

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2019

Nos. 19-8850, 19A-1069

BILLY JOE WARDLOW,
Petitioner,

v.

LORIE DAVIS, 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

CAPITAL CASE–EXECUTION JULY 8, 2020

PETITIONER’S REPLY BRIEF

In terms relevant to this Questions Presented by the Petition (not Davis’s attempt to re-frame the questions), Rule 60(b) motions fall into two categories. One, is a “pure” 60(b) motion raising a procedural defect in the habeas proceeding that prevented the court from deciding a claim or claims. The other is a “mixed” 60(b) motion raising a procedural defect in the habeas proceeding that did not prevent the court from deciding a claim but affected the way in which the court decided claim. Mr. Wardlow’s motion fell into the “mixed” category.

The Fifth Circuit has been internally inconsistent in how it treats motions in the mixed category. On the one hand, in cases like Mr. Wardlow’s and the cases cited in the Petition, *Segundo* and *Preyor*, the Fifth Circuit has held that a mixed Rule 60(b) motion is not a proper motion under 60(b), because any mention of the way the court decided the merits of a claim, even if that discussion is by way of showing how the procedural defect impacted the decision on the

merits, makes the motion a successive habeas petition. On the other hand, in cases like *United States v. Vialva*, 904 F.3d 356, 361 (5th Cir. 2018), the Fifth Circuit acknowledges, “Rule 60(b) motions can legitimately ask a court to reevaluate already-decided claims – as long as the motion credibly alleges a non-merits-based defect in the prior habeas proceedings.” And in that case, the Fifth Circuit faulted the movants, and affirmed the denial of their motion, precisely because the movants did not show how the non-merits-based defect affected the way the claims were decided. Examination of *Vialva* shows this quite clearly.

The basis for Vialva’s and Bernard’s argument was that the federal judge, Walter Smith, had been the subject of an investigation into “unwanted advances toward a court employee.” *Id.* at 358 n.1. The Fifth Circuit explained that this allegation raised no “inference of defects in the habeas proceedings at issue here.” *Id.* at 361. There was “no evidence – beyond gross speculation – that Judge Smith was ... ‘impaired’ or ‘unfit’ to oversee their 2000 trial and subsequent habeas proceedings.” *Id.* Thus, “Judge Smith’s unrelated misconduct does not constitute a defect in the integrity of Bernard’s and Vialva’s habeas proceedings.” *Id.* In short, the movants failed in showing that the alleged defect actually affected the habeas proceeding.

It is this issue that is at the heart of the Questions Mr. Wardlow presents. Can there be a proper Rule 60(b) motion alleging that a procedural defect actually affected the way in which a court decided claims? The Fifth Circuit itself is divided about this, and so is Davis’s BIO, arguing on one hand that there can be no proper 60(b) motion if the defect did not preclude the district court from deciding the merits, and on the other that the approach in *Vialva* is proper.

The *Vialva* approach is in harmony with the Tenth Circuit. The *Wardlow*, *Segundo*, *Preyor* approach is not.

For these reasons, the Court should grant certiorari and resolve this conflict.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Richard Burr", with a long horizontal flourish extending to the right.

Counsel for Billy Joe Wardlow

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