CAPITAL CASE

No. 18-8214

In the Supreme Court of the United States

CHARLES D. RABY,

PETITIONER,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

RESPONDENT.

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

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

Raby's petition seeks resolution of a circuit split regarding whether relief from judgment under Federal Rule of Civil Procedure 60(b)(6) is available when it is based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), which permit federal habeas courts to consider ineffective assistance of trial counsel claims that are otherwise procedurally barred because of ineffective state habeas representation. Rule 60(b)(6) is commonly a petitioner's only means of raising such claims.[1] The State of Texas denies that the Fifth Circuit applies a categorical rule prohibiting the revival of claims based on *Martinez* and *Trevino* through Rule 60(b)(6). But other federal appeals courts and authorities have acknowledged it, and petitioners have long urged this Court to address it. Raby has separately raised in his petition the Fifth Circuit's continuing practice, despite three rebukes by this Court, of denying habeas COAs by deciding the underlying merits first, regardless of whether they were developed—an issue that the State improperly conflates with Raby's 60(b)(6) claim. This case presents an ideal opportunity to reject both the Fifth Circuit's categorical rule against 60(b)(6) relief under *Martinez* and *Trevino* and its extra-jurisdictional approach to COAs.

I. The COA Process Is Still Being Sidestepped, Despite *Buck*

The Fifth Circuit's sidestepping of the COA process remains an issue despite reprimands by this Court, which has made clear that, "when a court of appeals

[1] *Klapprott v. United States*, 335 U.S. 601, 615 (1949) (noting that Rule 60(b) "vests power in courts . . . to vacate judgments whenever such action is appropriate to accomplish justice").

sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Buck v. Davis,* 137 S. Ct. 759, 773 (2017) (quoting *Miller–El v. Cockrell,* 537 U.S. 322, 336-37 (2003)). In Raby's case, decided after *Buck*, the Fifth Circuit adopted a plainly incorrect analysis demonstrated by its conclusion that, "[b]ecause there are no extraordinary circumstances meriting Rule 60(b)(6) relief, Raby's application for COA is DENIED." Pet. App. F at 6.

II. The Circuit Split Regarding Rule 60(b)(6) Consideration Of *Martinez* And *Trevino* Continues

The Third, Seventh, and Ninth Circuits have correctly held that a Rule 60(b)(6) motion premised on *Martinez* as an intervening decision of law can be granted (Pet. at 18-20); while the Fourth, Fifth, Sixth, and Eleventh Circuits have incorrectly held that a 60(b)(6) motion premised on *Martinez* as an intervening decision of law cannot be granted (Pet. at 15-18).

Although the State calls the split "illusory," the circuit courts acknowledge it. Pet. at 14-15. The Third Circuit discussed the split at length in *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), noting the Fifth Circuit's "categorical rule that a change in decisional law is never an adequate basis for Rule 60(b)(6) relief." *Id.* at 121. It observed further that, in *Adams v. Thaler*, 679 F.3d 312 (5th Cir. 2012), the Fifth Circuit "ended its analysis after determining that *Martinez*'s change in the law was an insufficient basis for 60(b)(6) relief," "did not consider whether the capital nature of the petitioner's case or any other factor might counsel that *Martinez* be accorded

heightened significance in his case or provide a reason or reasons for granting 60(b)(6) relief," and indeed "did not address in any meaningful way the petitioner's claim that he was not offering *Martinez* 'alone' as a basis for relief." *Cox*, 757 F.3d at 122. "The fact that the petitioner's 60(b)(6) motion was predicated chiefly on a post-judgment change in the law was the singular, dispositive issue for the *Adams* court." *Id.* By contrast, the Third Circuit applies a "flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law, that takes into account all the particulars of a movant's case." *Id.* The Third Circuit recently noted its continuing disagreement with the Fifth Circuit, rejecting *Tamayo v. Stephens*, 740 F.3d 986 (5th Cir. 2014), because it "relies on an earlier decision in *Adams v. Thaler* . . . which we explicitly declined to adopt in *Cox*." *Satterfield v. Dist. Attorney Philadelphia*, 872 F.3d 152, 161 n.9 (3d Cir. 2017).

