CAPITAL CASE

No. _____

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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PETITION FOR A WRIT OF CERTIORARI

KEVIN D. MOHR
TRACEY M. ROBERTSON
KING & SPALDING LLP
1100 Louisiana, Suite 4000
Houston, TX 77002
Telephone: (713) 751-3200
kmohr@kslaw.com
trobertson@kslaw.com

SARAH M. FRAZIER
Counsel of Record
BERG & ANDROPHY
3704 Travis Street
Houston, TX 77002
Telephone: (713) 529-5622
SFrazier@bafirm.com

Counsel for Petitioner Charles D. Raby

February 28, 2019

CAPITAL CASE

QUESTIONS PRESENTED

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court held that a federal habeas petitioner who has procedurally defaulted a claim by failing to raise it in state court may not excuse that default by pointing to negligence of postconviction counsel. In *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court carved out an important exception to that rule, allowing petitioners to raise an ineffective-assistance-of-trial-counsel (IATC) claim for the first time in federal court if that claim was defaulted through ineffective assistance of postconviction counsel in state court.

After *Martinez* and *Trevino* were decided, some petitioners—including some on death row—filed motions under Federal Rule of Civil Procedure 60(b)(6), asking the courts to reopen judgments premised on the new "cause" exception to default. There is an acknowledged disagreement in the circuits regarding the rule for deciding those motions. Four circuits have held that such motions must be rejected, adopting a *per se* rule against granting Rule 60(b)(6) motions premised on *Martinez*. By contrast, three circuits hold that Rule 60(b)(6) motions premised on *Martinez* may be granted in appropriate circumstances.

The questions presented are:

1. Must a court categorically deny a Rule 60(b)(6) motion premised on the change in decisional law produced by *Martinez*?

2. If the Court declines to grant plenary review, should the Court summarily reverse the Fifth Circuit's denial of a Certificate of Appealability to allow for full briefing and argument on the proper treatment of Raby's Rule 60(b)(6) motion premised on *Martinez*?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the petition. Petitioner is Charles D. Raby. Respondent is Lorie Davis, Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

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PETITION FOR A WRIT OF CERTIORARI

Charles Raby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished November 27, 2002 Memorandum and Order of the United States District Court for the Southern District of Texas denying Raby's Petition for Writ of Habeas Corpus (*Raby v. Cockrell*, 4:02-cv-0349, Dkt. 20 (S.D. Tex. Nov. 27, 2002)) is reproduced at Appendix A ("Pet. App. A"), and the same court's unpublished denial of reconsideration (*Raby v. Cockrell*, 4:02-cv-0349, Dkt. 23 (S.D. Tex. Dec. 30, 2002)) is reproduced at Appendix B. The October 15, 2003 opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of Raby's Petition for Writ of Habeas Corpus (*Raby v. Dretke*, 78 F. App'x 324 (5th Cir. 2003)) is reproduced at Appendix C, and this Court's 2004 denial of certiorari (*Raby v. Dretke*, 542 U.S. 905 (2004)) is reproduced at Appendix D. The unpublished April 6, 2018 Order of the United States District Court for the Southern District of Texas denying Raby's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) (*Raby v. Davis*, H-02-349, Dkt. 44 (S.D. Tex. Apr. 6, 2018)) is reproduced in Appendix E. The October 31, 2018 opinion of the United States Court of Appeals for the Fifth Circuit denying a COA (*Raby v. Davis*, 907 F.3d 880 (5th Cir. 2018)) is reproduced in Appendix F.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on October 31, 2018. Pet. App. F. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments.

The Sixth Amendment provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

The Eighth Amendment provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

This case involves the application of 28 U.S.C. § 2253(c), which states:

> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

This case also involves the application of Federal Rule of Civil Procedure 60(b), which states in relevant part:

> "(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 the following reasons:
>
> . . .
>
> (6) any other reason that justifies relief."

INTRODUCTION

Under *Coleman v. Thompson*, 501 U.S. 722 (1991), ineffective assistance on the part of a prisoner's postconviction attorney could never qualify as cause to excuse a procedural default. For example, if a capital petitioner's counsel performed no investigation whatsoever at the sentencing stage, and his state habeas counsel failed to raise an ineffective assistance of trial counsel (IATC) claim in state court, that claim could never be raised in federal court, no matter how meritorious.

