NO. 18-5597

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID EARL MILLER,
Petitioner,

v.

TONY MAYS, 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

QUESTION PRESENTED

Under *Buck v. Davis*, 137 S.Ct. 759 (2017), does the change in law announced in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), when coupled with a particularly substantial deprivation of a capital defendant's right to the effective assistance of counsel, establish grounds for relief under Fed. R. Civ. P. 60(b)(6)?

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The opinion of the United States Court of Appeals for the Sixth Circuit affirming the district court's denial of post-judgment relief under Fed. R. Civ. P. 60(b)(6) is reported at *Miller v. Mays*, 879 F.3d 691 (6th Cir. 2018). Pet. Appx. 1. The Sixth Circuit's order denying the petition for rehearing en banc is unreported. Pet. Appx. 24. The district court's Memorandum and Opinion denying petitioner's Rule 60(b)(6) motion for relief from judgment is unreported. *David E. Miller v. Wayne Carpenter, Warden*, No. 3:01-cv-487 (E.D. Tenn. Oct. 31, 2014). Respondent's Appendix ("Resp. Appx."), 1.

JURISDICTIONAL STATEMENT

The court of appeals entered judgment on January 9, 2018, and denied a petition for rehearing en banc on March 14, 2018. Justice Kagan extended the time for filing the petition for writ of certiorari, and the petition was filed on August 13, 2018, the last day of the extension period not a Saturday, Sunday, or legal holiday. This Court has jurisdiction to review the decision of the court of appeals by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Twenty-eight U.S.C. § 2254 governs federal habeas corpus proceedings for petitioners in state custody and provides in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) The applicant has exhausted the remedies available in the courts of the State . . . .

28 U.S.C. § 2254(b).

Rule 60, Fed. R. Civ. P., provides:

> (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 . . .
>
> (6) any other reason that justifies relief.
>
> * * *
>
> (c)(1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time . . . .

Fed. R. Civ. P. 60(b)(6), (c)(1).

STATEMENT OF THE CASE

In May 1981, the petitioner, David Earl Miller, killed twenty-three-year-old Lee Standifer in Knoxville, Tennessee. Petitioner was tried by a Knox County jury in March 1982. The jury convicted petitioner of first-degree murder and sentenced him to death based upon the aggravating circumstance that the murder was especially heinous, atrocious, or cruel because it involved torture or depravity of mind. On direct appeal, the Tennessee Supreme Court affirmed the conviction but reversed the death sentence and remanded the case for a new sentencing hearing. *State v. Miller*, 674 S.W.2d 279 (Tenn. 1984).[1]

In February 1987, a re-sentencing hearing was conducted. The jury again sentenced petitioner to death based upon a finding that the murder was especially heinous, atrocious, or cruel. On direct appeal of the re-sentencing proceeding, the Tennessee Supreme Court affirmed. *State v. Miller*, 771 S.W.2d 401 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990) (reh. denied June 19,

[1]The Tennessee Supreme Court determined that re-sentencing was required because the jury had considered inadmissible evidence during the sentencing hearing. *Miller*, 674 S.W.2d at 284.

1989).

Petitioner later sought state post-conviction relief. The criminal court denied his petition, and the Tennessee Court of Criminal Appeals affirmed. *Miller v. State*, No. 03C01-9805-CR-00188, 1999 WL 1046415 (Tenn. Crim. App. Nov. 19, 1999). The Tennessee Supreme Court affirmed the judgment in 2001, and this Court denied certiorari. *Miller v. State*, 54 S.W.3d 743 (Tenn. 2001), *cert. denied*, 536 U.S. 927 (2002).

In May 2002, petitioner filed a federal habeas application in the United States District Court for the Eastern District of Tennessee seeking relief under 28 U.S.C. § 2254. The district court denied relief. *David E. Miller v. Ricky Bell, Warden*, 2005 WL 8155162, No. 3:01-cv-487 (E.D. Tenn., Mar. 25, 2005). The Sixth Circuit affirmed the judgment of the district court. *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 2739 (2013).

