

NO. 18-5505

**IN THE
SUPREME COURT OF THE UNITED STATES**

**FARRIS GENNER MORRIS,
Petitioner,**

v.

**BRUCE WESTBROOKS, Warden,
Respondent.**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
STATEMENT OF QUESTIONS PRESENTED

I.

When *Martinez v. Ryan*, 566 U.S. 1 (2012), was decided during the pendency of a petitioner's initial federal habeas corpus proceeding, is the petitioner entitled to application of *Martinez* by some court to substantial, procedurally defaulted claims of ineffective assistance of trial counsel?

II.

Where the equitable rule of *Martinez* was intended to protect the right to federal habeas review of a substantial ineffective assistance of trial counsel claim, does *Martinez* allow consideration of evidence that is essential to such a claim, where post-conviction counsel ineffectively failed to investigate or present such evidence in state court?

TABLE OF CONTENTS

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| CAPITAL CASE QUESTIONS PRESENTED..... | i |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW..... | 1 |
| JURISDICTIONAL STATEMENT | 1 |
| STATEMENT OF THE CASE..... | 1 |
| REASONS FOR DENYING THE WRIT | 5 |
| A. Standard for Relief under Fed. R. C.iv P. 59 | 6 |
| B. The District Court’s Judgment Was Compelled by the Sixth Circuit Mandate | 6 |
| C. There is No Intervening Change in Controlling Law..... | 8 |
| D. The Sixth Circuit Previously Rejected Petitioner’s Request to Relitigate His Defaulted Claims in Light of <i>Martinez</i> , and Petitioner Did Not Ask this Court to Review that Ruling | 8 |
| CONCLUSION..... | 11 |
| CERTIFICATE OF SERVICE | 12 |

TABLE OF AUTHORITIES

CASES

| | Page(s) |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Cases | |
| <i>Ayestas v. Thaler</i> , 569 U.S. 1015 (2013)..... | 10 |
| <i>In re Ivan F. Boesky Sec. Litig.</i> , 957 F.2d 65 (2nd Cir. 1992)..... | 7 |
| <i>Brown v. City of Syracuse</i> , 673 F.3d 141 (2nd Cir. 2012)..... | 10 |
| <i>Farris Genner Morris v. State</i> , No. W2005-0426-CCA-R3-PD, 2006 WL 2872870 (Tenn. Crim. App. Oct. 10, 2006), <i>perm. app. denied</i> (Tenn. Feb. 26, 2007)..... | 2 |
| <i>Farris Morris v. Warden</i> , No. 1:07-cv-01084 (W.D. Tenn.)..... | 2, 4, 7, 8 |
| <i>Gascho v. Global Fitness Holdings, Inc.</i> , 918 F.Supp. 2d 708 (S.D. Ohio Jan. 16, 2013)..... | 10 |
| <i>GenCorp, Inc. v. American Int’l Underwriters</i> , 178 F.3d 804 (6th Cir. 1999) | 6 |
| <i>Haynes v. Thaler</i> , 569 U.S. 1015 (2013)..... | 10 |
| <i>Howard v. United States</i> , 533 F.3d 472 (6th Cir. 2008) | 6, 8 |
| <i>Martinez v. Ryan</i> , 132 S.Ct. 1309 (2012)..... | <i>passim</i> |
| <i>Morris v. Carpenter</i> , 802 F.3d 825 (6th Cir. 2015) (reh. denied Nov. 19, 2015), <i>cert. denied</i> , 137 S.Ct. 540 (2016) (reh. denied Nov. 28, 2016)..... | 1, 3, 10 |
| <i>Morris v. Carpenter</i> , No. 11-6322/11-6323 (Petitioner’s Application, filed Mar. 1, 2012)..... | 9, 10 |

