No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON BERNARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDICES

APPENDIX 1

Order Denying a Certificate of Appealability,
United States v. Vialva, 904 F.3d 356 (5th Cir. 2018)

904 F.3d 356

United States Court of Appeals, Fifth Circuit.

UNITED STATES of America,
Plaintiff - Appellee
v.
Christopher Andre VIALVA,
Defendant – Appellant

United States of America,
Plaintiff - Appellee
v.
Brandon Bernard,
Defendant – Appellant

No. 18-70007
|
Consolidated With No. 18-70008
|
September 14, 2018

Synopsis

Background: Defendants convicted of capital murder under federal law and sentenced to death, affirmed at 299 F.3d 467, appealed from orders of the United States District Court for the Western District of Texas dismissing their motions for relief from judgment that denied their initial motions to vacate, as unauthorized second or successive motions to vacate. Defendants applied for certificates of appealability (COA).

The Court of Appeals held that defendants failed to show that reasonable jurists could disagree with District Court's determination that their motions for relief from judgment were unauthorized second or successive motions to vacate.

Applications for COA denied.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***357** Appeals from the United States District Court for the Western District of Texas

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Before HIGGINBOTHAM, JONES, and DENNIS*, Circuit Judges.

Opinion

PER CURIAM:

***358** Brandon Bernard and Christopher Andre Vialva were convicted of capital murder under federal law and sentenced to death. Both men moved for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), seeking to reopen their initial habeas proceedings under 28 U.S.C. § 2255. The district court concluded that these motions constituted second-or-successive Section 2255 petitions and so dismissed them for lack of jurisdiction. Bernard and Vialva now seek certificates of appealability ("COAs") pursuant to 28 U.S.C. § 2253(c)(2). For the reasons set forth below, we **DENY** the COA applications.

BACKGROUND

In 1999, Bernard, Vialva, and other gang members planned a carjacking and robbery in Killeen, Texas. *See United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002) (denying claims on direct appeal); *United States v. Bernard*, 762 F.3d 467 (5th Cir. 2014) (denying COA applications for Section 2255 claims). Their plan culminated in the murders of Todd and Stacie Bagley on federal government property. Vialva shot both victims in the head. Bernard then set fire to the Bagleys' car to destroy evidence. The gunshot killed Todd Bagley, and Stacie died from smoke inhalation. A jury found Bernard and Vialva guilty on multiple capital counts. The jury subsequently found that aggravating factors outweighed mitigating factors for each defendant. They were sentenced to death under 18 U.S.C. § 3591 *et seq*. This court affirmed their sentences on direct appeal. 299 F.3d at 489, *cert. denied*, 539 U.S. 928, 123 S. Ct. 2572, 156 L.Ed.2d 607 (2003).

Bernard and Vialva filed habeas petitions challenging their convictions and sentences pursuant to Section 2255. After careful review, the district court denied Bernard and Vialva an evidentiary hearing and rejected their claims, declining to certify any questions for appellate review. Bernard and Vialva then sought COAs from this court. This court denied their COA applications, holding that "reasonable jurists could not disagree with the district court's disposition of any of Bernard's and Vialva's claims on the voluminous record presented." 762 F.3d at 483.

In October 2017, Vialva moved in district court for relief from judgment under Federal Rule of Criminal

Procedure 60(b)(6). His motion requested that the district court's denial of his initial Section 2255 motion be vacated because purported defects in the integrity of those proceedings precluded meaningful collateral review. A month later, Bernard filed a substantially similar motion.

The motions both allege that Judge Walter Smith, the district court judge who oversaw their trials and initial habeas petitions, was unfit to conduct proceedings because of "impairments."[1] The motions also assert numerous errors committed by Judge Smith during their trial and initial habeas proceedings. And the motions contend that this court misapplied the standard of review in denying Bernard's and Vialva's COA applications when they sought to appeal Judge Smith's denial of their habeas petitions.

***359** In support of their Rule 60(b) motions, Bernard and Vialva both attached the Judicial Council's Order from Judge Smith's misconduct proceeding. Bernard attached several other related documents, including the order effecting Judge Smith's suspension from new case assignments, an excerpt of the deposition of the court employee who alleged misconduct against Judge Smith,[2] and a 2017 article from the *Texas Lawyer* that details the misconduct proceedings and Judge Smith's decision to retire. Bernard also attached an *amicus* brief by the Federal Capital Habeas Project supporting Bernard's petition for a writ of certiorari and arguing that this court erred in denying his COA application.