The Sixth Circuit's 2012 opinion summarized the facts of petitioner's crime:

> On May 20, 1981, Lee Standifer, a twenty-three-year-old woman diagnosed with diffused brain damage and mild retardation, was murdered in Knoxville, Tennessee. *State v. Miller (Miller I)*, 674 S.W.2d 279, 280 (Tenn. 1984). A medical examiner testified that Standifer had been stabbed repeatedly all over her body with both a large knife and a fireplace poker; some stab wounds were so deep (including two that pierced the ribcage) that the examiner speculated a hammer-like object had been used to drive in the knife. *Id*. at 281. The evidence suggested that a large rope was used to bind the victim's body after the murder and drag it into a wooded area. An examination also showed that Standifer had engaged in sexual intercourse shortly before her death.
>
> The evidence at trial established the following course of events. Miller and Standifer had arranged to go on a date the night of May 20, and the two of them eventually took a cab to the house of Benjamin Thomas, where Miller was staying. *Id*. at 280. Later that evening, Thomas returned to his home and found Miller hosing the basement floor; he also found streaks of blood inside the house. *Id*. The next day, Thomas discovered Standifer's body in his backyard, as well as a blue t-shirt belonging to Miller stained with blood of the same type as Standifer's. Miller, who had left Knoxville, was apprehended in Columbus, Ohio, and transported back to Knoxville. *Id*. After waiving his *Miranda* rights, he admitted to hitting Standifer with his fist and then dragging her outside Thomas's house after she was non-responsive and not breathing. *Id*. at 281–82.

Miller, 694 F.3d at 693.

On September 20, 2013, petitioner moved for relief from the judgment of the district court under Fed. R. Civ. P. 60(b)(6), arguing that under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 13 S.Ct. 1911 (2013), the ineffective assistance of post-conviction counsel provided cause to excuse his procedural default of his claim that trial counsel was ineffective at his re-sentencing proceeding for failing to investigate and discover available mitigating evidence and for failing to retain competent mental health experts. Resp. Appx. 3-4.

The district court denied the motion. The court first observed that "*Martinez* effected a change in decisional law after entry of petitioner's judgment," which many courts have found to be insufficient to establish the kind of extraordinary circumstance that would call for relief under Rule 60(b)(6). Resp. Appx. 6 (citing *Gonzalez* [*v. Crosby*, 545 U.S. 524, 536 (2005)] (finding that a change in the interpretation of AEDPA's statute of limitations, which occurred after petitioner's case had concluded, was not an extraordinary circumstance)) (additional citations omitted).

Nevertheless, the district court was "mindful" that a change in decisional law *may* call for reopening a final judgment when the balance of "numerous factors" favor the petitioner. Resp. Appx. 6. *See McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013). It thus conducted a detailed analysis of petitioner's case, including the existence of any new factual developments, any constitutional change, the substance of petitioner's ineffective-assistance claim, policy considerations, and petitioner's diligence in pursuing his motion. Resp. Appx. 7-14. In the end, the district court concluded that none of these factors favored petitioner and it denied relief. Resp. Appx. 14. Indeed, as to petitioner's principal claim that trial counsel was ineffective for failing to retain mental health experts at petitioner's re-sentencing hearing, the district court observed:

> The [state] trial court denied Miller the expert [requested by counsel], the appellate court found no reason to overrule the denial, and the state supreme court likewise declined relief from the lower court's refusal to afford the defense the mental health expert counsel [sic] for which counsel had all but begged. *See Esparza v. Shelton*, 765 F.3d 615, 622 (6th Cir. 2014) (finding that the petitioner did not tie his attorneys' failure to retain an independent psychologist, forcing him to use a court-appointed expert, with the trial court's decision to deny him the independent expert). The fact that [petitioner's trial counsel] was unable to persuade the state courts to furnish the defense with its own psychological expert to help him develop a mental health defense is not chargeable to any error, substantial or otherwise, on the part of trial counsel. [FN3 As a matter of fact, this Court did not find the state court's denial of a defense mental health expert to be contrary to or an unreasonable application of the rule in *Ake v. Oklahoma*, 470 U.S. 68 (1985), and neither did the Sixth Circuit.]