Federal district courts also recognize the split. *See, e.g.*, *Sallie v. Humphrey*, No. 5:11-CV-75, 2016 WL 6897790, at *2 (M.D. Ga. Nov. 22, 2016) (noting that "[t]he circuits are split" as to whether *Martinez* "can [ever] qualify as an extraordinary circumstance" under Rule 60(b)(6)); *Balentine v. Stephens*, No. 2:03-CV-00039, 2016 WL 1322435, at *3 (N.D. Tex. Apr. 1, 2016) (noting that the issue is "the subject of differing opinions and reversals in the appellate courts"); *Moses v. Joyner*, No. 1:03CV910, 2015 WL 631989, at *5 (M.D.N.C. Feb. 13, 2015) (rejecting argument—repeated here by the State (Resp. at 21-22)—that the Fifth Circuit in *Haynes v. Stephens*, 576 F. App'x 364 (5th Cir. 2014), held that *Martinez* could be an equitable consideration supporting 60(b)(6) relief), *aff'd*, 815 F.3d 163 (4th Cir. 2016); *Diggs v.*

Mitchem, No. 03–0104–WS–M, 2014 WL 4202476, at *6 (S.D. Ala. Aug. 22, 2014) (noting that some other circuits apply a multifactor analysis).

Others have urged this Court to address the split. In *Johnson v. Carpenter*, 137 S. Ct. 1201 (2017), the petitioner argued that three circuit courts have recognized that "intervening changes in decisional law (like *Martinez*) may form a basis for Rule 60(b)(6) relief in conjunction with critical, case-specific equities," but that four circuit courts have rejected that principle. Pet. for a Writ of Certiorari at 13 (Mar. 22, 2016) (No. 15-1193). A group of former federal district judges submitted an *amicus* brief in support of that case also arguing that "the Sixth Circuit is joined by the Fourth, Fifth, and Eleventh Circuits in adopting a *per se* rule against granting 60(b)(6) relief for motions based on *Martinez*." Brief for Former Federal District Judges as *Amici Curiae* in Support of Petitioner at 4 (Apr. 22, 2016) (No. 15-1193). The University of Texas's Capital Punishment Center ("UTCPC") also recognizes this "persistent split." Brief for UTCPC as *Amicus Curiae* in Support of Petitioner at 24 (Apr. 3, 2018) (No. 18-8214). The State is alone in asserting that no circuit split exists.

The Fifth Circuit is certainly not applying other circuit courts' holistic, multifactor test when, in this case and others discussed by the State (Resp. at 18-23), it rejects *Martinez* and other factors *seriatim* as independently insufficient to support 60(b)(6) relief. *See, e.g.*, *Beatty v. Davis*, 755 F. App'x 343, 348-50 (5th Cir. 2018) (denying relief based on timeliness and stating in *dicta* that a "combination" of *Martinez* and other equitable factors were insufficient after determining that each

individual factor was not extraordinary in and of itself), *cert. petition docketed*, No. 18-8429 (U.S. Mar. 11, 2019).

The cases cited by the State demonstrate instead that Rule 60(b)(6) motions premised on *Martinez* categorically fail in the Fifth Circuit. Indeed, *Diaz v. Stephens*, 731 F.3d 370 (5th Cir.), *cert. denied*, 570 U.S. 946 (2013), cited by the State as disproving the split, confirms it. In *Diaz*, the Fifth Circuit expressly acknowledged that, in prior cases, it had not cited additional equitable factors "as bearing on the analysis of extraordinary circumstances under Rule 60(b)(6)." *Id.* at 376; *see also Cox*, 757 F.3d at 122. The Fifth Circuit considered whether equitable considerations beyond just *Martinez* supported Diaz's 60(b)(6) motion, concluding that they did not, but only in *dicta.* 731 F.3d at 375-78 & n.1 (assuming "*arguendo*" that such factors "may have some application in the Rule 60(b)(6) context," and including a footnote arguing that they do not).