The district court construed Bernard's and Vialva's Rule 60(b) motions as successive motions under Section 2255 and dismissed them for lack of jurisdiction. The court then concluded that no COAs should issue. Both petitioners timely applied to this court for COAs.

STANDARD OF REVIEW

We review *de novo* whether the district court properly construed the purported Rule 60(b) filings as subsequent habeas petitions under Section 2255. *In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014). However, this court may not consider an appeal from the district court's denial of relief unless Bernard and Vialva "first obtain a COA from a circuit justice or judge." *Buck v. Davis*, ––– U.S. ––––, 137 S.Ct. 759, 773, 197 L.Ed.2d 1 (2017) (citing 28 U.S.C. § 2253(c)(1)). "A COA may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.' " *Id.* (quoting 28 U.S.C. § 2253(c)(2)). Unless an applicant secures a COA, this court "may not rule on the merits of his case." *Id.* (citing *Miller–El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003)).

The COA inquiry itself is "limited" and

"not coextensive with a merits analysis." 137 S.Ct. at 773-74. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' " *Id*. at 773 (quoting *Miller–El*, 537 U.S. at 327, 123 S.Ct. at 1034). In other words, this court must make only "an initial determination whether a claim is reasonably debatable." *Id*. at 774. And this "initial determination" must be made without "full consideration of the factual or legal bases adduced in support of the claims." *Id*. at 773 (quoting *Miller–El*, 537 U.S. at 336, 123 S.Ct. 1029). "Finally, any doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005).

DISCUSSION

Given the limited standard of review, the question here is whether reasonable jurists could disagree with the district court's determination that Bernard's and Vialva's Rule 60(b) motions were successive habeas petitions under Section 2255. We conclude that the issue is not reasonably debatable.

***360** Congress has specified that individuals may file successive Section 2255 motions only under limited circumstances. *See* 28 U.S.C. § 2255(h)(1)-(2) (requiring that a successive motion point to either "newly discovered evidence" establishing the movant's innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"). A federal district court lacks jurisdiction to entertain a successive motion unless the circuit court first certifies that the filing satisfies these requirements. *See id*.

To avoid the statutory limits on successive habeas petitions, individuals may seek to style their successive filings as motions for relief from judgement under Rule 60(b). This rule allows a court to reopen proceedings for obvious errors, newly discovered evidence, fraud, or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1)-(6). In *Gonzalez v. Crosby*, however, the Supreme Court stated that Rule 60(b) motions cannot "impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." 545 U.S. 524, 532, 125 S.Ct. 2641, 2648, 162 L.Ed.2d 480 (2005).[3] *Gonzalez* provides guidance for determining when a Rule 60(b) motion is subject to the requirements for successive petitions. *See id*. at 532-36, 125 S.Ct. at 2648-50.

Specifically, *Gonzalez* states that courts

must construe a Rule 60(b) motion as a successive habeas petition if it "seeks to add a new ground for relief" or "attacks the federal court's previous resolution of a claim on the merits." 545 U.S. at 532, 125 S.Ct. at 2648. If a motion challenges "not the substance of the federal court's resolution of a claim on the merits but some defect in the integrity of the federal habeas proceedings," then a Rule 60(b) motion is appropriate. *Id.*

Applying *Gonzalez*, we have held that claims of procedural defect must be "narrowly construed" when considering whether motions are subject to the limits on successive habeas petitions. *See In re Coleman*, 768 F.3d at 371. Claims properly brought under Rule 60(b) include assertions of "[f]raud on the habeas court" or challenges to procedural rulings that "precluded a merits determination"—for instance, the denial of habeas relief "for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." 545 U.S. at 532 n.5, 125 S.Ct. at 2648. Accordingly, a district court has jurisdiction to consider a motion that shows "a non-merits-based defect in the district court's earlier decision on the federal habeas petition." *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010). But motions that "in effect ask for a second chance to have the merits determined favorably" must be construed as successive habeas petitions regardless whether they are characterized as procedural attacks. *See id*.