Recognizing such situations could suffice to provide cause to excuse a procedural default, this Court carved out an exception to *Coleman* in *Martinez v. Ryan*, 566 U.S. 1 (2012). In *Martinez*, this Court held that having no counsel or ineffective counsel at the initial postconviction proceeding could excuse procedural default of substantial IATC claims. In acknowledging that "the right to the effective assistance of counsel at trial is a bedrock principle in our justice system," the Court recognized that Martinez and similarly situated petitioners would otherwise never receive the opportunity to have their IATC claims decided on the merits. *Martinez*, 566 U.S. at 12. *Martinez* initially covered those jurisdictions that require IATC claims to be raised in initial collateral review proceedings; *Trevino v. Thaler* later

made clear that the holding in *Martinez* extends to states such as Texas that make it "virtually impossible" for IATC claims to be presented on direct review. 569 U.S. 413, 417 (2013).

By the time *Martinez* and *Trevino* were decided, many capital petitioners found themselves in Charles Raby's position—with serious IATC claims that had never been heard because they were defaulted by absent or ineffective state habeas counsel and thus foreclosed by *Coleman*. Like Raby, these capital petitioners filed motions under Federal Rule of Civil Procedure 60(b)(6) seeking to reopen their habeas judgments citing *Martinez* and other equitable considerations.

This litigation led to an acknowledged conflict among the federal courts of appeals as to whether petitioners can ever win a Rule 60(b)(6) motion premised on *Martinez*'s change in law, or whether every such petition must necessarily be denied. Four circuits (the Fourth, Fifth, Sixth, and Eleventh) have effectively held that no petitioner like Raby can ever prevail; three circuits (the Third, Seventh, and Ninth) have correctly held that Rule 60(b)(6) motions premised on *Martinez*—like every other Rule 60(b)(6) motion—may *sometimes* be granted, when the equities of extraordinary cases so require.

In *Buck v. Davis*, this Court held that the Fifth Circuit erred in denying Buck the COA that was required to pursue an appeal of the denial of his Rule 60(b)(6) motion, which he based in part on *Martinez* and *Trevino*. 137 S. Ct. 759, 780 (2017). In so holding, the Court effectively rejected the Fifth Circuit and District Court

rulings on the COA that those cases were mere changes in decisional law that do not qualify as extraordinary circumstances under Rule 60(b)(6):

> Buck cannot obtain relief unless he is entitled to the benefit of this rule—that is, 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.

See id. (citations omitted). The rejection was central to the outcome in *Buck*.

This Court should take this opportunity to clarify that Rule 60(b)(6) empowers courts to "vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949). Because *Martinez*'s holding was grounded in "bedrock principle[s]" of justice (*Martinez*, 566 U.S. at 12), the change in law it produced should unquestionably be an avenue for petitioners to at least seek Rule 60(b)(6) relief—and for courts to grant it if—and only if—the case-specific equities counsel in favor of that result. Indeed, *Martinez* held that someone twice denied effective assistance of counsel must be able to excuse a procedural default "to ensure that proper consideration was given to a substantial claim." *Id.* at 14. The Fifth Circuit's categorical denial of Rule 60(b)(6) motions that are based in part on *Martinez* deprives petitioners of that opportunity.

This case provides an ideal vehicle to address the question of whether a Rule 60(b)(6) motion premised on *Martinez* may ever be granted because (1) the Fifth Circuit's denial of Raby's request for a COA presents a clean record on which to address the conflict among the courts of appeal; (2) Raby's IATC claim has merit, given it is based on his trial counsel's decision to use the same future-dangerousness expert who this Court deemed to have given incompetent testimony in *Buck* and the

failure to adequately investigate basic, but crucial, mitigation evidence; and (3) Raby has never been permitted to develop the merits of his IATC claim despite having diligently pursued it since 2002.

STATEMENT OF THE CASE

This case presents a specific and recurring question upon which the courts of appeals are in open conflict: whether a Rule 60(b)(6) motion premised on *Martinez* as an intervening decision of law must be categorically denied or may sometimes be granted on the equities presented.

