

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

STEPHEN MICHAEL WEST,)	
)	No. 10-6333
Petitioner)	No. 10-6338
)	
v.)	
)	DEATH PENALTY CASE
RICKY BELL, Warden,)	EXECUTION SCHEDULED
)	NOVEMBER 9, 2010
)	
Respondent)	

**REPLY TO RESPONDENT’S OPPOSITION TO
MOTION FOR STAY OF EXECUTION**

Now comes, Petitioner/Movant, Stephen Michael West, in reply to Respondent’s Response in Opposition to Motion for Stay of Execution. Respondent’s Opposition fails to acknowledge, let alone address, the central arguments before this Court: A large number of Mr. West’s claims of ineffective assistance of counsel were never considered by the habeas courts because of an erroneous ruling of procedural default. Such an erroneous ruling is the quintessential reason for reopening proceedings pursuant to FED. R. CIV. PRO. 60(b).

As Petitioner has emphasized in his Motion to Retransfer and his

Application for Certificate of Appealability, he has asked the habeas court for relief from judgment due to the district court's erroneous procedural default of claims of ineffective assistance of counsel in the sentencing phase. Such review under RULE 60(b) is proper because Petitioner is "assert[ing] that a previous ruling which precluded a merits determination was in error." *Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005). For example, a denial for such reasons as failure to exhaust, procedural default.

This Court has recently found that where a state court determination of a claim was unreasonable, full *de novo* review by the federal courts, including the consideration of new evidence, is required. *Thompson v. Bell*, 580 F.3d 423, 436-37 (6th Cir. 2010). In Mr. West's case, this Court found that the state post-conviction courts' resolution of his ineffectiveness claims were based on an unreasonable application of federal law. *West v. Bell*, 550 F.3d 542, 553-54 (6th Cir. 2008). Thus, new evidence presented in Mr. West's defaulted claims of ineffectiveness should have been considered. This recent change in the law shows the procedural error that caused the claims' default giving rise to a proper 60(b) motion. Whether this circuit's change in the law will be accepted by the Supreme Court is the subject of a recent grant of *certiorari*. *Cullen v. Pinholster*, No. 09-1088, 130 S.Ct. 3410 (Mem.)(2010). Obviously, this is an unsettled area of

litigation.

In the district court, Respondent argued that Mr. West's evidence showing prejudice in the penalty phase was defaulted because it "presented significant new factual allegations" and made ineffectiveness claims "significantly stronger." (R.125, Memo. of Law in Supp. of Resp. Motion to Dismiss Am. Pet., p.162). The district court accepted these arguments and found procedural default due to a failure to exhaust. (R.188, Memo. and Order, p.88). Respondent now argues, in asking this Court to deny a stay of execution, that the claims were rejected on the merits. (In re: Stephen M. West, Nos. 10-6333 and 10-6338, Resp. in Opp. to Motion for Stay of Execution, p.2). Respondent is trying to have it both ways. Having secured an erroneous default, Respondent now argues that Mr. West should be executed because he has had his day in court. Mr. West's execution must not be based on this double standard.

Respondent simply does not address the habeas court's findings of default that demonstrate that Mr. West has filed a proper 60(b) motion. Given this Court's divided opinion affirming Mr. West's death sentence, those findings and the excluded claims clearly matter. Mr. West has demonstrated a substantial likelihood of success on the merits and this Court should stay his execution to give full consideration to his arguments.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, the foregoing Reply to Respondent's Opposition to Motion for Stay of Execution was filed electronically. Notice was electronically mailed by the Court's electronic filing system to all parties indicated on the electronic filing receipt. Notice was delivered by other means to all other parties via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

s/Stephen Ferrell