| | |
|------------------------------------------------------------------------------------------------------------------------------------|---------|
| <i>Morris v. Mays</i> , No. 16-6661 (6th Cir., Order, Mar. 9, 2018) | 1 |
| <i>Morris v. Westbrooks</i> , ___ S.Ct. ___, 2016 WL 1600242 (2016)..... | 10 |
| <i>Morris v. Westbrooks</i> , 137 S.Ct. 44 (Oct. 3, 2016), <i>reh. denied</i> , 137 S.Ct. 540 (Nov. 28, 2016)..... | 3 |
| <i>Morris v. Westbrooks</i> , No. 07-1084-JDB-egb (W.D. Tenn., Order, Mar. 13, 2017) | 1 |
| <i>Morris v. Westbrooks</i> , No. 15-9002 (U.S.) (Petition, filed Apr. 15, 2016) | 3 |
| <i>Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC</i> , 477 F.3d 383 (6th Cir. 2007) | 6 |
| <i>State v. Morris</i> , 24 S.W.3d 788 (Tenn. 2000), <i>cert. denied</i> , 531 U.S. 1082 (2001) | 1 |
| <i>Sutton v. Carpenter</i> , 745 F.3d 787 (6th Cir. 2014) | 3 |
| <i>Trevino v. Thaler</i> , 133 S.Ct. 1911 (2013)..... | 3 |
| <i>United States v. O'Dell</i> , 320 F.3d 674 (6th Cir. 2003) | 7 |
| <i>U.S. ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc.</i> , 179 F.R.D. 541 (S.D. Ohio 1998) | 6 |
| Statutes | |
| 28 U.S.C. § 1254..... | 1 |
| 28 U.S.C. § 2106..... | 7 |
| 28 U.S.C. § 2253..... | 7 |
| 28 U.S.C. § 2254..... | 1, 2, 7 |
| Other Authorities | |
| Fed. R. App. P. 41(d)(4) | 5 |

| | |
|-----------------------------|---------------|
| Fed. R. Civ. P. 59 | <i>passim</i> |
| Fed. R. Civ. P. 59(e) | <i>passim</i> |

OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability is unreported. *Morris v. Mays*, No. 16-6661 (6th Cir., Order, Mar. 9, 2018). Petitioner's Appendix ("Pet. Appx.")

1a. The district court's order denying petitioner's motion to alter or amend judgment under Fed. R. Civ. P. 59(e) is unreported. *Morris v. Westbrooks*, No. 07-1084-JDB-egb (W.D. Tenn., Order, Mar. 13, 2017). Pet. Appx. 6a. The district court's order denying habeas relief under 28 U.S.C. § 2254 pursuant to the judgment and mandate of the court of appeals is unreported. *Morris v. Westbrooks*, No. 07-1084-JDB-egb (W.D. Tenn., Order, Oct. 5, 2016). Pet. Appx. 5a. The decision of the court of appeals affirming in part and vacating in part the judgment of the district court is reported at *Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015) (reh. denied Nov. 19, 2015), *cert. denied*, 137 S.Ct. 540 (2016) (reh. denied Nov. 28, 2016). Pet. Appx. 40a.

JURISDICTIONAL STATEMENT

The order of the court of appeals denying a certificate of appealability was filed March 9, 2018. Pet. Appx. 1a. Justice Kagan extended the time for filing the petition for writ of certiorari to August 6, 2018, and the petition was filed on that day. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

A Tennessee jury convicted the petitioner of two counts of premeditated first-degree murder for the deaths of Charles Ragland and his fifteen-year-old niece, Erica Hurd, and of the aggravated rape of Angela Ragland, Charles Ragland's wife. *State v. Morris*, 24 S.W.3d 788 (Tenn. 2000), *cert. denied*, 531 U.S. 1082 (2001). The jury imposed the death penalty for the murder of Erica Hurd and life without the possibility of parole for the murder of Charles Ragland. The trial court imposed a sentence of twenty-five years of imprisonment for aggravated rape. The

Tennessee Supreme Court affirmed the judgment on direct appeal, and this Court denied certiorari. *Id.*

Petitioner unsuccessfully sought post-conviction relief in the trial court. The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court denying relief, and the Tennessee Supreme Court denied permission to appeal. *Farris Genner Morris v. State*, No. W2005-0426-CCA-R3-PD, 2006 WL 2872870 (Tenn. Crim. App. Oct. 10, 2006), *perm. app. denied* (Tenn. Feb. 26, 2007).