1. Raby's Trial

On October 15, 1992, Edna Franklin was found dead in her home by one of her two adult grandsons, both of whom lived with her. Pet. App. A at 2. The assailant had stabbed Mrs. Franklin with a knife that was never found. *Raby v. Davis*, No. 4:02-cv-00349 (S.D. Tex. Nov. 13, 2017), ECF No. 37-4, p. 149 (Trial Tr.). Raby was a sometime friend of Mrs. Franklin's two grandsons and was seen in the same neighborhood on the day of the crime, but no physical evidence tied Raby to the crime. Pet. App. A at 3. Police obtained a custodial statement under circumstances that included holding Raby's girlfriend and her infant son at the station.[1] A Harris County,

[1] Raby testified at a hearing on a motion to suppress the custodial statement that, upon his arrest, he feared his girlfriend would be charged in relation to his short-lived avoidance of his warrant, and further that he was denied access to her until he signed the statement. *Raby v. Davis*, No. 4:02-cv-00349 (S.D. Tex. Nov. 13, 2017), ECF No. 37-4, p. 97 (Trial Tr.). Along with that evidence of coercion, Raby's confession has all the hallmarks of a "persuaded false confession," which occurs when police interrogation tactics cause an innocent suspect to doubt his memory, persuading him that he likely committed the crime, despite having no memory of committing it, especially where substance abuse gives rise to less confidence in memory. *See* Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*. J. Am. Acad. Psychiatry Law 37:332–43 (2009), *available at*: http://jaapl.org/content/jaapl/37/3/332.full.pdf.

Texas jury convicted Raby of capital murder and sentenced him to death on June 17, 1994.

Raby's sentencing (like the rest of his trial), was marred by trial counsel's errors, including the failure to conduct an adequate investigation and a fundamental misunderstanding of the law and facts. On the issue of future dangerousness, Raby's trial counsel presented the testimony of Dr. Walter Quijano, a psychologist whose views on "future dangerousness"[2] had helped the State persuade jurors to impose the death penalty in numerous capital trials. *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-21, p. 24 (Trial Tr.). Dr. Quijano was engaged one week before he testified and produced an expert report only after he had given his testimony. *Id*. ECF No. 31-21, p. 25. *Testifying for the defense*, Dr. Quijano opined that only death could keep society safe from Raby and improperly labeled Raby as a psychopath, a sociopath, and antisocial. *Id*. ECF No. 31-21, pp. 37–39, 41.

Trial counsel either used inexcusably bad judgment in calling Dr. Quijano as an expert witness despite knowing of his prejudicial views or failed to learn his opinions before his testimony. Either amounted to constitutionally deficient performance, and Raby was unquestionably prejudiced. The prosecution seized on the testimony of Dr. Quijano and exaggerated the risk of Raby's future dangerousness in closing arguments. This Court has since discredited Dr. Quijano's opinions and methods in *Buck*, 137 S. Ct. at 775–78.

[2] "Future dangerousness" is one of the "special issues" that a Texas jury must find to exist—unanimously and beyond a reasonable doubt—before a defendant may be sentenced to death. *See* TEX. CODE CRIM. PROC. art. 37.071 § 2 (West 2013).

Trial counsel also failed to perform a thorough medical, educational, family, and social history for Raby, despite having a clear obligation to do so. *Raby v. Cockrell*, 4:02-cv-00349 (S.D. Tex. Jan. 30, 2002), ECF No. 4, pp. 40–70 (Pet. for Writ of Habeas Corpus); *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-27, pp. 2–8 (trial counsel timesheets); 31-28–31-42 (affidavits of Raby's family and friends)). The jury in the punishment phase thus heard few of the available witnesses who saw firsthand the profound abuse and neglect suffered by Raby during his childhood. The failure to adequately investigate basic, but crucial, mitigation evidence in a death penalty case cannot be waved off as strategy.

2. First State Habeas Application

Raby needed his initial state habeas petition to challenge his trial counsel's constitutionally deficient performance, but counsel appointed to represent Raby in his initial state habeas proceedings did no investigation and filed an application containing no ineffective assistance or other extra-record claims. *Raby v. Cockrell*, 4:02-cv-00349 (S.D. Tex. July 10, 2002), ECF No. 16, pp. 6–24 (Resp. to Mot. Summ. J.); *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31, pp. 63–69 (Rule 60(b) Mot.); 31-54, pp. 2–12 (billing records). The thirty-one claims for relief in Raby's July 16, 1998 initial state habeas application could be reduced to five basic issues, none of which was directly cognizable in state habeas proceedings because they should have been raised on direct appeal or were not yet ripe. In the absence of a cognizable, extra-record claim, the state district court predictably entered findings and conclusions recommending rejection of Raby's initial state habeas application.