Indeed, courts have repeatedly rejected attempts to portray *substantive* claims as asserting *procedural* defects. For example, in *United States v. Washington*, the Ninth Circuit addressed a Rule 60(b) motion alleging that the district judge "lacked familiarity with the facts of the case" and erroneously "declined to conduct an evidentiary hearing." 653 F.3d 1057, 1064 (9th Cir. 2011). Though presented as a procedural challenge, these claims did not, the court explained, "constitute an allegation ***361** of a defect in the integrity of the proceedings; rather, such arguments are merely asking 'for a second chance to have the merits determined favorably.' " *Id*. (quoting *Gonzalez*, 545 U.S. at 532 n.5, 125 S.Ct. at 2648). Similarly, in *In re Lindsey*, the Tenth Circuit addressed a Rule 60(b) motion in which the movant "characterized his arguments as procedural in nature, asserting they 'deal[t] primarily with some irregularity or procedural defect in the procurement of the judgment.' " 582 F.3d 1173, 1174 (10th Cir. 2009). Despite this characterization, the Tenth Circuit applied *Gonzalez* to find that the claim—another challenge to the denial of an evidentiary hearing—"le[d] inextricably to a merits-based attack on the dismissal of the § 2255 motion," thereby requiring circuit-court authorization as a successive Section 2255 motion. *Id*. at 1175-76.

Here, the district court held that

Bernard's and Vialva's motions were "the very definition of ... successive" because they "ask[ed] the court to vacate the previous adverse judgment on the merits and to consider the claims raised in their [original] Section 2255 motions afresh." The court noted that Bernard and Vialva both spent much of their Rule 60(b) motions rearguing the merits of the claims brought in their initial Section 2255 motions. And the court inferred that "the alleged procedural defects are simply an attempt to circumvent" the limits placed by Congress on successive habeas petitions.

Bernard and Vialva contend that the district court erred because their Rule 60(b) motions properly identified "non-merits-based defect[s]" in their habeas proceedings that "wrongfully deprived [them] of meaningful collateral review under 28 U.S.C. § 2255." Bernard and Vialva stress that "a fundamental purpose" of motions under Rule 60(b) "is to provide an exception to finality ... where procedural defects marred the integrity of the earlier proceedings," and so it is not inappropriate that their motions seek to relitigate "the merits of claims that were advanced and decided in earlier habeas proceedings."

Bernard and Vialva are correct that Rule 60(b) motions can legitimately ask a court to reevaluate already-decided claims—as long as the motion credibly alleges a non-merits defect in the prior habeas proceedings. However, the question before us is not whether Rule 60(b) motions can reopen proceedings—they certainly can—but whether Bernard and Vialva have actually alleged procedural defects cognizable under Rule 60(b).

Although they purport to attack the integrity of their prior habeas proceedings, Bernard's and Vialva's invocation of defective procedure rests substantially on a merits-based challenge. To begin with, evidence from Judge Smith's misconduct investigation does not credibly implicate the procedural integrity of Bernard's and Vialva's prosecutions or subsequent habeas proceedings. Evidence that Judge Smith engaged in unrelated misconduct in 1998 or that he neglected certain recusal requirements during the 2014 misconduct investigation does not raise an inference of defects in the habeas proceedings at issue here. The allegations offer no evidence—beyond gross speculation—that Judge Smith was, as Bernard and Vialva repeatedly assert, "impaired" or "unfit" to oversee their 2000 trial and subsequent habeas proceedings. Judge Smith's unrelated misconduct does not constitute a defect in the integrity of Bernard's and Vialva's habeas proceedings. To hold otherwise would implicate every one of Judge Smith's decisions for an undetermined period of time nearly twenty years ago and would justify circumventing the second-or-successive limitations in countless cases.

***362** Attempting to link Judge Smith's misconduct to their own proceedings, Bernard and Vialva point to errors allegedly committed by Judge Smith during their trial and habeas proceedings: (1) Judge Smith's appointment of ineffective counsel, (2) his incorrect jury instructions, (3) his admission of improper victim impact statements, (4) his failure to rule on the original Section 2255 motions in a timely manner,[4] (5) his summary denial of their habeas claims, and (6) his denial of requests for an evidentiary hearing.

These are clearly merits-based attacks, and they have already been reviewed and rejected by this court. *See* 299 F.3d at 484-85 (concluding that jury instruction error was "harmless beyond a reasonable doubt"); *id.* at 480-81 (finding that challenged statements "did not alone unduly prejudice the jury" because the "inadmissible portion of the victim impact testimony was short and mild compared to the horror of the crimes and the pathos of the admissible impact on the parents"); 762 F.3d at 471-80 (finding that the district court's rejection of Bernard's and Vialva's ineffective assistance of counsel claims was "not reasonably debatable"); *id.* at 483 (holding that "reasonable jurists could not disagree with the district court's disposition of any of Bernard's and Vialva's claims," including the court's decision to deny an evidentiary hearing and further discovery). Bernard and Vialva seek to transform these previously unsuccessful merits-based claims into a claim of procedural defect. *Gonzalez* squarely rejects this sort of "attack [on] the federal court's previous resolution of ... claim[s] on the merits." 545 U.S. at 532, 125 S.Ct. at 2648.