Resp. Appx. 11.

The district court found that, even without the psychological expert for which he had sought funds, "[t]rial counsel acted objectively reasonable [sic] in conducting the investigation and in presenting to the jury, in layman's terms, evidence of the tragic circumstances of Petitioner's background, the dire circumstances of his upbringing, and his client's inebriated and impaired condition at the time of the murder." Resp. Appx. 10. The district court concluded that counsel's performance fell within the wide range of reasonable professional assistance required by *Strickland*, that counsel's performance was not deficient, and that petitioner failed to present a substantial ineffective-assistance claim for *Martinez* purposes. Resp. Appx. 11.

In denying equitable relief under Rule 60(b)(6), the district court also weighed petitioner's lack of diligence in seeking relief "heavily" against him, observing that petitioner waited eighteen months after *Martinez* was decided to file a Rule 60(b) motion making a *Martinez* argument. Resp. Appx. 14 (*citing Ryan v. Schad*, 133 S.Ct. 2548, 2549-50 n.2 (2013) (disapproving of a delay of under four months in presenting a *Martinez*-based argument in a motion to vacate judgment)).

The Sixth Circuit affirmed the district court's judgment. The Court observed that "Rule 60(b)(6) motions necessitate 'a case-by-case inquiry' in which the district court 'intensively

balance[s] numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." Pet. Appx. 5. The "exceptional or extraordinary circumstances" mandating relief under Rule 60(b)(6) "rarely occur" in the habeas context, and a district court's discretion in assessing a request for relief is "especially broad due to the underlying equitable principles involved." Pet. Appx. 5.

Applying that well-settled standard, the Sixth Circuit concluded that the district court did not abuse its discretion in denying petitioner's request for relief. Pet. Appx. 17. The Court specifically rejected petitioner's assertion that *Buck v. Davis*, 137 S.Ct. 759 (2017), altered the analysis of Rule 60(b)(6) motions seeking to revive defaulted ineffective-trial-counsel claims under *Martinez*. The Sixth Circuit explained: "When the Court [in *Buck*] considered whether the petitioner had established extraordinary circumstances under Rule 60(b)(6), it looked to only three factors: (1) that Buck 'may have been sentenced to death in part because of his race,' which would have punished him on the basis of an immutable characteristic; (2) that the state had conceded error and had consented to resentencing in similarly situated cases; and (3) that the state had a competing finality interest." Pet. Appx. 11. *Buck* did not consider the merits of the underlying claim or assign greater weight to the change in decisional law based on the alleged substantiality of the underlying claim for Rule 60(b)(6) purposes. Pet. Appx. 11.

But even factoring in an assessment of the merits of petitioner's underlying ineffective-trial-counsel claim, the Sixth Circuit found that it would not change the balance of equities in this case. Pet. Appx. 17.

> Given our uncertainty as to Miller's ability to establish prejudice, we cannot agree that his [ineffective-trial-counsel] claim is "unquestionably meritorious." Nor can we say that he has presented such a clear case of ineffective assistance that it overcomes the other relevant equitable factors weighing against Rule 60(b)(6) relief, especially Miller's lack of diligence in raising his *Martinez* claim—a factor to which we have previously given considerable weight. . . . Thus, in light of the

> Supreme Court's instruction that extraordinary circumstances are rare in the habeas context, *Gonzalez*, 545 U.S. at 535, 125 S.Ct. 2641, and the "especially broad" discretion we must give to the district court in this context, *West*, 790 F.3d at 697, we conclude that the district court did not abuse its discretion in finding that Miller failed to establish extraordinary circumstances under Rule 60(b)(6).

Pet. Appx. 17.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW DOES NOT CONFLICT WITH ANY OPINION OF THIS COURT OR ANY OTHER CIRCUIT COURT, AND THE PETITION DOES NOT PRESENT ANY IMPORTANT ISSUE OR COMPELLING REASON FOR REVIEW.

