

documented a fact, but clear and convincing evidence showed otherwise).

While Respondent now seeks to distance the CCA's decision from its unreasonable factual determination, the decision itself suggests the opposite.

Similarly, a plain reading of the CCA's decision reflects that a primary basis for denying Petitioner relief was that the court "cannot agree with this claim *based on* a record showing that appellant objected to the officers' uniforms on only two occasions during . . . 12 days of testimony." *Will*, 2004 WL 3093238, at *4 (emphasis added). Again, as demonstrated in Petitioner's petition, the conclusion that Petitioner did not raise proper objections was an unreasonable determination of facts. *See* 28 U.S.C. § 2254(d)(2).

Because the Fifth Circuit was wrong to conclude there was no unreasonable application of clearly established federal law and no unreasonable determination of the facts, this Court should grant review of whether Petitioner was afforded a fair trial.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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