ORIGINAL

No. 18-5597

IN THE SUPREME COURT OF THE UNITED STATES

DAVID E. MILLER,

Petitioner,

v.

TONY MAYS, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Miller's underlying claim of ineffective assistance of counsel is truly extraordinary. The circuit court's equating of Miller's expert declarations with lay testimony presented at trial which could not be weighed by the jury is truly indefensible. If indeed *Buck v. Davis*, 137 S.Ct. 759 (2017) was intended to require the consideration of the merits of a movant's underlying claim of ineffective assistance of counsel when relief is sought based upon the change of law in *Martinez* and *Trevino*, to allow the judgment below to stand renders that requirement meaningless.

Respondent suggests the circuit court's decision, rather than a degradation of this Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), is nothing more than the circuit court's routine application of Rule 60(b)(6)'s requirement that a movant demonstrate extraordinary circumstances in order to obtain relief and, accordingly, unworthy of this Court's attention. Respondent, however, makes almost no attempt to defend the circuit court's decision. Instead, he returns to an argument which is both wholly unsupported by the record and which the circuit court itself rejected. On an application for *certiorari* review, where the necessarily limited record cannot fully inform this Court's decision, candor is the coin of the realm, *see generally U.S. v. Bowen*, 969 F.Supp.2d 546, 578 (2013). Here, Respondent's coin shows no dent.

With barely a mention of the circuit court's decision, *see* BIO at 6-7, 13, Respondent sets out, in a long block quote, the district court's tale of how trial

counsel had diligently sought the assistance of an expert at re-sentencing only to be rebuffed by the state courts. *Id.* at 14. Respondent then adopts the story as its own.

> 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.

Id. at 15

The district court's order was unsupported by the record. Trial counsel never sought the assistance of a psychological expert for Miller's resentencing. In fact, Respondent raised the identical argument before the circuit court at pages 25-26 of his appellate brief and the circuit court explicitly found otherwise. *Miller v. Mays*, 879 F.3d 691, 703 (6th Cir. 2018)("We cannot excuse [trial counsel's] failure to engage any expert in support of Miller's case for mitigation."). Respondent's sleight of hand cannot conceal the extraordinary nature of Miller's underlying ineffective assistance of counsel claim and the extraordinary circumstances supporting his 60(b) request to consider the merits of that claim.

Martinez represented a monumental change in law, overturning a decision in *Coleman v. Thompson*, 501 U.S. 722 (1991) that had stood for decades. Miller filed his 60(b) motion even before the Sixth Circuit, after conducting the state by state analysis required under *Trevino*, determined *Martinez* applied in Tennessee. Three expert declarations, drawing a direct line from Miller's childhood of near-total neglect coupled with repeated physical and sexual trauma to the crime he

committed, were filed in support of his motion. But for counsel's ineffectiveness, they would have been weighed by Miller's jury under the statutory "mental disease or defect" mitigating instruction provided to his jury. The lay testimony presented during sentencing of Miller's history of neglect and pervasive physical and sexual abuse, which the circuit court correctly observed was compelling in its own right, however, was not weighed by Miller's sentencing jury. Miller was sentenced before this Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987) and his jury did not receive a non-statutory mitigating circumstance instruction as is required under *Penry v. Lynaugh*, 492 U.S. 302, 326 (1989). The circuit court's prejudice analysis equating the lay evidence presented at sentencing with the expert reports Miller provided in support of his motion overlooks the fundamental change of law occasioned by *Hitchcock*, a case afforded retroactive application. Moreover, it overlooks the fact that Miller's compelling history of neglect and abuse serves as the basis for of the expert opinions offered in support of his motion. Accordingly, while it could not have been weighed during Miller's sentencing standing on its own, but for trial counsel's inexcusable performance, it could have been weighed under the mental disease or defect" statutory mitigating factor.

Miller's motion is extraordinary because his claim of ineffective assistance of sentencing counsel is extraordinary. Solely because of sentencing counsel's deficient performance, Miller's jury could not consider that Miller was not merely the victim of an abusive stepfather, but also the victim of the pervasive sexual abuse he suffered at the hands of the very person trial counsel called to tell his life history

(his mother, Loretta Miller), and the predators to whom she handed him over. It could not consider how the physical, sexual and emotional trauma he suffered as a child left him with severe and chronic Post Traumatic Stress Disorder. And, it could not consider how each of the bizarre aspects of the murder he committed are consistent with this mental illness. In fact, were it not for this Court's decisions in *Martinez*, *Trevino* and *Buck*, trial counsel's ineffectiveness, combined with the ineffectiveness of his state-provided post-conviction counsel, would have prevented even this Court from considering it now.

If *Buck* stands for the proposition that *Martinez* and *Trevino*, coupled with a truly extraordinary claim of ineffective assistance of counsel support relief under Rule 60(b)(6), it must be stated here.

Miller's petition should be granted.

Respectfully submitted,

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