The petitioner asks this Court to exercise its certiorari jurisdiction to review the Sixth Circuit's decision affirming a district court's denial of petitioner's motion to reopen a habeas judgment that had been entered nearly a decade earlier. But this Court should deny certiorari because the Sixth Circuit's decision does not conflict with any opinion of this Court or with any decision of a sister circuit and because the petition for certiorari presents no important issue of compelling reason for review.

Petitioner cites no new facts or any change of circumstance after entry of the judgment to support his request for Rule 60(b)(6) relief other than this Court's 2012 decision in *Martinez*. Instead, petitioner's argument for certiorari review rests on two untenable contentions. First, he argues that *Buck v. Davis*, 137 S.Ct. 759 (2017), requires a habeas court faced with a Rule 60(b)(6) motion seeking to reopen a defaulted ineffective-assistance-of-trial-counsel (IATC) claim under *Martinez* to consider the merits of the underlying IATC claim in determining whether there are extraordinary circumstances under Rule 60(b)(6). Second, petitioner contends that the Sixth Circuit's analysis represents a "rapid degradation" of the Court's decision in *Buck*. Both contentions are incorrect.

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court explained that relief under Rule 60(b) requires a showing of "extraordinary circumstances," a requirement not satisfied by a mere change in decisional law. *Gonzalez*, 125 S.Ct. at 2650. *Buck* did not change the test for reopening judgments under Rule 60(b)(6). Rather, *Buck* re-affirmed the rule in *Gonzalez*, emphasizing that a court's inquiry into the existence of "extraordinary circumstances" requires consideration of "a wide range of factors," *Buck*, 137 S.Ct. at 777-78, and that "[s]uch circumstances will rarely occur in the habeas context." *Id*., at 772. Indeed, although questioning the majority's application of settled principles, the dissenting opinion observed, without comment by the majority, that "the test [under *Buck*] for reopening judgments under Rule 60(b)(6) remains the same." *Buck*, 137 S.Ct. at 786 (Thomas, J., dissenting).

In denying relief to petitioner, the district court balanced "numerous factors," including the substance of petitioner's IATC claim and his lack of diligence in pursuing relief. Resp. Appx. 7-14. The Sixth Circuit affirmed the district court's judgment after also considering multiple "relevant equitable factors," again including the merits of petitioner's IATC claim. Pet. Appx. 17. Both rulings were entirely consistent with *Gonzalez* and *Buck* regarding the availability of relief under Fed. R. Civ. P. 60(b) when this Court announces a change in procedural rules after a habeas case becomes final.

Moreover, even if *Buck* altered the Rule 60(b) calculus by imposing an obligation on habeas courts to assess the merits of the underlying IATC claim as part of the Rule 60(b)(6) balancing of equities, both of the lower courts engaged in that review here. Petitioner's quarrel with the Sixth Circuit's decision is with its outcome rather than the rule of law on which it was based. Under these circumstances, this case presents no compelling reason for certiorari review, and the petition should be denied.

A. Summary of the Applicable Law

1. Rule 60(b)(6) of the Federal Rules of Civil Procedure

Rule 60(b)(6), Fed. R. Civ. P., permits reopening a case that has reached final judgment when the movant shows any reason justifying relief from the operation of judgment other than the reasons set forth in subparagraphs (1) through (5). Fed. R. Civ. P. 60(b)(6); *Gonzalez*, 545 U.S. at 528-29. "[C]ourts must apply Rule 60(b)(6) relief only in 'unusual and extreme situations where principles of equity *mandate* relief.'" *Blue Diamond Coal Co., v. Trustees of UMWA Combined Ben. Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (internal citation omitted) (emphasis in the original). Rule 60(b)(6) relief is available "only in 'extraordinary circumstances,' and [this] Court has explained that '[s]uch circumstances will rarely occur in the habeas context.'" *Buck*, 137 S.Ct. at 772 (quoting *Gonzalez*, 545 U.S. at 535).

