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 APPENDIX
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

DAVID E. MILLER, Petitioner, v. WAYNE CARPENTER, Warden, Respondent.	)	No.: 3:01-cv-487 *Judge Jordan*

MEMORANDUM and ORDER

On March 25, 2005, this Court denied Petitioner David E. Miller's capital habeas corpus application for a writ of habeas under 28 U.S.C. § 2254, (Doc. 86), and seven years later, the decision was affirmed by the Sixth Circuit. *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012). In 2013, the Supreme Court denied Petitioner certiorari review. *Miller v. Colson*, 133 S. Ct. 2739 (2013). On September 20, 2013, more than eight years after Miller's § 2254 petition was denied, he filed this motion for relief from judgment, under Rule 60(b) of the Federal Rules of Civil Procedure, (Doc. 53).[1] The motion relies on the ruling in *Martinez v. Ryan*, 132 S. Ct. 130 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), (Doc. 112). The Warden has filed a response in opposition and Petitioner a reply and notice of supplemental authority, (Docs. 115-117), and thus, this matter is ready for the Court's consideration.

For reasons which follow, the Court will deny the Rule 60(b) motion.

[1] The Rule 60(b) motion was filed while Miller's petition for a rehearing was pending in the Supreme Court. The Supreme Court denied a rehearing on October 22, 2013. Supreme Court of the United States, *see* online at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-9414.htm (Internet materials as visited Oct. 2, 2014, and available in Clerk of Court's case file.)

I. Factual and Procedural Background

On May 20, 1981, after an evening spent together in downtown Knoxville, Tennessee, Miller and the victim, who suffered from diffused brain damage and mild retardation, were dropped off by a taxi cab near the home where he was staying. Later that evening, the homeowner returned from church to his residence to find Petitioner hosing out the basement garage, a wet floor in the upstairs kitchen, and two streaks of blood leading from the living room to the dining room and kitchen area. The next day, the homeowner saw a blood-stained blue T-shirt hanging from a tree in his backyard and, underneath a tree in a nearby thicket, the victim's nude body lying face-up, with rope tied around her neck and wound up to bind her wrists. Petitioner, who had left Knoxville, was apprehended in another state, where he waived extradition. Miller was returned to Knoxville, where he admitted to striking the victim with his fist and dragging her outside when she became unresponsive and was not breathing.

Petitioner was tried for first-degree murder, convicted, and sentenced to death. On direct appeal, his conviction was affirmed, but his sentence was vacated and the case was remanded for a new sentencing hearing. *State v. Miller*, 674 S.W.2d 279 (Tenn. 1987). After again receiving the death penalty at his resentencing hearing, Petitioner's second direct appeal was denied by the Tennessee Supreme Court ("TSC") and the U. S. Supreme Court denied his petition for a writ of certiorari. *State v. Miller*, 771 S.W.2d 401 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990). He was unsuccessful in obtaining state post-conviction relief, *Miller v. State*, 54 S.W.3d 743 (Tenn. 2001), or further review by the Supreme Court. *Miller v. Tennessee*, 536 U.S. 927 (2002). Miller's petition for a writ of habeas corpus under § 2254 was denied by this Court and the decision was upheld on review to the higher federal courts. *Miller v. Colson*, 694 F.3d 691 (2012), *cert. denied*, 133 S. Ct. 2739 (2013).

Petitioner then filed this Rule 60(b) motion, relying upon *Martinez* and *Thaler* and asserting ineffective assistance of post-conviction counsel, as cause to excuse the procedural default of Claim XIII in his amended petition.

II. Petitioner's Motion/ The Warden's Response

Petitioner asserted, as Claim XIII in his amended habeas corpus petition, that his trial counsel gave him ineffective assistance at resentencing by "fail[ing] to retain competent mental health professionals with the skill and knowledge to diagnose the mental disorders and/or disturbances which [Petitioner's tragic life] left behind or to explain how those disturbances led to [the victim's] death," (Doc. 18, Amd. Pet. at 89). The Court determined that Petitioner had committed a procedural default during his state post-conviction proceedings by failing to raise this claim as a ground for relief. Because Petitioner did not make a showing of cause and prejudice, the Court declined to review the claim.