Similarly, in *Haynes v. Davis*, 733 F. App'x 766, 767 (5th Cir. 2018), *cert. denied,* 139 S. Ct. 917 (2019), the Fifth Circuit noted only that *Martinez* did not on its own demonstrate extraordinary circumstances and then rejected other equitable factors as independently insufficient. It did so over a dissenting opinion criticizing the failure to "actually engage with the specifics of Haynes's ineffective-assistance claim," even though *Martinez* and *Trevino* were a "significant change in habeas jurisprudence" important for "review of Haynes's particular circumstances." *Id.* at 772-73. Likewise, here, the Fifth Circuit noted only that *Martinez* does not demonstrate extraordinary circumstances before summarily rejecting other equitable

factors as independently insufficient. *Raby v. Davis*, 907 F.3d 880, 884-85 (5th Cir. 2018). And in *Balentine v. Stephens*, 553 F. App'x 424 (5th Cir. 2014), the Fifth Circuit merely remanded to the district court, which denied the 60(b)(6) motion based on a magistrate judge's conclusion that *Martinez* did not apply. *Balentine v. Davis*, No. 2:03-CV-39-J-BB, 2017 WL 9470540, at *5-16 (N.D. Tex. Sept. 29, 2017), *report and recommendation adopted*, 2018 WL 2298987 (N.D. Tex. May 21, 2018), *appeal docketed*, No. 18-70035) (5th Cir. Dec. 28, 2018)).

The weakness of the State's position that the Fifth Circuit is no longer on the wrong side of the circuit split is further illustrated by its reliance on the evidentiary hearings in *Haynes* and *Balentine* on the movants' *Martinez* claims. The State makes too much of those hearings given: (a) *Haynes* and *Balentine* are the only two Fifth Circuit Rule 60(b)(6) cases listed in Appendix G to Raby's petition in which such a hearing has been granted; (b) the movants were given an evidentiary hearing only after appealing to this Court (*see Haynes v. Thaler*, 569 U.S. 1015 (2013) (vacating and remanding for further consideration in light of *Trevino*), and *Balentine v. Thaler*, 569 U.S. 1014 (2013) (same))[2]; and (c) both movants' motions were still summarily denied.

Buck v. Davis, 137 S. Ct. 759 (2017), in which this Court reversed the Fifth Circuit's COA denial and allowed the claim outright, also evidences the categorical nature of the Fifth Circuit's approach. Buck's trial counsel hired an expert

[2] As noted above, the district court then ruled *again* for the State, and that case is again before the Fifth Circuit.

psychologist who opined that Buck was statistically more likely to pose a future danger because he is black. If that is not extraordinary in conjunction with a new constitutional claim, it is unclear what would be. Indeed, the court's subsequent decisions suggest that *only* racial discrimination can establish extraordinary circumstances. *Raby*, 907 F.3d at 885 ("Raby neither alleges racial discrimination nor demonstrates how his claims 'give rise to the sort of pernicious injury that affects communities at large.'").