Ex parte Raby, No. 9407130-A (248th Dist. Ct., Harris County, Tex., Nov. 14, 2000). The Texas Court of Criminal Appeals subsequently adopted the trial court's recommendation. *Ex parte Raby*, No. 48131-01 (Tex. Crim. App. Jan. 31, 2001).

Raby attempted in vain to obtain competent representation in his initial state habeas proceedings. First, Raby directed his counsel toward numerous issues regarding the ineffective assistance of counsel claims. *Raby v. Davis,* 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-56 (Feb. 20, 1998 Letter); *Raby v. Cockrell*, 4:02-cv-00349 (S.D. Tex. July 10, 2002), ECF No. 16, pp. 8–9, 13–15 (Resp. Mot. Summ. J.); *Raby v. Davis,* 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-62 (Nov. 23, 1999 Letter). When these efforts failed, Raby notified the state district court and the district attorney of the failure of his initial state habeas counsel to respond to Raby's numerous pleas to investigate specific potential claims related to Raby's trial and sentencing. Raby requested that the district court appoint new counsel with adequate time to investigate those claims and stressed that, if no action was taken, his initial state habeas counsel's failures would prevent him from obtaining any review of his claims in federal court. *Raby v. Davis,* 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-64 (Apr. 5, 2000 Letter); *Raby v. Davis,* 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-65 (Aug. 18, 2000 Letter); *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-66 (Sept. 13, 2000 Letter). When those efforts failed, Raby attempted to drop his appeal and be assigned an execution date for the sole purpose of obtaining an appearance in court to voice his objections to counsel's representation. *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-

67–31-70) (Letters from Raby dated Oct. 22, 2000; Nov. 4, 2000; Dec. 15, 2000; Dec. 20, 2000).

Initial state habeas counsel's representation of Raby was consistent with the generally ineffective state habeas representation of Texas defendants during that period. Widely acknowledged problems included: assigned lawyers "farming out" their cases to other lawyers; cases being assigned to lawyers with disciplinary problems; assigned lawyers admitting to being unqualified, inexperienced or overburdened; assigned lawyers filing perfunctory petitions raising no cognizable issues; assigned lawyers failing to investigate and present evidence outside the trial record; assigned lawyers being accountable to no one for their performance; poor compensation for assigned lawyers; and lack of judicial oversight. *The Adequacy of Representation in Capital Cases: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 110-11 (2008) (quoting Task Force Report, State Bar of Texas's Task Force on Habeas Counsel Training & Qualifications at 5–6 (Apr. 27, 2007). Raby was emblematic of an era in which exceptionally poor habeas representation was commonplace. *See e.g. Ex parte Medina*, 361 S.W.3d 633, 647 (Tex. Crim. App. 2011) (Keasler and Hervey, JJ., dissenting) ("Over the past thirteen years that I have been on this Court, I have reviewed numerous 11.071 applications. Some of them have been just as poorly pled as this application. Yet, in those cases, we denied relief, despite the appalling deficiencies . . . . The applicants in those cases were victims of deficient and inadequate lawyering that was a result of ignorance . . . .").

3. Federal Habeas Application

In his initial federal habeas petition, Raby's current counsel presented—for the first time—claims of ineffective assistance based on the handling of Dr. Quijano's testimony and the failure to investigate and present the jury with critical mitigation evidence.

These claims were rejected by the federal district court. *Raby v. Cockrell*, No. H-02-0349 (S.D. Tx. Nov. 27, 2002). Citing *Coleman*, the district court declined to reach the merits of the claims, finding that Raby was procedurally defaulted from raising his punishment-phase IATC claims for the first time in federal court, even if those claims had only been defaulted through ineffective assistance of state post-conviction counsel. This ruling was affirmed by the Fifth Circuit.[3] *Raby v. Dretke*, 78 F. App'x 324 (5th Cir. 2003). In *Buck*, this Court specifically faulted the Fifth Circuit for engaging in the same sort of impermissible merits determination at the COA stage:

> But the question for the Fifth Circuit was not whether Buck had "shown extraordinary circumstances" . . . . Those are ultimate merits determinations the panel should not have reached. We reiterate what we have said before: A "court of appeals should 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 (citing *Miller–El v. Cockrell*, 537 U.S. 322, 336–37 (2003)).