In finding a procedural default, the Court relied on the longstanding rule that ineffective assistance of post-conviction counsel could not supply cause for a state procedural default of a habeas corpus claim. *See Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). *Martinez* articulated a limited equitable exception to that rule, by holding that where state law requires ineffective-assistance claims to be raised during initial collateral review, counsel's ineffective assistance during those proceedings can excuse a procedural default of a substantial claim that a trial attorney rendered ineffective assistance. *Martinez*, 133 S. Ct. at 1220. *Trevino* extended that holding to convictions where state law "as matter of its structure, design and operation [] does not offer . . . a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921.

Based on the rulings in *Martinez* and *Trevino*, Petitioner now alleges, as cause for his procedural default, that he did not raise his claim during his state collateral proceedings because his post-conviction attorney gave him ineffective assistance.

In response, the Warden argues that *Martinez* does not apply to Tennessee's judicial review system because it does not preclude direct review of claims of ineffective assistance of counsel. However, subsequent to the filing of the Warden's response, as observed in Petitioner's notice of supplemental authority, (Doc. 117), the Sixth Circuit issued *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014), in which it held that, under *Trevino*, *Martinez* applies to Tennessee convictions, meaning that that ineffective assistance of post-conviction counsel can be asserted as cause to excuse a procedural default of a claim that trial counsel gave ineffective assistance. The Sixth Circuit reasoned that, like the Texas system at issue in *Thaler*, "Tennessee's procedural rules make it almost impossible for a defendant in a typical case to adequately present an ineffective assistance claim on appeal." *Id.* at 792-93.

Alternatively, the Warden argues that *Martinez* only applies to a substantial claim of ineffective assistance and that Petitioner's claim with regard to counsel's alleged shortcomings at the resentencing hearing is not a substantial claim.

III. Rule 60(b)(6), Federal Rules Civil Procedure

Rule 60(b) of the Federal Rules of Civil Procedure permits a party to ask a Court to relieve him from a judgment and reopen a case for certain enumerated reasons" and for "any other reason justifying relief from the operation of the judgment." Fed.R.Civ.P. 60(b)(1)-(6). Rule 60(b) applies in a federal habeas corpus action under 28 U.S.C. § 2254, as long as "[it is] not inconsistent with applicable federal statutory provisions and rules." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (citations and footnote omitted).

Subsection (b)(6)—the "any other reason" subsection—is known as the "catchall" provision of Rule 60(b), *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 751 (6th Cir. 2013), and, thus, due to its "residual nature," a "claim of simple legal error" of Rule 60(b)(6) is only recognizable when accompanied "by extraordinary and exceptional circumstances." *Pierce v. United Mine Workers of America Welfare and Retirement Fund for 1950 and 1974*, 770 F.2d 449, 451 (6th Cir. 1985); *accord Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 387 (6th Cir. 2001). Indeed, Supreme Court precedent requires "a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment" and instructs that "[s]uch circumstances will rarely occur in the habeas context." *Gonzalez*, 125 S.Ct. at 2649 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)).

Moreover, Rule 60(b) relief is "circumscribed by public policy favoring finality of judgments and termination of litigation" and this is "especially true" when relief is sought under subsection 6 of Rule 60. *McGuire*, 738 F.3d at 750 (quoting *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 468 (6th Cir. 2007)). Thus, whether to grant Rule 60(b)(6) relief commands "a case-by-case inquiry that requires the trial court to intensively balance 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." *Id.* (quoting *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009).

IV. Analysis

The Court is instructed by the reasoning in *Gonzalez* and *McGuire*. After observing that the procedural ruling at issue in the *Gonzalez* case had appeared to be correct under then prevailing legal interpretations, the Supreme Court stated, that "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different

interpretation. Although our constructions of federal statutes customarily apply to all cases then pending on direct review, not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final." *Gonzalez*, 545 U.S. at 536.