The State's analysis of other circuit courts' precedent also misleadingly characterizes any mention of other factors as proof that those factors mattered. For example, in *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014), the Eleventh Circuit ruled that *Martinez* did not apply, and did not address other equitable factors except to deny any extraordinariness.[3] The Sixth Circuit, as shown in *Zagorski v. Mays*, 907 F.3d 901 (6th Cir. 2018), and *Miller v. Mays*, 879 F.3d 691 (6th Cir. 2018), continues to deny claims based on *Martinez* under *Abdur'Rahman v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015) ("[E]ven if *Martinez* did apply, that case was a change in decisional law and does not constitute an extraordinary circumstance . . ."). In the State's cited cases, not one petitioner won review of a *Martinez* claim in an evidentiary hearing except after appealing to this Court. Most of the cases have an analysis of *Martinez*

[3] The State cites other Eleventh Circuit decisions repeating that the court is barred from addressing *Martinez* claims. *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) ("We are bound by our Circuit precedent."); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1171 (11th Cir. 2017) ("*Martinez* alone cannot form the basis for relief under Rule 60(b)(6)."), *cert. denied sub nom. Lambrix v. Jones*, 138 S. Ct. 217 (2017); *Griffin v. Sec'y, Fla. Dep't of Corr.*, 787 F.3d 1086, 1087 (11th Cir. 2015) ("Insofar as the Rule 60(b)(6) part of the application is concerned, it is squarely foreclosed by our decision in *Arthur*.").

and other equitable factors that amounts to no more than a few sentences. The cases cited by the State establish the predetermined outcome of every Rule 60(b)(6) motion based on *Martinez*. This Court has stated that extraordinary circumstances will "rarely occur in the habeas context." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). But, as noted by the Third and Seventh Circuits, "rarely" does not mean "never." *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015); *Cox*, 757 F.3d at 122.

III. Raby's Case Is An Ideal Vehicle To Resolve The Circuit Split

A. Trial Counsel's Performance In Presenting Quijano As An Expert Witness On Future Dangerousness Supports Rule 60(b) Relief

In attempting to rebut Raby's argument that his case is the ideal vehicle to resolve this circuit split, the State ignores this Court's exhortation to the Fifth Circuit to "limit its examination at the COA stage to a threshold inquiry into the underlying merit of the claims, and *ask only if the District Court's decision was debatable*." *Buck*, 137 S. Ct. at 774 (emphasis added; brackets and quotation marks omitted) (quoting *Miller–El*, 537 U.S. at 327, 348). To do otherwise, as the Fifth Circuit did below, compounding its error by categorically denying relief under *Martinez*, impermissibly "inverts the statutory order of operations" and necessarily requires too much at the COA stage. *Id.*

Examining the debatability of Raby's IATC claim would change the outcome. Raby's counsel, like the defense counsel in *Buck*, called Dr. Walter Quijano as an expert on future dangerousness. Dr. Quijano then conceded future dangerousness by diagnosing Raby (without foundation) as a sociopath and psychopath and testifying that only a death sentence could keep society safe from him. Dr. Quijano weighed

irrelevant factors, failed to assess the extent to which certain factors might decrease future dangerousness, and made numerous unfounded assumptions about the actual risks. The effect of Dr. Quijano's testimony was to *exaggerate* the risk that Raby would commit criminal acts of violence if sentenced to life in prison. No strategy is evident here; trial counsel was so unprepared that they did not even know what opinions Dr. Quijano held. Forensic psychologist Mark Cunningham concluded that Raby was deprived of "competent and informed expert testimony on risk assessment" at the sentencing phase, resulting in "serious potential for grave error in the jury's sentencing determination." Aff. of Mark D. Cunningham at 55 (¶ 139), *Raby v. Davis*, 4:02-cv-00349, ECF No. 31-24 (S.D. Tex. Aug. 4, 2017).[4]

The State's prejudice argument cannot rebut debatability. A minimally competent expert on future dangerousness would have told the jury that the best predictive factor of criminal violence in prison, favoring Raby, is any prior pattern of behavior in incarceration. *Id*. at 4-7.