[3] The Fifth Circuit purported to make an alternative ruling on the merits of the IATC claim. *Id.* This was improper because the district court never reached the merits and the court was without jurisdiction to reach the merits in a COA proceeding.

4. Further Proceedings

Raby moved in state court on November 19, 2002 for post-conviction DNA testing. Almost three years later, the Texas Court of Criminal Appeals granted the request for testing as to several different items. Upon testing the victim's left-hand fingernails, a partial DNA profile incontrovertibly excluded Raby as the source of the scraped cells. The state district court also heard evidence on the state's concealment at trial that it had found foreign blood under the fingernails of the other hand. On December 19, 2012, the state district court held that the DNA results were not probative of innocence. *State v. Raby*, No. 9407130, Court Amended Findings at 1, 13 (248th Dist. Ct., Harris Cty., Tex., Jan. 11, 2013). This ruling was affirmed by the Texas Court of Criminal Appeals. *Raby v. State*, No. AP–76,970, 2015 WL 1874540, at *8–9 (Tex. Crim. App. Apr. 22, 2015) (not designated for publication).

On June 16, 2016, Raby filed a second state habeas application that the Texas Court of Criminal Appeals rejected without analysis on May 17, 2017.[4] *Ex parte Raby*, No. WR-48,131-02 (Tex. Crim. App. May 17, 2017).

Martinez and *Trevino* issued during the DNA proceedings in state court. After the conclusion of the state proceedings,[5] Raby filed a Rule 60(b)(6) motion requesting that the federal district court examine his procedurally defaulted punishment-phase IATC claims in the wake of *Martinez*, *Trevino*, and *Buck*. The district court

[4] These claims are currently the basis of a motion for an order authorizing the filing and consideration of a successive federal habeas petition in the Fifth Circuit pursuant to 28 U.S.C. § 2254.

[5] Raby could not challenge his conviction or sentence in federal court while his state litigation was pending because of Texas's "two-forum rule," a state court abstention doctrine which precludes state habeas review when a petitioner is challenging the same judgment in federal court. *See Ex parte Soffar*, 143 S.W.3d 804, 805–06 (Tex. Crim. App. 2004).

summarily rejected the motion pursuant to *Adams v. Thaler,* 679 F.3d 312 (5th Cir. 2012), in which the Fifth Circuit held that the change in law brought about by *Martinez* could not constitute an "extraordinary circumstance." The district court further held that *Buck* was inapplicable because the extraordinary circumstance there was "the insertion of race as a factor in the sentencing decision." *Raby v. Davis*, 4:02-cv-00349, Dkt. 44 (Apr. 5, 2018).

The Fifth Circuit denied a COA, finding:

> A "change in decisional law after entry of judgment does not constitute [extraordinary] circumstances and is not alone grounds for relief from a final judgment." Hence, the district court correctly determined that the change in decisional law effected by *Martinez* and *Trevino*, without more, did not amount to an extraordinary circumstance.

Raby v. Davis, 907 F.3d 880, 884 (5th Cir. 2018) (citing *Adams*, 679 F.3d at 319), Pet. App. F. It further agreed with the district court that *Buck* only applies where race is a factor in sentencing. *Id*. at 884–85. The Fifth Circuit reiterated its holding in 2003 that Raby's IATC claims lack merit.[6] *Id*.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit stands with the Fourth, Sixth, and Eleventh Circuits in holding that Rule 60(b)(6) motions premised on *Martinez*'s intervening change in law must be denied. This categorical rule is incorrect and runs counter to the approach adopted by the Third, Seventh, and Ninth Circuits, which hold that Rule 60(b)(6) petitioners relying on *Martinez* must at least be afforded the *possibility* of relief.

[6] As previously identified, this determination was improper. *See supra* note 3.