Martinez effected a change in decisional law after entry of petitioner's judgment. Courts have found that such a change is not the kind of extraordinary circumstance which would call for relief under Rule 60(b)(6). *Gonzalez*, 545 U.S. at 536 (finding that a change in the interpretation of the AEDPA's limitations statute, after petitioner's case concluded, was not an extraordinary circumstance); *Agostini v. Felton*, 521 U.S. 203, 239 (1997) (observing that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)"); *McGuire*, 738 F.3d at 750 (noting that "[i]ntervening law," such as that set forth in *Martinez* and *Trevino*, "does not generally permit the reopening of finally decided cases"); *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) (finding that "[t]he *Martinez* Court's crafting of a narrow, equitable exception to *Coleman*'s holding is hardly extraordinary") (internal quotation marks and citation omitted); *Lopez v. Ryan*, 678 F.3d 1131, 1135 (9th Cir. 2012) (determining that *Martinez*, while "remarkable," did not qualify as an extraordinary circumstance warranted reopening of a final judgment under Rule 60(b)); *Cooper v. Bell*, 2014 WL 1366517, at *5 (E.D.Tenn. Apr.14, 2014) (noting that various courts have held that, relative to a Rule 60(b) motion, *Martinez* and *Trevino* "fail to amount to 'extraordinary circumstances' warranting relief") (listing cases).

However, the Court is mindful that a change in decisional law, when the application of numerous factors on balance favor a petitioner," *see McGuire*, 738 F.3d at 750, may call for

reopening a final judgment and to that end has examined Petitioner's case to determine which, if any, factors support Petitioner.

A. New Developments

In *McGuire*, after commenting that the petitioner's case had "been thoroughly litigated in the state courts and on federal habeas through to the United States Supreme Court," the Sixth Circuit found it important that, since the final judgment in the habeas petition in April of 2011, the only new development was *Trevino* and there had been no newly developed facts. *McGuire*, 738 F.3d at 750. Miller's habeas corpus case became final on May 28, 2013, when the Supreme Court denied his petition for a writ of certiorari. *Miller v. Colson*, 133 S. Ct. 2739 (2013). *Trevino* was decided that same date.[2]

In support of his Rule 60(b)(6) motion, Miller has presented the affidavits of the attorneys who represented him in his post-conviction case and at his resentencing, (Docs. 112-1 and 112-2). The Court will examine the affidavits to determine whether they contain any newly developed facts pertinent to Petitioner's case.

Mark E. Olive, Miller's counsel during the resentencing proceedings, testifies in his affidavit that he was "extremely overworked" during Petitioner's resentencing, did not convey information about Petitioner's sexual and physical trauma about which he had learned to any psychological expert, and did not investigate the extent of Petitioner's head trauma, (Doc. 112-2, Affidavit of Mark E. Olive). Mr. Olive also explains that he was unable to obtain the assistance of any independent psychological expert to assist him in presenting Petitioner's mitigation case at resentencing. He further testifies that, in his opinion, the expert testimony obtained by Petitioner's habeas corpus counsel is precisely the type of mitigating evidence that would have led one juror to reject the sentence of death.

[2] It is noted that, in *Martinez* and *Trevino*, the judgment had not become final in their § 2254 cases.

As detailed in the opinion accompanying the judgment denying Petitioner's habeas corpus application, (Doc. 85, Memorandum Opinion), Mr. Olive submitted a prior affidavit, (Doc. 61, Attachment A), in which he offered similar testimony. In his previous affidavit, Mr. Olive testified that "the opinions expressed by Drs. Pablo Stewart, Thomas M. Hyde, and David Lisak (the psychiatric and neurological experts retained by habeas counsel to evaluate the petitioner based on interviews, reviews of records, including mental and social history records, etc.) would have accounted for the petitioner's conduct at the time of the crime; would have been consistent with the theory of defense which was presented to the jury; and also, would have supplied details of the petitioner's tragic life history—all of which he would have presented as a defense at the guilt and sentencing phases of trial, had the state courts allowed him the funds to hire his own mental health expert," (Doc. 85 at 28). The Court finds that, with minor exceptions, the testimony offered by Mr. Olive is not new but was previously presented to the Court during its review of Miller's § 2254 petition.