B. Trial Counsel's Performance In Presenting Mitigation Evidence Supports Rule 60(b) Relief

In discussing Raby's mitigation IATC claims and prejudice stemming from deficient performance, the State continues to urge a merits analysis, while no jurisdiction exists for such analysis at the COA stage, and even though Raby had no opportunity to develop evidence in the district court. The State does not deny that trial counsel hired no investigator, completed no medical/educational/social/family

[4] Expert testimony on future dangerousness is critical to curb the average juror's tendency to overestimate that risk. *Id*. at 55-56.

history, and conducted no out-of-court investigation. Pet. at 31; Resp. at 37. While there were "more than twenty" witnesses (Resp. at 9-13; 37-39), they actually consisted of Dr. Quijano himself, no mitigation expert, only seven family members (three of whom were themselves chief sources of violence and neglect in Raby's life), a girlfriend, two caseworkers, a woman Raby dated six times, and fully nine witnesses to a jail incident. *Raby*, 4:02-cv-00349, ECF Nos. 31-21, 22, 23. The witnesses raised few of the 21 "adverse developmental experiences" identified by Raby's mitigation expert post-conviction (Aff. of Mark D. Cunningham at 42, *id.*, ECF No. 31-25 (S.D. Tex. Aug. 4, 2017)), omitting important factors that neither counsel nor the jury learned about, such as sexually traumatic exposure. Only Raby's mother was interviewed before testifying, and she had spent 20 years in a haze of depression, drunkenness, institutionalization, and domestic victimization.[5]

Counsel fell grievously short of guidelines requiring that they "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor," including creating a full social history. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added), cited in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Many uncontacted witnesses whose affidavits were presented to the district court in 2002 could have described Raby's childhood and good

[5] Two other witnesses attested to very brief interviews, such as in the courthouse halls just before testifying. *Id.* ECF No. 31-28, 30.

acts, and exposed serious falsehoods in state witnesses' testimony.[6] Both mitigation and prejudice support debatability.

C. The Timing of *Martinez* Does Not Undermine Raby's Diligence In Seeking Competent Habeas Counsel And Redress For Its Absence

Arguing that Raby has not pursued his sentencing IATC claims "diligently," the State notes that Raby previously asserted the same claims and many of the same facts. Resp. at 39. But that law has since changed. It is no criticism of Raby that he asked the district court in 2017 to consider for the first time facts that it refused to consider in 2002 because of procedural default barriers that have now dissipated. The State does not argue the Rule 60(b) motion was untimely; it is aware that the motion was necessarily delayed by Raby's litigation of DNA results and related state claims at the time *Trevino* was issued in 2013,[7] and his subsequent state habeas petition (*Id.* ECF No. 31-77).

The State is silent about the earliest years of Raby's pleas for competent habeas counsel, including his repeated pleas to trial counsel to raise non-record claims, his rejected attempt to have another lawyer file an amended brief, his attempt to drop all appeals in order to win a hearing with a judge on the issue, and his 2002

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[6] *Id.* ECF Nos. 31-33 (Butler), 34 (Hicks), 36 (Richards), 37 (Robinson), 38 (Sowell), 39 (Taylor), 40 (Langenbagh), 41 (Hamner), 42 (Jordan); *Raby v. Cockrell*, 4:02-cv-00349 (S.D. Tex. May 3, 2002), Ex. 13 (Dunbardo).

[7] *Id.* ECF No. 31-17 (*Raby v. State*, No. AP76970, Appellant's Br. on Appeal (Tex. Crim. App. Apr. 22, 2013)). The need to complete the DNA proceedings and exhaust state claims was discussed below. Petitioner's Mot. for Relief from Judgment at 20-22, *Raby v. Davis*, 907 F.3d 880 (5th Cir. 2018). After the state appeal was concluded in 2015, Raby filed in 2016 without State objection a 272-page state habeas petition including both sets of claims.

claim for ineffective assistance of state habeas counsel, which he pursued with the district court before it was cognizable. Pet. at 8-10. These efforts demonstrate extraordinary diligence in the face of adversity, especially given the disastrous state of habeas representation in Texas at the time. Pet. at 10; Brief for UTCPC as *Amicus Curiae* in Support of Petitioner at 4-20.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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