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

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

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**MOTION TO RE-TRANSFER CASE BACK**
**TO THE UNITED STATES DISTRICT COURT FOR**
**THE EASTERN DISTRICT OF TENNESSEE**

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COMES NOW Movant, Stephen Michael West, through undersigned counsel, and respectfully requests this Court to re-transfer the instant case back to the District Court for consideration of Mr.West's FED.RULE CIV.P. RULE 60(b) motion for relief from judgment because his motion is not "successive" within the meaning of 28 U.S.C. § 2244(b).

## I. Background

On July 15, 2010, the Tennessee Supreme Court set the execution date for Mr. West at November 9, 2010.

On October 15, 2010, Mr. West filed with the District Court a motion for relief from judgment pursuant to FED. R. CIV. P. RULE 60(b). (R.212).

On October 27, 2010, the District Court entered an order holding "to the extent the submission is actually a RULE 60(b) motion, it is DENIED and the Clerk is DIRECTED to IMMEDIATELY transfer this successive habeas corpus petition to the United States Court of Appeals for the Sixth Circuit ...." (R. 217).

That same day, Mr. West filed a notice of appeal (R.219) and a motion for certificate of appealability (R.218). That motion was denied on October 29, 2010. (R.221).[1]

**II. This Court should transfer this matter back to the district court for initial review because it is not successive under 28 U.S.C. 2244(b).**

Mr. West filed a Motion for Relief from Judgment Pursuant to FED. R. CIV. P. 60(b) alleging that the proceedings were defective because the district court erroneously failed to review and consider several allegations of ineffectiveness at sentencing, due to a misapprehension of the relationship between 28 U.S.C. §§ 2254 (d) and (e). (R.212). Specifically, Mr. West alleged defective proceedings caused the district court to fail to review the following claims:

- whether trial counsel was ineffective for failing to present evidence

[1]Concurrent with this filing, Mr. West files an application for Certificate of Appealability to appeal the district court's denial of his 60(b) motion on the merits.

about Mr. West being born in a mental hospital and how this strongly suggests a genetic tendency to succumb to significant mental illness, a high likelihood of emotional deprivation in the critical bonding phase of his life,[2]

- whether trial counsel was ineffective for failing to present the testimony of Mr. West's sister, Debra West Harless, that West was physically abused as a child,[3]
- whether trial counsel was ineffective for failing to present the testimony of West's former wife, Karen West Bryant, about West describing to her the abuse he suffered,[4]
- whether trial counsel was ineffective for failing to present the testimony of his father, Vestor West, admitting that he severely abused Mr. West,[5]

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[2]Affidavit of Dr. Keith Caruso, dated February 23, 2001 (R. 212-1 to Motion for Relief from Judgment); Medical Record from Community Hospital confirming West was born in a mental institute (R. 212-2). *See* page 85, n. 23, of the Court's Memorandum Opinion, R.188.

[3]Affidavit of Debra West Harless, dated December 31, 1998 (R. 212-3). *See* page 85, n. 23 of the Court's Memorandum Opinion, R.188.

[4]Affidavit of Karen West Bryant, dated December 18, 2001 (R. 212-4). *See* page 85, n. 23 of the Court's Memorandum Opinion, R.188.

[5]Affidavit of Vestor West, dated December 31, 1998 (R. 212-5). *See* page 85, n. 23 of the Court's Memorandum Opinion, R.188.

- whether trial counsel was ineffective for failing to present testimony of Mr. West's manager at McDonald's that Ronnie Martin was hostile and aggressive while Mr. West was more passive,[6] and
- whether trial counsel was ineffective for failing to present proof that Mr. West suffered repeated childhood abuse which caused him to become very passive and submissive as an adult, suffering from post-traumatic stress disorder.[7]

The original proceedings in the district court were indeed defective. In its original opinion, the district court failed to review these claims on procedural grounds. The district court addressed Mr. West's ineffective assistance of counsel at sentencing claim using a two-step analysis. The Court first considered whether the previously mentioned evidence could be considered pursuant to 28 U.S.C. § 2254(e)(2)(*See*, p. 83-88 of the Court's

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[6]Affidavit of Patty Rutherford, dated February 11, 2002 (R. 212-6). *See* page 85, n. 23 of the Court's Memorandum Opinion, R.188.