The claim that this court misapplied the COA standard fares no better. To show error, Bernard and Vialva cite *Buck v. Davis*, a decision in which the Supreme Court reversed a different panel of this court for failing to limit its COA review appropriately—that is, the panel failed to consider only whether the district court's decision was "reasonably debatable." —— U.S. ——, 137 S.Ct. 759, 774, 197 L.Ed.2d 1 (2017). Yet Bernard and Vialva fail to explain how the error present in *Buck* was also present in this court's application of the COA standard in their proceedings. They merely argue that the district court's disposition of their Section 2255 motions was, in fact, debatable by jurists of reason.[5] Of course, Bernard and Vialva have already challenged this court's denial of their COA applications in their petitions for writs of certiorari, which were denied by the Supreme Court. *See Vialva v. United States*, —— U.S. ——, 136 S.Ct. 1155, 194 L.Ed.2d 173 (2016); *Bernard v. United States*, —— U.S. ——, 136 S.Ct. 892, 193 L.Ed.2d 788 (2016), *reh'g denied*, —— U.S. ——, 137 S.Ct. 2154, 198 L.Ed.2d 226 (2017). Reasserting that the district court's dismissal of their Section 2255 motions was "debatable" is

not a claim cognizable under Rule 60(b). The claim is "fundamentally substantive," *Coleman*, 768 F.3d at 372, and Bernard and Vialva plainly seek "a second chance to have the merits [of their claims] determined favorably." *Balentine*, 626 F.3d at 847.

In sum, this case illustrates the importance of preventing claims of procedural defect from becoming a talisman to ward off the limits placed on successive habeas petitions. Although Bernard and Vialva characterize their Rule 60(b) motions as ***363** attacking "defect[s] in the integrity of their proceedings" they cast no doubt on those proceedings' integrity. Instead, they cite unrelated misconduct by Judge Smith and then seek to link this to their substantive "attacks [on] the federal court's previous resolution of a claim on the merits." *Gonzalez*, 545 U.S. at 532, 125 S.Ct. at 2648. Under these circumstances, jurists of reason could not debate that the district court was correct to construe the petitioners' filings as successive motions under Section 2255.

CONCLUSION

For the foregoing reasons, Bernard's and Vialva's applications for certificates of appealability are **DENIED**.

All Citations

904 F.3d 356

Footnotes

[*] Judge Dennis concurs in all but footnote 4 of this opinion.

[1] These allegations stem from a 2014 judicial misconduct investigation involving Judge Smith. The Judicial Council found that, in 1998, Judge Smith made unwanted advances toward a court employee. The Council also noted that Judge Smith did not follow appropriate procedures regarding recusal from cases in which his counsel in the misconduct investigation was representing parties before his court. The investigation resulted in a reprimand for Judge Smith, and he was suspended for one year from being assigned new cases.

[2] The deposition excerpt includes the court employee's discussion of the alleged misconduct, her opinion that Judge Smith may have been drinking prior to some of his interactions with her, and her statement that, at one point, Judge Smith's law clerk called her to say that Judge Smith had "been in the hospital," was "falling apart," and had needed to "cancel court things" because he was "not functioning."

[3] *Gonzalez* considered "only the extent to which Rule 60(b) applies to habeas proceedings under 28 U.S.C. § 2254," *id*. at 529 n.3, 125 S.Ct. at 2646, but this court has applied its holding in the Section 2255 context. *See United States v. Hernandes*, 708 F.3d 680, 681 (5th Cir. 2013).

[4] For obvious reasons, capital habeas petitioners rarely, if ever, criticize a court's delay in ruling on their petitions.

[5] As noted earlier, Bernard also points to an *amicus* brief, but this offers no evidence of procedural error beyond arguing that this court should have found Bernard's claims debatable and granted his COA.