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Tennessee. *Farris Morris v. Warden*, No. 1:07-cv-01084 (W.D. Tenn.). In an order entered September 29, 2011, the district court granted relief, in part, concluding that petitioner received ineffective assistance of counsel at his capital sentencing hearing due to counsel's failure to present evidence of Bipolar Disorder.¹ *Morris v. Warden*, No. 1:07-cv-01084 (W.D. Tenn.) (Order, Doc. No. 58). The district court denied relief in all other respects. A conditional writ of habeas corpus—directing the State of Tennessee to initiate new penalty-phase proceedings within 120 days of the order or impose a non-capital sentence consistent with law—was stayed pending any appeal to the United States Court of Appeals for the Sixth Circuit. *Id.* at 156. The parties cross-appealed on October 28, 2011, and October 31, 2011, respectively. *Morris v. Warden*, No. 1:07-cv-01084 (W.D. Tenn.) (Notice of Appeal, Doc. Nos. 62, 63).

While the habeas appeal was pending in the Sixth Circuit, this Court decided *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), which held that a state post-conviction counsel's failure in an initial-review collateral proceeding to raise a substantial claim of ineffective assistance of trial counsel

¹ Documents filed in the district court are available for review through the online Public Access to Court Electronic Records (PACER/ECF) system at the docket entries noted above.

may serve as an equitable cause to excuse a habeas petitioner's procedural default of that claim. The Court defined initial-review collateral proceedings as "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id.* at 1315. The following year, in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Court clarified that *Martinez* applies to States in which criminal defendants do not have a meaningful opportunity in the typical case to raise trial-counsel-ineffectiveness claims on or before direct appeal. *Trevino*, 133 S. Ct. at 1921.²

On July 24, 2013, petitioner filed a motion in the Sixth Circuit to remand to the district court for further proceedings in light of *Trevino* and *Martinez*. Respondent's Appendix ("Resp. Appx."), 1. He argued that application of those cases would permit him to show cause for his procedural default of his claims that trial counsel was ineffective for failing to object to certain jury instructions regarding the State's burden of proof of *mens rea* and for failing to challenge the racial composition of petitioner's grand jury. Resp. Appx. 1, 8-10. The Sixth Circuit denied the motion to remand. Resp. Appx. 13. Later, on the merits of petitioner's appeal, the Sixth Circuit affirmed in part, vacated in part, and remanded to the district court for entry of judgment denying the writ of habeas corpus. *Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015). Resp. Appx. 14.

Petitioner filed a petition for writ of certiorari in this Court, but he did not challenge or otherwise seek review of the Sixth Circuit's denial of the motion to remand or the disposition of his case with respect to procedurally defaulted claims. *See Morris v. Westbrooks*, No. 15-9002 (U.S.) (Petition, filed Apr. 15, 2016). The Court denied certiorari on October 3, 2016. *Morris v. Westbrooks*, 137 S.Ct. 44 (Oct. 3, 2016), *reh. denied*, 137 S.Ct. 540 (Nov. 28, 2016). The Sixth Circuit's mandate issued the next day. Resp. Appx. 15.

² The Sixth Circuit has held that the *Martinez* exception, as clarified by *Trevino*, applies to Tennessee cases. *Sutton v. Carpenter*, 745 F.3d 787, 789 (6th Cir. 2014).

On October 5, 2016, the district court denied the writ of habeas corpus “pursuant to the order of the United States Court of Appeals for the Sixth Circuit dated September 23, 2015, and the mandate issued on October 4, 2016.” Pet. Appx. 5a. The district court entered judgment on October 12, 2016. Resp. Appx. 16.

On November 8, 2016, petitioner moved the district court pursuant to Fed. R. Civ. P. 59(e) to alter or amend its October 12 judgment and apply *Martinez* to his procedurally defaulted ineffective-assistance claims. *Morris v. Westbrooks*, No. 1:07-cv-01084 (W.D. Tenn.) (Doc. No. 77). The district court denied the motion, finding that petitioner’s *Martinez* claims were ripe for review while petitioner’s case was on appeal and that further consideration would be impermissible under the limited scope of the Sixth Circuit’s mandate.

The remand in the instant case was limited to a denial of the writ consistent with the Sixth Circuit’s opinion and required no further action from the district court. The appellate court used specific language and prescribed a chain of events that was to take place at the district court level.