There is one aspect of Petitioner's case which is new—an affidavit submitted by Petitioner's post-conviction counsel, John R. Halstead, (Doc. 112-1, Affidavit of John R. Halstead). In that affidavit, Mr. Halstead avers that he could find nothing to suggest that Mr. Olive performed a follow-up investigation of Petitioner's physical and sexual trauma and brain injury which Attorney Olive had discovered. Mr. Halstead also faults Mr. Olive for failing to seek mental health experts to assist Attorney Olive with information that he had discovered concerning his client's brain deficits and history of physical and sexual abuse. Mr. Halstead likewise faults himself for following a similar path, in that he filed a motion for funds to hire psychological experts, but then abandoned that motion after he found that trial counsel had made some effort to develop psychological evidence.

Whether post-conviction counsel gave ineffective assistance only matters if the underlying ineffective assistance of trial counsel is substantial. In this case, as will be discussed later in this opinion, the claim is not substantial.

B. Constitutional Change

The Sixth Circuit, in *McGuire*, also thought it significant that "the change in the law resulting from the recent *Trevino* decision is flatly not a change in the constitutional rights of criminal defendants, but rather an adjustment of an equitable ruling by the Supreme Court as to when federal statutory relief is available." *McGuire*, 738 F.3d at 750-51 *Id.* at 750-51. Of course, that is true in Petitioner's case as well.

C. *Substantial* Ineffective-Assistance Claim

The Supreme Court was careful to limit the cause exception in *Martinez* to claims of ineffective assistance of trial counsel which were substantial claims. The Sixth Circuit, in *McGuire* likewise observed that success under *Trevino* depended upon whether a petitioner could "show a 'substantial' claim of ineffective assistance." *Id.* at 752 (citing *Trevino*, 133 S. Ct. at 1918).

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 petition 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.

To show ineffective assistance, Petitioner must establish that counsel's deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1986). In considering the first prong of the test set forth in *Strickland*, the appropriate measure of attorney performance is "reasonableness under prevailing professional norms." *Id.* at 688. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6, (2003). A criminal accused is guaranteed "effective (not mistake-free) representation." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). The evaluation of the objective reasonableness of counsel's performance must be made "from counsel's perspective at the time of the alleged error and light of all the circumstances, and the standard of review is highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986).

According to Mr. Olive's affidavit, he investigated Petitioner's background; sought his client's social records and educational records; interviewed Petitioner's mother and presented her to testify during the resentencing; and sought funds to hire an expert to help him develop psychological materials and evidence to mitigate the death sentence and to explain Petitioner's psychological makeup to the jury, which, in turn, would have helped the jury make sense of how and why the crime was committed.

Trial counsel acted objectively reasonable in conducting the investigation and in presenting to the jury, in laymen'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. Counsel did all this without the psychological expert for which he had sought funds to hire. Indeed, presenting the jury with evidence of a brain injury could only have been accomplished with the assistance of a medical expert. *See e.g., Hall v.*

Florida, 134 S.Ct. 1986, 1993 (2014) (noting the reliance of courts on medical "professionals [who] use their learning and skills . . . [in] the diagnosis of persons with mental or psychiatric disorders or disabilities"); *Black v. Bell*, 664 F.3d 81, 88 (6th Cir. 2011) (pointing to testimony by experts in psychiatry, neurology, and neuropsychology which established the petitioner's brain damage), *c.f. Schriro v. Landrigan*, 550 U.S. 465, 490-491 (2007) (noting that lay witnesses could not "have offered expert testimony about [a petitioner's] organic brain disorder") (Stevens, J., dissenting).

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 counsel 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 Mr. Olive 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.[3]

Given the strong presumption that counsel's conduct was within the wide range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, the Court finds that counsel's performance at Petitioner's resentencing was not deficient. Thus, Petitioner has not presented a substantial claim of ineffective assistance on the part of counsel at the resentencing. *Id.* at 697 (holding that a court need not address the prejudice component if there was no deficient performance).

[3] 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.

D. Policy Considerations

The Sixth Circuit evaluated "the strong policy of maintaining the finality of judgments," which, in the *McGuire* petitioner's case, entailed "two state court collateral attacks and a federal collateral attack that was litigated to the United States Supreme Court," against "the single fact" of the issuance of *Trevino* and found no sufficient reason for reopening the final judgment.