Given the importance of this issue both to capital habeas petitioners and the states, the Court should use this case to resolve the persistent division.

I. There Is An Acknowledged, Entrenched, And Untenable Circuit Split On The Precise Question Presented

Rule 60(b) allows courts to grant relief from a final judgment for five enumerated reasons (*see* Fed. R. Civ. P. 60(b)(1)–(5)), as well as for "any other reason that justifies relief" (*id.* 60(b)(6)). The latter form of relief, as this Court clarified in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), is reserved for "extraordinary circumstances." *Id.* at 536. At the same time, this Court has also made clear that Rule 60(b)(6) must be at least *available* in every case to "accomplish justice" where such extraordinary case-specific circumstances are present. *Klapprott*, 335 U.S. at 615. Accordingly, important, intervening changes in decisional law (like *Martinez*) should form a basis for Rule 60(b)(6) relief in conjunction with critical, case-specific equities. The circuit conflict here results from the fact that three circuits have recognized this fundamental tenet of Rule 60 jurisprudence, and four have rejected it—holding, incorrectly, that no Rule 60(b)(6) motion premised on *Martinez* can ever be granted.

This conflict is widely acknowledged. The Seventh Circuit, for example, has stated that it "agree[s] with the Third Circuit's approach in *Cox*, in which it rejected the absolute position that the Fifth Circuit's *Adams* decision may have reflected, to the effect that intervening changes in the law *never* can support relief under Rule 60(b)(6)." *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015) (emphasis in original). The Eleventh Circuit has likewise recognized that "[t]he Third Circuit has

disagreed" with its rule in these cases, while the Third Circuit has expressly said that the Fifth Circuit's rule "does not square with [its] approach." *Hamilton v. Sec'y*, 793 F.3d 1261, 1266 (11th Cir. 2015); *Cox v. Horn*, 757 F.3d 113, 121–22 (3d Cir. 2014). The conflict is clear and well-established.

A. The Circuits Are Divided

Four circuits have incorrectly held that a Rule 60(b)(6) motion premised on *Martinez* as an intervening decision of law must be automatically denied. These courts hold that, under *Gonzalez*, *Martinez*'s change in decisional law is insufficient to reopen a judgment even if other equitable considerations relevant to particular cases strongly recommend relief. Thus, in these circuits, Rule 60(b)(6) petitioners relying on *Martinez* can simply never prevail.

The Fifth Circuit was the first to adopt this mistaken categorical approach. In *Adams v. Thaler*, 679 F.3d 312 (5th Cir. 2012), a death-row petitioner filed a Rule 60(b)(6) motion, arguing that *Martinez*'s change, combined with the capital nature of his case and the merits of his underlying IATC claims, constituted "extraordinary circumstances" justifying reopening of an adverse judgment. *Id.* at 319. The Fifth Circuit held that the district court abused its discretion in granting even a stay of execution pending the resolution of the motion, stating that "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances." *Id.*

Relying on *Gonzalez*, the Fifth Circuit explained that this *per se* rule applies with full force in the habeas context and therefore to *Martinez*'s jurisprudential shift: "*Martinez*, which creates a narrow exception to *Coleman*'s holding regarding cause to excuse procedural default, does not constitute an 'extraordinary circumstance' under

Supreme Court and our precedent to warrant Rule 60(b)(6) relief." *Id.* at 320 (citing *Gonzalez*, 545 U.S. at 536). The Fifth Circuit thus refused to balance the equities, reasoning that, because the petitioner premised his motion on *Martinez*'s change in law, it was "without merit" regardless of any other equitable considerations. *Id.*

Since *Adams*, the Fifth Circuit has repeatedly reaffirmed its categorical approach to Rule 60(b)(6) motions premised on *Martinez*. *See, e.g.*, *Raby*, 907 F.3d at 884 ("the district court correctly determined that the change in decisional law effected by *Martinez* and *Trevino*, without more, did not amount to an extraordinary circumstance"); *In re Paredes*, 587 F. App'x 805, 825 (5th Cir. 2014); *Hall v. Stephens*, 579 F. App'x 282, 283 (5th Cir. 2014). As in *Adams* and subsequent cases, in Raby's case the Fifth Circuit did not consider any of the petitioner's individual equities. Based on this categorical bar, the Fifth Circuit denied a COA and denied Raby the opportunity to brief these questions.