2. Procedural default, dismissal, and ineffective assistance of post-conviction counsel as cause to excuse default under *Martinez v. Ryan*

A state prisoner who has procedurally defaulted a federal constitutional claim in state court forfeits the right to federal review of the claim unless he can show cause for the default and some actual prejudice arising from the alleged constitutional violation. 28 U.S.C. § 2254(b)(1); *Gray v. Netherland*, 518 U.S. 152, 162 (1996); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Castille v. Peoples*, 489 U.S. 346, 349 (1989). Absent a showing of cause and actual prejudice, the district court must dismiss the defaulted claim. 28 U.S.C. § 2254(b)(1); *Coleman*, 501 U.S. at 749 ("We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate *cause for the default and actual prejudice* as a result of the alleged violation of federal law . . . .") (emphasis added).

In general, the ineffective assistance of post-conviction counsel cannot serve as cause to excuse a claim's procedural default. *Coleman*, 501 U.S. at 753, 757. But in 2012, this Court created a narrow exception to that rule. *Martinez*, 132 S. Ct. at 1320. The Court held that, in an initial-review collateral proceeding, a state post-conviction counsel's failure to raise a substantial claim of ineffective assistance of counsel at trial may serve as an equitable cause to excuse the claim's default, thus allowing review of the claim on the merits for the first time in federal court. *Id*. 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*, the Court clarified that *Martinez* applies to States where 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. 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).

B. *Buck* Did Not Change Rule 60(b)(6) Law.

Petitioner asserts that *Buck* altered the Rule 60(b) analysis for cases seeking to reopen defaulted IATC claims under *Martinez* and *Trevino* by mandating that "the change of law embodied in *Martinez* and *Trevino* constitutes an extraordinary circumstance under Rule 60(b)(6) when the underlying ineffective assistance of counsel claim is particularly substantial." Pet., 15. But that rule appears nowhere in *Buck*. Rather, *Buck* relies on well-settled precedent, including *Gonzalez*, in discussing the extraordinary nature of relief under Rule 60(b)(6) in federal habeas cases.

In *Buck*, this Court found extraordinary circumstances existed under Rule 60(b)(6) because the petitioner "may have been sentenced to death in part because of his race[,]" which the Court

described as "a disturbing departure from a basic premise of our criminal justice system" that the "law punishes people for what they do, not who they are." 137 S.Ct. at 778.

> Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. . . . It thus injures not just the defendant, but "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." . . . Such concerns are precisely those we have identified as supporting relief under Rule 60(b)(6).

Buck, 137 S.Ct. at 778.

The Court also found that the extraordinary nature of the case was "confirmed" by the actions of the State of Texas, which had confessed error in six other cases that presented substantially the same issue while refusing to confess error in Buck's case. *Id*. at 778-79. This "unusual confluence of factors" made Buck's case extraordinary for Rule 60(b) purposes. *See also Buck*, 137 S.Ct. at 785-86 (Thomas, J., dissenting) (explaining that the majority's opinion "relies on the convergence of three critical factors [the death penalty, a race-based ineffective-trial-counsel claim, and Texas's confession of error in other cases but not in Buck's] that will rarely, if ever, recur").

Buck did not hold that *Martinez* and *Trevino* themselves constitute an extraordinary circumstance that justifies relief under Rule 60(b)(6). Indeed, as the dissenting opinion observed, the Court "does not even count those decisions in its tally of extraordinary circumstances." *Buck*, 137 S.Ct. at 787 (Thomas, J., dissenting). Rather, the Court found that extraordinary circumstances existed under Rule 60(b)(6) before even addressing whether *Martinez* and *Trevino* provided an avenue for habeas relief. *See Buck*, 137 S.Ct. at 780 ("Buck cannot obtain relief unless . . . *Martinez* and *Trevino*, not *Coleman*, would govern his case were it reopened. If they would not, his claim would remain unreviewable, and Rule 60(b)(6) relief would be inappropriate."). Thus, while a potentially viable claim under *Martinez* and *Trevino* is "precondition" to relief under Rule

60(b)(6), it is not enough to establish that extraordinary circumstances exist. *Buck*, 137 S.Ct. at 780 ("Buck cannot obtain relief unless he is entitled to the benefit of" the rule in *Martinez* and *Trevino*.). In other words, "the absence of a potentially valid *Martinez* claim is disqualifying, but the presence of one does nothing to demonstrate the existence of extraordinary circumstances." *Buck*, 137 S.Ct. at 787 (Thomas, J., dissenting). [2]