Miller has had one trial, a resentencing, two direct appeals in Tennessee courts, state post-conviction review, and a § 2254 petition which has been pursued to the U.S. Supreme Court. As in *McGuire*, Petitioner has litigated his state court conviction through many levels of state and federal courts. Also, the TSC has issued an order, granting the State's motion to schedule an execution date for Miller, setting that date for August 18, 2015, and denying his request for a certificate of commutation, noting that Petitioner presented an insanity defense to the jury during the guilt phase of his trial and that evidence of his deprived and abused childhood, his alcoholism and other factors were presented to the jury during the sentencing phase of his trial. Tennessee State Courts, *see* online at https://www.tn courts. gov/sites/default/files/docs/20131217121600_20131217121613_-_00000010_1.pdf (last visited Oct. 23, 2014 and available in Clerk of Court's File).

For all the foregoing reasons, policy considerations involving the finality of judgments do not favor Petitioner.

E. Diligence

Though *McGuire* does not include an inquiry into a petitioner's diligence in determining whether an extraordinary circumstance has been presented in a Rule 60(b) motion to justify reopening a final judgment, *Gonzalez* speaks to that factor. The petitioner in *Gonzalez* sought relief from a procedural ruling on a statute of limitation issue, but waited "approximately eight

months" after the U.S. Supreme Court issued *Artuz v. Bennett*, 531 U.S. 4 (2000), the decision upon which he based his Rule 60(b) motion. *Gonzalez*, 545 U.S. at 542 (Breyer, J., concurring). The *Gonzalez* Court observed that the petitioner had failed to raise the issue of the procedural ruling in an application for a certificate of appealability in the Circuit Court of Appeals or in a petition for certiorari review, though the particular procedural rule was then being litigated in the Supreme Court in *Artuz*. Had the petitioner sought such review, the Supreme Court noted that "indisputably" it would have surely granted him reconsideration in light of *Artuz*, upon which he later sought his Rule 60(b) motion. *Id.* at 537 n.10. The Court concluded that "[t]he change in the law . . . is all the less extraordinary in petitioner's case, because of his lack of diligence in pursuing review of the statute-of-limitations issue." *Id.* at 537.

Here, the Sixth Circuit decided Miller's appeal in his habeas corpus case on September 13, 2012, *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012), and denied his motion for a rehearing and a rehearing en banc on October 22, 2012. Though Miller filed a petition for certiorari review in the Supreme Court, he did not argue that *Martinez* furnished a basis for revisiting this Court's procedural default ruling. Another Tennessee prisoner, who filed a petition for certiorari less than one month before Miller's post-review motions were denied by the Sixth Circuit, pled the *Martinez* decision as a basis for relief from a procedural default finding and subsequently added the *Trevino* ruling as support, one day after the Supreme Court issued *Trevino*. *See Smith v. Colson*, 133 S. Ct. 2763 (2013).[4] The Supreme Court granted certiorari and, in the same order, vacated the judgment and remanded the case in light of *Trevino*. *Id.*

[4] Previously, the Supreme Court had granted certiorari, vacated the Sixth Circuit Court of Appeals decision, *Smith v. Colson*, 381 F. App'x 547 (6th Cir. 2010), and remanded the case for further consideration in light of *Martinez*. *Smith v. Colson*, 132 S.Ct 1790 (2012). Upon concluding that *Martinez* had no bearing on Smith's case, the Sixth Circuit reinstated its previous judgment on April 11, 2012, and Smith again petitioned the Supreme Court for certiorari.

The Court sees no reason why Miller could not have done the same thing, and the fact that he failed to do so shows a lack of diligence. And if the real question is whether Petitioner diligently pursued Rule 60(b)(6) relief after *Martinez* was decided on March 20, 2012, the diligence factor weighs even more heavily against him since he waited eighteen months, i.e., until September 20, 2013, to file his Rule 60(b)(6) motion, making a *Martinez* argument. *See e.g., Ryan v. Schad*, 133 S. Ct. 2548, 2549-2250 n.2 (2013) (disapproving of a delay of under four months in presenting a *Martinez*-based argument in a motion to vacate judgment).

V. Conclusion

Accordingly, because *Martinez* and *Trevino* do not afford Petitioner any relief, his Rule 60(b) motion is **DENIED**.

IT IS SO ORDERED.

ENTER:

LEON JORDAN
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response Appendix 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