[7]Report of Claudia R. Coleman, Ph.D., dated November 7, 2001(R. 212-7); Report of Richard G. Dudley, Jr., M.D. dated February 22, 2002 (R. 212-8). *See* page 85, n.23 of the Court's Memorandum Opinion, R.188. Affidavit of Pablo Stewart, M.D. dated December 13, 2002 (R. 212-9), which was attached to Petitioner's Fourth Motion to Expand the Record filed December 19, 2002 (R.166), granted August 21, 2003 (R.181). Dr. Stewart's affidavit was presented to the district court. *See* Motion to Expand, *supra*, and Order granting same, *supra*. His affidavit was not specifically discussed in the district court's Memorandum dismissing Mr. West's petition. Implicit in that court's Memorandum Opinion is the holding that this evidence was likewise barred by 2254(e)(2). *See* R.188, p. 85-88.

Memorandum Opinion, R. 188), and ruled it would not do so. *Id.*, p. 88. Next the Court reviewed the reasonableness of the state court opinion under 28 U.S.C. § 2254(d)(1):

> The state post-conviction court and the appellate court decision that counsel was not ineffective for failing to investigate and present mitigating evidence during the sentencing hearing was based on a reasonable determination of the facts in light of the evidence presented in the state court proceeding, and that the decision was not contrary to *Strickland*. The decision reached by those courts does not reflect an unreasonable determination of the facts in light of the evidence presented in those state court proceedings nor is the decision contrary to *Strickland.*

Court's Memorandum Opinion, p. 93 (R. 188).

Mr. West appealed that ruling to this Court. This Court did not hesitate to conclude the state court rulings were an unreasonable application of federal law: "Clearly, the Criminal Court for Union County stated the wrong standard for proving prejudice in a claim of ineffective assistance ... West is correct that his situation satisfies requirements of 28 U.S.C. §§ 2254[d] ... [W]e must deny West's petition for a grant of habeas corpus even though the state court decision was an unreasonable application of clearly established federal law." *West v. Bell*, 550 F.3d 542, 553-54 (6th Cir. 2009). This Court's panel was deeply divided over whether West had established prejudice. Two judges found he had not established

prejudice and voted to deny relief. *Id.* at 550. One judge would have held Mr. West established he was prejudiced, as contemplated in *Strickland v. Washington*, 466 U.S. 668 (1984), and would have ordered a new sentencing hearing. *West*, 550 F.3d at 568.

Despite finding that the state court's decision was unreasonable in this case, this Court did not include any of the evidence that is the subject of the 60(b) motion in its *de novo* review of Mr. West's ineffectiveness claims. This Court failed to conduct that review because it erroneously believed that the district court had denied Mr. West's motions to expand the record to include the evidence in question. *West*, 550 F.3d at 551. This was an obvious oversight since the district court had indeed expanded the record to include all of the proposed evidence. (R. 145, 181). However, the district court refused to consider it because that "would skew the determination to be made under AEDPA's standard of review because, logically, the state court could not have applied the law to facts that were not before it." Court's Memorandum Opinion, p. 87 (R. 188).

The "skewing" that occurred in this case was the finding that trial counsel was not ineffective without reviewing the critical evidence contained in Mr. West's 60(b) motion. Where there is a finding that the state court

opinion was unreasonable, all evidence presented should have been reviewed by a habeas court conducting *de novo* review. *See Cullen v. Pinholster*, No. 09-1088, 130 S.Ct. 3410; *see Petitioner's Brief, 2010 WL 3183845 p. 21-42 (U.S. Aug. 9, 2010)*. The failure to review this evidence on procedural grounds provides a proper basis for 60(b) review.

As to the present 60(b) motion, the district court held that "Petitioner's motion is a second or successive 2254 as it leads inextricably to a merits-based attack on the Court's prior dismissal of the 2254 petition." R. 216, p. 5 of 13. The district court also stated that Mr. West's motion sought "to revisit the federal court's denial on the merits" of his ineffective assistance claim. R. 216, p. 7 of 13.