The Eleventh Circuit has also adopted this erroneous categorical approach. In *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014), it interpreted *Gonzalez* to hold that "a change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)." *Id.* at 631 (citing *Gonzalez*, 545 U.S. at 535–38). As a result, it found that *Martinez* categorically could not form the basis for Rule 60(b)(6) relief. *Id.* It thus refused to account for "other factors beyond [the] change in decisional law," such as the petitioner's death sentence and the fact that no court had considered his IATC claims on the merits. *Id.* at 633.

The Eleventh Circuit has followed *Arthur* since, and—like the Fifth Circuit—now denies a COA to any petitioner whose Rule 60(b)(6) motion is in any way rooted in *Martinez*. For example, in *Hamilton v. Sec'y*, 793 F.3d 1261 (11th Cir. 2015), it denied a COA to a death-row petitioner who filed a Rule 60(b)(6) motion premised on *Martinez*, explaining that "*Arthur* is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision" that the petitioner's motion must be categorically denied. *Id.* at 1266; *see also Lambrix v. Sec'y*, 851 F.3d 1158, 1171 (11th Cir. 2017) and *Griffin v. Sec'y*, 787 F.3d 1086, 1087 (11th Cir. 2015) (both holding that the possibility of granting petitioner's Rule 60(b)(6) motion premised on *Martinez* was foreclosed by the court's decision in *Arthur*).

The Sixth Circuit aligned with the Fifth and Eleventh Circuits. In *Abdur-Rahman v. Carpenter*, 805 F.3d 710 (6th Cir. 2015), the court denied a Rule 60(b)(6) motion premised on *Martinez* without considering any equities, holding that *Martinez* "was a change in decisional law and does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief." *Id.* at 714. In dissent, Chief Judge Cole criticized the majority's categorical approach, explaining that "[t]he decision to grant Rule 60(b)(6) relief" should remain "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.* at 718 (Cole, C.J., dissenting) (quoting *McGuire v. Warden*, 738 F.3d 741, 750 (6th Cir. 2013) (emphasis in original)). The Sixth

Circuit continues to follow *Abdur-Rahman*. *See Zagorski v. Mays*, 907 F.3d 901, 904–05 (6th Cir. 2018), *Miller v. Mays*, 879 F.3d 691, 698–99 (6th Cir. 2018), and *Jones v. Lebo*, No. 16–6439, 2017 WL 4317144, at *2 (6th Cir. Mar. 22, 2017).

The Fourth Circuit belongs to the *per se* denial camp as well, having rejected a *Martinez*-based Rule 60(b)(6) motion on the ground that "a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016) (citation omitted).

In contrast, the Third, Seventh, and Ninth Circuits correctly recognize that *Martinez*'s change can be the basis for Rule 60(b)(6) relief, and that some such motions might prevail. These courts have all held that a court reviewing a Rule 60(b)(6) motion premised on *Martinez* must conduct a holistic review of the equities, including the significance of *Martinez*'s change in law. Under this approach—and unlike in the other three circuits—Rule 60(b)(6) petitioners at least have a *chance* of getting *Martinez* relief.

The Third Circuit's decision in *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), embodies this well-reasoned view. There, the district court had adopted the Fifth Circuit's reasoning in *Adams*, holding that a Rule 60(b)(6) motion premised on *Martinez* categorically fails. *See id.* at 120. The Third Circuit vacated the district court's decision, making clear that the Fifth Circuit's ruling in *Adams* "does not square with our approach to Rule 60(b)(6)." *Id.* at 121. As it explained: "[W]e have not embraced any categorical rule that a change in decisional law is never an adequate basis for Rule 60(b)(6) relief. Rather, we have consistently articulated a

more qualified position: that intervening changes in the law *rarely* justify relief from final judgments under 60(b)(6)." *Id.*

The Third Circuit explicitly parted ways with the Fifth Circuit's refusal "to consider the full set of facts and circumstances attendant to the Rule 60(b)(6) motion under review." *Id.* at 122. It emphasized the need for "a flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law," and thus took issue with the Fifth Circuit's choice to "end[] its analysis after determining that *Martinez*'s change in the law was an insufficient basis for 60(b)(6) relief" without considering "whether the capital nature of the petitioner's case or any other factor might . . . provide a reason . . . for granting 60(b)(6) relief." *Id.*

The Third Circuit also distanced itself from the Eleventh. It explained that, "the Eleventh Circuit extract[ed] too broad a principle from *Gonzalez*" because "*Gonzalez* did not say that a new interpretation of the federal habeas statutes—much less, the equitable principles invoked to aid their enforcement—is *always* insufficient to sustain a Rule 60(b)(6) motion." *Id.* at 123 (emphasis in original).