The Sixth Circuit reached the same conclusion:

> When the Court considered whether the petitioner had established extraordinary circumstances under Rule 60(b)(6), it looked to only three factors: (1) that Buck "may have been sentenced to death in part because of his race," which would have punished him on the basis of an immutable characteristic; (2) that the state had conceded error and had consented to resentencing in similarly situated cases; and (3) that the state had a competing finality interest. . . . Contrary to [petitioner's] argument on appeal, the Buck Court did not consider the merits of the ineffective-assistance claim for the purposes of Rule 60(b)(6), nor did it assign greater weight to the change in the law because of the substantiality of that claim. Instead, it focused on the injection of race into the sentencing determination, the state's actions in similar cases, and notions of finality.

Pet. Appx. 11.[3]

Petitioner also argues that certiorari review would allow this Court to "adopt" the standard announced by the Third Circuit in *Cox v. Horn*, 757 F.3d 113 (3rd Cir. 2014). But *Cox* announced no unique principle. Rather, it simply observed that a potentially viable *Martinez* claim is a precondition to Rule 60(b) relief. *Cox*, 757 F.3d at 124-25 ("A court need not provide a remedy

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[2] Petitioner also erroneously states that *Buck* overruled Sixth Circuit precedent in *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750-51 (6th Cir. 2013). In *McGuire*, the Sixth Circuit reiterated: "It is well established that a change in decisional law is usually not, *by itself*, an extraordinary circumstance meriting Rule 60(b)(6) relief." *McGuire*, 738 F.3d at 750 (internal quotation marks omitted) (emphasis added). *Buck* does nothing to undermine that ruling.

[3] Petitioner's citation to *Lambrix v. Sec'y, Fla. Dept of Corr.*, 851 F.3d 1158 (11th Cir. 2017), *cert. denied sub nom. Lambrix v. Jones*, 138 S.Ct. 217 (2017), and *Davis Kelley*, 855 F.3d 833 (8th Cir. 2017), does not support his request for certiorari review. Those cases instead demonstrate complete uniformity in the lower courts' application of *Buck*.

under Rule 60(b)(6) for claims of dubious merit that only weakly establish ineffective assistance by trial or post-conviction counsel."). In any event, if this Court had been inclined to "adopt" the "*Cox* standard," it could have done so explicitly in *Buck*.

The fact-bound analysis in *Buck*, which addresses an "unusual confluence of factors," does nothing to undermine the Sixth Circuit's analysis of his appeal from the district court's decision to deny petitioner's request for relief under Rule 60(b)(6) under the particular circumstances of this case.

C. The Lower Courts' Merits Analyses Provide No Basis for Review.

Even if *Buck* imposed an obligation on habeas courts to assess the merits of the underlying IATC claim as part of the Rule 60(b)(6) balancing of equities, the lower courts engaged in that review here. The Sixth Court explained: "we cannot say that we must, as a matter of course, consider the merits of Miller's IATC claim simply because it was appropriate to do so in [other cases]. However, we will assume that it is appropriate in this case and proceed to evaluate Miller's IATC claim for the purpose of considering whether it changes the balance of equities with respect to his Rule 60(b)(6) motion." Pet. Appx. 12. That analysis of petitioner's IATC claim yielded only "uncertainty" about petitioner's ability to establish prejudice due to trial counsel's alleged ineffectiveness. Pet. Appx. 17. The Sixth Circuit thus concluded that petitioner had failed to "present such a clear case of ineffective assistance that it overcomes the other relevant equitable factors weighing against Rule 60(b) relief, especially [petitioner's] lack of diligence in raising his *Martinez* claim." Pet. Appx. 17.

> [I]n light of the Supreme Court's instruction that extraordinary circumstances are rare in the habeas context, *Gonzalez*, 545 U.S. at 535, and the "especially broad' discretion we must give to the district court in this context, *West*, 790 F.3d at 697, we conclude that the district court did not abuse its discretion in finding that [petitioner] failed to establish extraordinary circumstances under Rule 60(b)(6).