The district court is in error for the simple reason that, as evidenced by its ruling above, the district court never reviewed the merits of these claims. In fact, no court has ever reviewed whether counsel was ineffective for failing to present the above-mentioned evidence and whether there is a reasonable probability that the consideration of this evidence could have caused at least one juror to return a verdict of less than death.

When this case was initially before the district court, Respondent vigorously urged this court to not review the merits of the sentencing claim.

*See e.g.*, Response to Petitioner's Motion to Expand Record ("the merits of his ineffective assistance of counsel claim, of which a substantial portion is procedurally defaulted for purposes of federal habeas review") R.119, p. 6-7; Motion for summary judgment (urging denial of relief on basis of ineffective assistance as sentencing because "he has not exhausted his state remedies") R.125, p. 162. The district court accepted Respondent's arguments and refused to review the claims. Accordingly, the district court's conclusion that these claims have been reviewed on the merits is without basis. These claims have not, in fact, been reviewed on the merits. It is the erroneous denial of merits review that is the basis for Mr. West's Motion for Relief. Mr. West's Motion for Relief from Judgment cannot be recharacterized as an impermissible successor petition.

The inclusion of the claim in the initial petition does not prohibit later consideration of whether earlier proceedings were defective for failure to review the claim. Review under RULE 60(b) is proper where the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error–for example, a denial for such reasons as failure to exhaust, procedural default, or statute of limitations bar." *Gonzalez v. Crosby*, 545 U.S. 524, 532 n. 4. That consideration is exactly what Mr.

West is asking for here.

Mr. West's motion is similar to the one granted in *Balentine v. Thaler*, 609 F.3d 729 (6th Cir. 2010). In that case, the petitioner included an ineffective assistance at sentencing claim. The district court dismissed the petition, finding the sentencing claim unexhausted. *Id.* at 732. The petitioner later returned to state court and exhausted his claim. Thereafter, he returned to federal court and filed a Motion to Reopen his initial habeas petition. The State of Texas argued the motion was barred by AEDPA's requirements for successor petitions. *Id.* at 734. Relying on the language from *Gonzalez* concerning erroneous determination of exhaustion, the Fifth Circuit held the motion to reopen should be granted. *Id.* at 743. *See also Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007) (same).

A procedural error prevented the habeas courts from considering the full merits of the facts supporting *Strickland* prejudice. The district court only reviewed the state court's merits decision through the deferential lens of AEDPA. Acknowledgement of the procedural error (not conducting a 2254(d) analysis first) will allow the district court to consider these claims for the very first time. Where the state court's application of federal law was unreasonable, as found by this Court, that review had to be *de* novo. It

further needed to include a consideration of all of the available evidence.

Mr. West urged the district court to consider this evidence, asserting it did not alter the claim presented in state court. (*See* Petitioner's Response to Respondent's Motion to Dismiss or for Summary Judgment, R. 144, p. 11). The district court, however, held this evidence altered the claim and declined to review it. (*See* the district court's memorandum at p. 84 of 226, R. 188). Accordingly, this evidence, which was presented with Mr. West's initial petition, has never been reviewed. *Cf., Gonzalez*, 545 U.S. at 531, (a motion "seeking to present newly discovered evidence ... 'in support of a claim previously denied'" is not a true 60(b) motion. ) The evidence is not newly discovered, nor is it offered in support of a new claim. It was part of Mr. West's initial habeas action. The district court erroneously barred consideration of it, finding it was unexhausted. *Gonzalez* specifically held that an erroneous exhaustion finding will support a 60(b) motion. *Gonzalez*, 550 U.S. at 532, n. 4. Mr. West's motion is not a successor. This Court must transfer it back to the district court for proper consideration.

**III. Conclusion**

For the above-stated reasons, Mr. West's 60(b) motion was properly filed in the district court. That court erred in recharacterizing its substance

as being an improper successive habeas petition and transferring it to this Court. Because it is a proper 60(b) motion, this Court must transfer it back to the district court.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2010, the foregoing Motion to Re-transfer Case Back To the United States District Court for The Eastern District of Tennessee 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