The *Martinez* issue was ripe for review while Morris’s claims were on appeal. However, he waived appellate review of his guilt-phase ineffective assistance of trial counsel claims on direct appeal. The Sixth Circuit denied remand of his case for the purposes of *Martinez* review, by implication, denying him the potential equitable relief that the *Martinez* opinion provided. Given the procedural history of this case, the multiple opportunities that Petitioner had to raise *Martinez/Trevino* arguments while the case was on direct appeal over a span of nearly five years, and the fact that the district court is bound by the mandate issued by the Sixth Circuit, further consideration of Morris’s claims would exceed the scope of the mandate.

Pet. Appx. 15a-16a.

The district court also denied a certificate of appealability. *Morris v. Westbrooks*, No. 1:07-cv-01084 (W.D. Tenn.) (Doc. No. 89).

Petitioner again appealed to the Sixth Circuit. *Morris v. Westbrooks*, No. 1:07-cv-01084 (W.D. Tenn.) (Doc. No. 86). But the Sixth Circuit too denied a certificate of appealability because jurists of reason would not disagree with the district court’s decision to deny petitioner’s Rule

59(e) motion to alter or amend the judgment. Pet. Appx. 1a. “Morris did not identify any clear error, new evidence, change in the controlling law, or manifest injustice that would justify relief under Rule 59(e) or a deviation from this court’s prior mandate. . . . Jurists of reason would not find it debatable that the district court followed the law of the case and this court’s mandate when it denied Morris’s Rule 59(e) motion.” Pet. Appx. 3a-4a.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari presents no issue requiring resolution by this Court and should be denied. The Sixth Circuit’s order denying petitioner a certificate of appealability did not address the application of *Martinez* to procedurally defaulted claims in a first habeas petition because it was unnecessary to do so. Rather, the Sixth Court addressed only the district court’s application of established criteria for revising a judgment under Fed. R. Civ. P. 59(e) and the mandate rule, and that procedural ruling is unassailable regardless of the underlying issue the petitioner now seeks belatedly to revive.

Indeed, the district court’s denial of petitioner’s Rule 59(e) motion was textbook. The court identified the correct legal standard and concluded that petitioner met none of the requirements necessary to alter or amend the district court’s judgment. That judgment was not the result of clear legal error but was dictated by the Sixth Circuit’s mandate following this Court’s denial of certiorari in petitioner’s federal habeas appeal.³ *Martinez* was clearly not “intervening” for Rule 59 purposes because it was decided more than three years before entry of the judgment petitioner sought to reopen. The district court’s judgment resulted in no manifest injustice because the Sixth Circuit had already considered and rejected petitioner’s *Martinez/Trevino* arguments

³ See Fed. R. App. P. 41(d)(4) (“The court of appeals must issue the mandate immediately on receiving a copy of the Supreme Court order denying the petition [for writ of certiorari . . .].”).

when it rejected the motion for remand, and petitioner made no effort to expand the certificate of appealability to include review of his procedurally defaulted claims in light of *Martinez* during the years his case was pending in the Sixth Circuit. More importantly, petitioner did not challenge the Sixth Circuit's handling of the *Martinez* issue in this Court, failing even to mention it in his petition for writ of certiorari or otherwise seek a remand to the Sixth Circuit for reconsideration of his defaulted claims in light of *Martinez*.

A. Standard for Relief under Fed. R. Civ. P. 59.

Rule 59 relief may be granted only if there is a clear error of law, newly discovered evidence, an intervening change in the controlling law, or to prevent manifest injustice. *GenCorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). Rule 59 does not provide an avenue to re-argue the case or raise new legal arguments that could have been raised before judgment was entered. *Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC*, 477 F.3d 383, 395 (6th Cir. 2007). Rather, the purpose of Rule 59(e) is “to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings.” *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (quoting *York v. Tate*, 858 F.2d 343, 348 (6th Cir. 1988)). And because relief from judgment under Rule 59 is an extraordinary remedy, it should be sparingly granted with deference to finality and the conservation of judicial resources. *U.S. ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, 179 F.R.D. 541, 547 (S.D. Ohio 1998).