Pet. Appx. 17.

The district court also found petitioner's IATC claim insubstantial and meritless. Resp. Appx. 9-11. In its judgment denying habeas relief, the district court had previously recounted trial counsel's unsuccessful efforts to secure funding for a mental health expert at petitioner's initial trial and re-sentencing proceedings. *Miller*, 2005 WL 8155162, at *23-29. The district court's refusal to attribute the absence of expert testimony to trial counsel—and its conclusion that petitioner's defaulted IATC claim was both insubstantial and meritless—were thus entirely justified.

> Here, after Petitioner's case was remanded for resentencing, counsel filed an unsuccessful motion for a new trial, claiming that he was entitled to psychiatric assistance which had been requested previously, and he likewise filed an unsuccessful state habeas corpus petitioner making the same argument. Petitioner again was sentenced to death and once more counsel raised the denial of his request for a defense mental health expert as an issue in his client's second direct appeal. The TSC refused to revisit the issue and affirmed the second capital sentence.
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> * * *
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> The trial court denied Miller the expert, the appellate court found no reason to overrule the denial, and the state supreme court likewise declined relief from the lower court's refusal to afford the defense the mental health expert [ ] for which counsel had all but begged. . . . The fact that [trial counsel] was unable to persuade the state courts to furnish the defense with its own psychological expert to help him develop a mental health defense is not chargeable to any error, substantial or otherwise, on the part of trial counsel. [FN3. As a matter of fact, this Court did not find the state court's denial of a defense mental health expert to be contrary to or an unreasonable application of the rule in *Ake v. Oklahoma*, 470 U.S. 68 (1985), and neither did the Sixth Circuit.]

Resp. Appx. 10-11. *See also Smith v. Mitchell*, 348 F.3d 177, 208 (6th Cir. 2003) (petitioner's ineffective claim for failing to request and expert "must be rejected because, as he himself admits in his brief, his attorneys requested an independent psychiatrist for the mitigation phase, but the trial court denied the motion").

Petitioner's trial counsel plainly recognized the need for expert assistance to develop evidence related to his mental condition at the time of the murder. He repeatedly sought funding for that purpose but was denied the relief requested by the state trial and appellate courts. The absence of expert testimony at petitioner's resentencing was not attributable to any act or omission of trial counsel, and the district court correctly rejected petitioner's ineffective-trial-counsel claim.

D. Petitioner Was Not Diligent in Presenting his *Martinez* Claim.

Unless a motion for Rule 60(b)(6) relief based on *Martinez* is brought "within a reasonable time of that decision," the motion must fail. *See Cox v. Horn*, 757 F.3d 113, 116 (3rd Cir. 2014) (citing Fed. R. Civ. P. 60(c)(1)). Thus, the petitioner's motion in *Cox*—filed approximately ninety days after *Martinez*—was deemed reasonable. *Id*. But here, petitioner waited one year and six months to file his Rule 60(b)(6) motion, a period that did not satisfy the "reasonable time" requirement and thus weighed heavily against him in the balancing of equities. Indeed, in its order denying his motion, the district court specifically found petitioner's lack of diligence in filing his motion to be a factor disfavoring him. Resp. Appx. 12-13.

Petitioner's lack of diligence is especially egregious given the obvious departure in *Martinez* from a long-established procedural rule. *Martinez* announced for the first time that a state post-conviction counsel's failure to raise a substantial claim of ineffective assistance of counsel at trial may serve as an equitable cause to excuse the claim's default and thereby may allow review of the claim on the merits for the first time in federal court, thus creating a narrow exception to the well-established rule in *Coleman* to the contrary. *Martinez*, 132 S. Ct. at 1320. Shortly after the decision was issued, *Martinez* was ballyhooed as a "remarkable—if limited" development in the Court's equitable jurisprudence. *See Lopez v. Ryan*, 678 F.3d 1131, 1136 (9th

Cir. 2012). The *Martinez* dissenting opinion even criticized the rule as "a radical alteration of . . . habeas jurisprudence." *Martinez*, 132 S.Ct. at 1327 (Scalia, J., dissenting).