End of Document

APPENDIX 2

Order on Motions for Relief from Judgment,
United States v. Bernard, Crim. No. W-99-CR-070 (2) – LY, Civil No. W-04-CV-164-LY (W.D. Tex., December 20, 2017)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	**CIVIL NO. W-04-CV-163-LY**
V.	§	**CRIMINAL NO. W-99-CR-070 (1)-LY**
	§	
CHRISTOPHER ANDRE VIALVA	§	*** CAPITAL CASE ***

AND

UNITED STATES OF AMERICA	§	
	§	**CIVIL NO. W-04-CV-164-LY**
V.	§	**CRIMINAL NO. W-99-CR-070 (2)-LY**
	§	
BRANDON BERNARD	§	*** CAPITAL CASE ***

ORDER ON MOTIONS FOR RELIEF FROM JUDGMENT

Movants Christopher Andre Vialva and Brandon Bernard were convicted under federal law of capital murder and sentenced to death. Their convictions and sentences were affirmed on direct appeal, and each unsuccessfully challenged their respective conviction and sentence pursuant to 28 U.S.C. § 2255. Both Movants have now filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), requesting a re-evaluation of the claims previously raised and rejected during Movants' habeas corpus proceedings. Doc. # 553 (Vialva); Doc. # 569 (Bernard). After carefully considering the pleadings and relief sought by Movants, however, the court concludes the Rule 60(b) motions should be construed as successive Section 2255 motions which this court is prohibited from considering. Both motions are therefore dismissed for lack of jurisdiction.

Background

In June 2000, Vialva and Bernard were convicted in the Western District of Texas of capital murder and sentenced to death for the carjacking and murder of Todd and Stacie Bagley

while on federal government property. As stated previously, their convictions were affirmed on direct appeal, and certiorari was denied by the United States Supreme Court. *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002), *cert. denied*, 539 U.S. 928 (2003). Movants then challenged their convictions and sentences by filing motions to vacate, set aside, or correct under 28 U.S.C. § 2255 alleging a myriad of constitutional violations. After careful consideration, the district court—the Honorable Judge Walter S. Smith, Jr. presiding[1]—denied an evidentiary hearing, denied the Section 2255 motions and the claims raised therein, and denied Movants a certificate of appealability (COA). Doc. # 449. On appeal, the Fifth Circuit also denied Movants a COA, and their subsequent petitions for certiorari review were again denied by the Supreme Court in early 2016. *United States v. Bernard*, 762 F.3d 467 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 892 (2016), 136 S. Ct. 1155 (2016).

On October 13, 2017, Vialva filed his Rule 60(b) motion to vacate the district court's denial of his Section 2255 motion, arguing "defects" in the integrity of the proceedings tainted the post-conviction review process and amounted to an extraordinary circumstance sufficient to justify reopening the Section 2255 proceedings. Doc. # 553. A month later, Bernard filed a similar motion largely parroting the arguments raised in Vialva's motion. Doc. # 569. Both motions focus on the alleged unfitness of Judge Smith to preside over the Section 2255 proceedings. Specifically, Movants contend: (1) Judge Smith was unfit to preside over the Section 2255 proceedings because of various "impairments"[2] which are now a matter of public record; (2) this alleged lack of fitness was illustrated by the fact it took over seven years to

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[1] Judge Smith also presided over the Movants' original trial.

[2] These alleged impairments—which include a failure to properly follow procedures regarding recusal, as well as a reputation for drinking and having a temper—stem from a 2014 investigation into allegations that Judge Smith had made unwanted sexual advances toward a member of his staff in 1998. As a result of the investigation, Judge Smith was reprimanded and prohibited for a year from being assigned any new cases.

produce an Order and Judgment; (3) Judge Smith's failure to recuse himself despite having presided over the trial resulted in an appearance of bias; (4) this bias was apparent by Judge Smith's summary dismissal of potentially meritorious claims without an evidentiary hearing. According to Movants, these defects were also compounded on appeal by the Fifth Circuit's flawed procedure for determining the standard for appellate review. *See Buck v. Davis*, 137 S. Ct. 759, 777 (2017). As a result, Movants asks this Court to vacate Judge Smith's Order and Judgment denying Section 2255 relief and to reinitiate the post-conviction review process by reviewing anew the allegations raised in their Section 2255 motions.

Analysis

A district court has jurisdiction to consider a Rule 60(b) motion in habeas proceedings so long as the motion "attacks, not the substance of the federal court's resolution of the claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005); *United States v. Williams*, 274 Fed. App'x 346, 347 (5th Cir. 2008) (applying *Gonzalez* to Section 2255 motions). A motion that seeks to add a new ground for relief or attacks the previous resolution of a claim on the merits is, in fact, a successive petition subject to the standards of 28 U.S.C. § 2244(b). *Gonzalez*, 545 U.S. at 531-32; *In re Sepulvado*, 707 F.3d 550, 552 (5th Cir. 2013). In other words, a motion that asserts or reasserts substantive claims of error actually attacking the validity of the movant's conviction may be treated as a successive Section 2255 motion to vacate.