None of the criteria for granting Rule 59 relief was present here, and the district court's denial of petitioner's Rule 59 motion provides no basis for certiorari review.

B. The District Court's Judgment Was Compelled by the Sixth Circuit Mandate.

In the district court, petitioner argued that the court's October 12, 2016, judgment

amounted to “clear error of law” in light of *Martinez*. *Morris v. Westbrooks*, No. 1:07-cv-01084 (W.D. Tenn.) (Doc. No. 77, at 4). But the Sixth Circuit’s mandate remanding the case to the district court “for the denial of the writ of habeas corpus in accordance with the opinion of the court” was unambiguous, and the district court’s compliance was consistent with and compelled by that mandate. Resp. Appx. 14.

A remand directing a specific, narrow course of action is fairly considered a limited remand. *United States v. O’Dell*, 320 F.3d 674, 680-81 (6th Cir. 2003). When an appellate court issues a limited remand, “[t]he mandate rule ‘compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.’” *Id.* at 679 (quoting *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir.2001)); *see also* 28 U.S.C. § 2106 (“The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.”). Indeed, because a district court has “no discretion” in carrying out a mandate, the appellate court retains the authority to determine whether the terms have been “scrupulously and fully carried out.” *In re Ivan F. Boesky Sec. Litig.*, 957 F.2d 65, 69 (2nd Cir. 1992) (citing *United States v. E.I. Dupont De Nemours & Co.*, 366 U.S. 316, 325 (1961)).

The Sixth Circuit remanded the case to the district court “for the denial of the writ of habeas corpus,” Resp. Appx. 14, following disposition of petitioner’s appeal under 28 U.S.C. §§ 2254 and 2253 and the denial of certiorari by this Court. The district court was bound to “scrupulously and fully” follow that directive, which is exactly what the district court did. In short, there was no “clear error” of law in entry of the judgment warranting reconsideration under Rule 59.

C. There Is No Intervening Change in Controlling Law.

Petitioner also argued in the district court that relief under Rule 59(e) was necessary because *Martinez* was “an intervening change in controlling law.” *Morris v. Westbrooks*, No. 1:07-cv-01084 (W.D. Tenn.) (Doc. No. 77, at 5). But that contention is patently wrong; *Martinez* was not an “intervening” occurrence. This Court decided *Martinez* on March 20, 2012, more than four years before the district court entered its judgment on remand in 2016.

Rule 59 provides no avenue to raise new legal arguments that could have been raised before judgment was entered. *See, e.g., Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (“The *Montanez* decision, upon which Howard bases his claim for post judgment relief, was decided before Howard even filed his motion to vacate sentence, and Howard could have, and arguably should have, raised this argument earlier.”). Thus, Rule 59 is not a path open to petitioner for presenting arguments that he could have raised before judgment was entered on remand.

D. The Sixth Circuit Previously Rejected Petitioner’s Request to Relitigate His Defaulted Claims in Light of *Martinez*, and Petitioner Did Not Ask this Court to Review that Ruling.

Finally, petitioner argued that the district court’s judgment resulted in manifest injustice. But that argument is unpersuasive because, as the district court found, petitioner waived review of his procedurally defaulted claims in his initial habeas appeal. Petitioner could have challenged the district court’s initial default determination in light of *Martinez* while his case was pending for the first time in the Sixth Circuit. But he did not ask for a certificate of appealability to challenge the district court’s procedural default rulings initially or ask to expand the certificate of appealability after *Martinez* had been decided. Instead, petitioner filed only a motion to remand to the district court, which the Sixth Circuit denied. Even before this Court, petitioner did not argue that the lower courts had refused to apply *Martinez* to his procedurally defaulted claims or otherwise ask

for remand and reconsideration in light of *Martinez*.