Petitioner's federal habeas judgment was not yet final when that "remarkable" ruling issued; his case was, in fact, still pending in the Sixth Circuit on appeal from the district court's denial of relief. Yet, he failed to seek reconsideration of the district court's disposition of his IATC claim then. Nor, as the district court observed, did petitioner argue in his petition for writ of certiorari that *Martinez* provided a basis to reopen the district court's default determination. Resp. Appx. 13.

On May 28, 2013, this Court "expanded and clarified" the *Martinez* rule in *Trevino*. *McGuire*, 738 F.3d at 748. That same day, this Court denied certiorari in petitioner's habeas corpus proceeding. *Miller*, 133 S.Ct. at 2739. Yet, petitioner did not seek rehearing or otherwise attempt to revive his case under that ruling either.

In *Gonzalez*, this Court concluded that a petitioner who waited to file his Rule 60(b) motion "approximately eight months" after the decision on which the motion was based demonstrated a "lack of diligence" in pursuing review of the procedural ruling at issue. *Gonzalez*, 545 U.S. at 537. Here, the petitioner waited more than twice that time. Under these circumstances, the district court's determination that the diligence factor "weighs even more heavily against him," Resp. Appx. 14, supports its decision to deny petitioner's request for equitable relief from the judgment.

E. The State's Interest in Finality Weighs in Favor of the Lower Courts' Decisions.

Principles of finality and comity, as expressed through AEDPA and habeas jurisprudence, dictate that federal courts pay ample respect to States' criminal judgments and weigh against disturbing those judgments through Rule 60(b) motions. Thus, whether a conviction and initial federal habeas proceeding were only recently completed or ended years ago are also appropriate

considerations in reviewing a habeas petitioner's Rule 60(b)(6) motion. *See Gonzalez*, 545 U.S. at 536-37.

This case has been thoroughly litigated. In addition to his trial by jury, the petitioner obtained direct review by the Tennessee Supreme Court. *State v. Miller*, 674 S.W.2d 279 (Tenn. 1984); *State v. Miller*, 771 S.W.2d 401 (Tenn. 1989). The Knox County Criminal Court, the Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court reviewed his various post-conviction claims. *Miller v. State*, No. 03C01-9805-CR-00188, 1999 WL 1046515 (Tenn. Crim. App. Nov. 19, 1999); *Miller v. State*, 54 S.W.3d 743 (Tenn. 2001), *cert. denied*, 536 U.S. 927 (2002). The district court analyzed petitioner's federal habeas claims in great detail. *David E. Miller v. Ricky Bell, Warden*, 2005 WL 8155162, No. 3:01-cv-487 (E.D. Tenn., Mem. & Order, Mar. 25, 2005). The Sixth Circuit reviewed petitioner's case twice. *Miller v. Mays*, 879 F.3d 691 (6th Cir. 2018); *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012). This Court has on three occasions examined certiorari petitions and declined to grant review. *Miller v. Tennessee*, 497 U.S. 1031 (1990); *Miller v. Tennessee*, 536 U.S. 9273 (2002); *Miller v. Colson*, 133 S.Ct. 2739 (2013).

This lengthy, thorough litigation process has spanned more than three decades. The murders petitioner committed occurred over thirty-five years ago. *Miller*, 694 F.3d at 693 (murder occurred on May 20, 1981). His conviction became final over twenty-eight years ago. *Miller v. Tennessee*, 497 U.S. 1031 (1990) (cert. denied on June 28, 1990). The judgment in his federal habeas proceedings became final more than five years ago. *Miller v. Colson*, 133 S.Ct. 2739 (U.S. May 28, 2013) (denying petition for writ of certiorari). The finality of the State's judgment in this case properly weighs against Rule 60(b)(6) relief.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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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: Stephen M. Kissinger, Federal Defender Services of Eastern Tennessee, Inc., 800 S. Gay Street, Suite 2400, Knoxville, TN 37929, on the 18th day of October, 2018. I further certify that all parties required to be served have been served.

Jennifer L. Smith

JENNIFER L. SMITH
Associate Solicitor General