By contrast, a motion that shows "a non-merits-based defect in the district court's earlier decision on the federal habeas petition" falls within the jurisdiction of the district court to consider. *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010). Thus, if the Rule 60(b) motion only attacks a "defect in the integrity" of the movant's federal habeas proceedings and does not

seek to advance any substantive claims, the motion shall not be treated as a second-or-successive motion. *Gonzalez*, 545 U.S. at 532. However, it is extraordinarily difficult to establish a claim of procedural defect:

> Procedural defects are narrowly construed. They include fraud on the habeas court, as well as erroneous previous rulings which precluded a merits determination—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar. They generally do not include an attack based on the movant's own conduct, or his habeas counsel's omissions, which do not go to the integrity of the proceedings, but in effect ask for a second chance to have the merits determined favorably.

In re Coleman, 768 F.3d 367, 371-72 (5th Cir. 2014) (alterations omitted).

Here, Movants argue their request for Rule 60 relief is not a successive Section 2255 motion because it is solely an attack on a *procedural* defect in prior habeas proceedings—namely, the denial of "meaningful review of potentially meritorious claims" by both the district court and Fifth Circuit. Even a cursory examination of the motions, however, reveals their true intent is to resurrect the numerous constitutional claims adjudicated on the merits in the original Section 2255 proceedings.[3] Movants all but admit this by asking the court to vacate the previous adverse judgment on the merits and to consider the claims raised in their Section 2255 motions afresh. That is the very definition of a successive motion. *See United States v. Hernandes*, 708 F.3d 680, 682 (5th Cir. 2013) (finding Rule 60(b) motion to be a "§ 2255 motion in disguise" because it attacked federal court's previous resolution of claim on the merits); *United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998) (finding attempt to raise same claim already raised in motion to vacate, even if supplemented by new Supreme Court precedent, is properly construed as a successive Section 2255 motion).

[3] Indeed, Vialva spends 6 out of 19 total pages of briefing on the claims he believes warrant additional substantive review, while Bernard spends 11 out of 30 pages doing the same.

Moreover, the alleged defects in this case did not preclude a merits determination as Movants now suggest. Quite the opposite, the district court adjudicated each of the numerous constitutional allegations raised in Movants' Section 2255 motions on the merits, and the Fifth Circuit denied review of seven of the allegations when they were raised on appeal. Thus, any suggestion the merits of these issues remain unaddressed is farcical. And although Movants allege the review ultimately given by the district court and Fifth Circuit was not a "meaningful review," such arguments are substantive rather than procedural. Movants disagree with the result of the previous proceedings and are essentially asking "for a second chance to have the merits determined favorably." *In re Coleman*, 768 F.3d at 372. Because the alleged procedural defects are simply an attempt to circumvent Section 2244, the motions must be dismissed as successive Section 2255 motions which this court has no jurisdiction to consider. *Hernandes*, 708 F.3d at 681.

Conclusion

The court concludes Movants' Rule 60(b) motions should be construed as successive Section 2255 motions. However, Movants have not obtained leave from the Fifth Circuit Court of Appeals to file a successive motion as dictated by Sections 2244(b)(3)(A) and 2255(h). Therefore, this court lacks jurisdiction to consider the motions. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (Section 2244(b)(3)(A) "acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition" until the appellate court has granted petitioner permission to file one). Accordingly, based on the foregoing reasons, Movants' successive motions are dismissed.

It is therefore **ORDERED** that Movant Vialva's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), filed October 13, 2017 (Doc. # 553), is **DISMISSED** without prejudice for want of jurisdiction.

It is further **ORDERED** that Movant Bernard's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), filed November 30, 2017 (Doc. # 569), is also **DISMISSED** without prejudice for want of jurisdiction.

Finally, it is **ORDERED** that no certificate of appealability shall issue in either case, as reasonable jurists could not debate the denial or dismissal of Movants' motions on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

SIGNED this the 20th day of December, 2017.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX 3

Text of Statutory Provisions Involved

28 United States Code § 2255 - Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the

United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105; Pub. L. 104–132, title I, § 105, Apr. 24, 1996, 110 Stat. 1220; Pub. L. 110–177, title V, § 511, Jan. 7, 2008, 121 Stat. 2545.)

Federal Rules of Civil Procedure
Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

28 United States Code § 2253 - Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, § 52, 65 Stat. 727; Pub. L. 104–132, title I, § 102, Apr. 24, 1996, 110 Stat. 1217.)