On appeal from the district court's initial judgment, petitioner filed an application in the Sixth Circuit for a certificate of appealability as to "all claims raised in his federal amended habeas corpus petition that address the guilt-innocence stage of his criminal prosecution." *Morris v. Carpenter*, No. 11-6322/11-6323 (Petitioner's Application, filed Mar. 1, 2012) (available via ECF/PACER). Although petitioner's application noted the pendency of *Martinez* in this Court, petitioner did not directly challenge the district court's procedural default determinations or argue with any specificity that his default should be excused, asking only that the Sixth Circuit "await the Supreme Court's decision in *Martinez* before determining whether [p]etitioner's claims are defaulted." *Id.* at 30. When this Court announced its decision in *Martinez* nineteen days later, petitioner did not supplement his application. And, petitioner did not seek expansion of Sixth Circuit's certificate of appealability to include claims purportedly impacted by *Martinez*. Indeed, the Sixth Circuit specifically found that petitioner had waived consideration of all but one guilt-phase claim by failing to argue them in his application for a certificate of appealability.

Upon review, we grant the application [for a certificate of appealability] in part and deny it in part. The case will proceed on the Warden's appeal and on Morris's claim that his trial counsel were ineffective in the guilt phase for failing to investigate and present a state-of-mind defense to the charge of first-degree intentional, deliberate, premeditated murder. *Morris has waived consideration of his other guilt-phase claims by failing to argue them in his COA application.* See *Brooks v. Tennessee*, 626 F.3d 878, 890 (6th Cir. 2010); *Summers v. Dretke*, 431 F.3d 861, 870 (5th Cir. 2005). The clerk is directed to establish a briefing schedule.

Morris v. Carpenter, No. 11-6322/11-6323 (Order, 6th Cir., Dec. 21, 2011) (available via ECF/PACER) (emphasis added).

On July 24, 2013, nearly a year and a half after *Martinez* was decided, petitioner filed a motion in the Sixth Circuit to remand his case to the district court for reconsideration of his defaulted claims under *Martinez*. The Sixth Circuit considered and rejected his request by order

filed on October 30, 2013. *Morris v. Carpenter*, No. 11-6322/11-6323 (Order, 6th Cir., Oct. 30, 2013) (available via ECF/PACER).

On September 23, 2015, the Sixth Circuit affirmed the district court's denial of petitioner's guilt-phase ineffectiveness claims, vacated the grant of relief as to sentencing-phase claims, and remanded to the district court "for denial of the writ." *Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015). Petitioner filed a petition for writ of certiorari with this Court, but the petition included no challenge to the lower courts' treatment of petitioner's procedurally defaulted ineffective-assistance claims.⁴ Petitioner's failure is especially significant because his primary argument in support of the Court's review was premised on a proposed expansion of *Martinez* to procedural deficiencies of other non-defaulted claims. This Court denied certiorari on October 3, 2016. *Morris v. Westbrooks*, __ S.Ct. __, 2016 WL 1600242 (2016).

In short, petitioner had every opportunity to press his *Martinez* claims while his case was before the Sixth Circuit and this Court in the first instance. Rule 59 is not designed to give an unhappy litigant an opportunity to relitigate matters already decided. *Gascho v. Global Fitness Holdings, Inc.*, 918 F.Supp. 2d 708, 714 (S.D. Ohio Jan. 16, 2013). Further, the Sixth Circuit previously ruled that petitioner had waived consideration on appeal of all but one guilt-phase claim, including procedurally defaulted claims, by failing to argue them in his COA application. When an appellate court has once decided an issue, the trial court, at a later stage of the litigation, is under a duty to follow the appellate court's ruling on that issue. *Brown v. City of Syracuse*, 673 F.3d 141 (2nd Cir. 2012). Rule 59 provides no vehicle to avoid the Sixth Circuit's adverse rulings.

Certiorari review is not warranted.

⁴ The cases petitioner now cites demonstrate that such requests were not uncommon in the period shortly after the *Martinez* decision. See, e.g., *Ayestas v. Thaler*, 569 U.S. 1015 (2013) (granting certiorari, vacating the denial of relief, and remanding for further consideration in light of *Martinez*); *Haynes v. Thaler*, 569 U.S. 1015 (2013) (same).

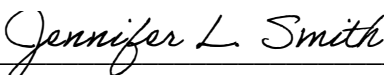
CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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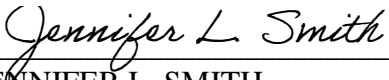
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, to counsel for the petitioner: Jerome C. Del Pino, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37203, on the 5th day of November 2018. I further certify that all parties required to be served have been served.



JENNIFER L. SMITH
Associate Solicitor General