After noting its disagreement with these other circuits, the Third Circuit set forth its view that a "case-dependent analysis, fully in line with Rule 60(b)(6)'s equitable moorings, retains vitality post-*Gonzalez*" and that it would be improper to "adopt a *per se* rule that a change in decisional law, even in the habeas context, is inadequate, either standing alone or in tandem with other factors, to invoke relief from a final judgment under 60(b)(6)." *Id.* at 124. Accordingly, the Third Circuit

remanded for a holistic analysis balancing the "jurisprudential change rendered by *Martinez*" (which it described as "remarkable" and "important"), "the merits of [the] petitioner's underlying ineffective assistance of counsel claim," the "movant's diligence in pursuing review of his ineffective assistance claims," and the "special consideration" of a capital sentence. *Id.* at 124–26.

The Seventh Circuit followed the Third Circuit's approach. In *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), that court noted that it "agree[d] with the Third Circuit's approach in *Cox*, in which it rejected the absolute position that the Fifth Circuit's *Adams* decision may have reflected, to the effect that intervening changes in the law *never* can support relief under Rule 60(b)(6)." *Id* at 850 (emphasis in original). And it stressed that "Rule 60(b)(6) is fundamentally equitable in nature" and therefore "requires the court to examine all of the circumstances." *Id.* at 851. Thus, the court held that a Rule 60(b)(6) motion premised on *Martinez* must be considered in light of the overall equities, including the significance of *Martinez*, "the diligence of the petitioner," "whether alternative remedies were available but bypassed," and "whether the underlying claim is one on which relief could be granted." *Id.* Considering those factors in the case before it, the Seventh Circuit ordered the district court to grant Rule 60(b)(6) relief. *Id.* at 856. The district court subsequently granted habeas relief. *See Ramirez v. United States*, No. 11-CV-719-JPG, 2016 WL 1058965 (S.D. Ill. Mar. 17, 2016).

The Ninth Circuit also conducts a holistic, equitable review of Rule 60(b)(6) motions premised on *Martinez*. For example, in *Lopez v. Ryan*, 678 F.3d 1131 (9th

Cir. 2012), that court evaluated such a motion by balancing "the nature of the intervening change in the law," "the petitioner's exercise of diligence in pursuing the issue during the federal habeas proceedings," "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief," the "degree of connection" between the petitioner's claim and the intervening change in law, and concerns about comity and finality. *Id.* at 1135–37. In considering the "nature" of *Martinez*'s intervening change of law, the court posited that *Martinez* "constitutes a remarkable—if 'limited'—development in the Court's equitable jurisprudence." *Id.* at 1136 (quoting *Martinez*, 566 U.S. at 14–15). The Ninth Circuit has since continued to conduct the required equitable balancing. *See, e.g.*, *Jones v. Ryan*, 733 F.3d 825, 839 (9th Cir. 2013); *Styers v. Ryan*, 632 F. App'x 329, 331 (9th Cir. 2015).

B. This Circuit Split Is Entrenched, Persistent, And Unlikely To Benefit From Further Percolation

The circuit conflict will not be resolved without this Court's intervention.

Even though they are aware of other circuits' contrary decisions, the courts of appeals have persisted in their conflicting interpretations. For example, in *Hamilton*, the Eleventh Circuit observed that "[t]he Third Circuit has disagreed with [our] *Arthur*[] holding" but expressly held itself "bound by our Circuit precedent, not by Third Circuit precedent." 793 F.3d at 1266. And in *Cox*, the Third Circuit recognized that the Fifth Circuit's decision in *Adams* "does not square with our approach to Rule 60(b)(6)" but nonetheless stayed true to its broader rule. 757 F.3d at 121.

The conflict is entrenched. Not only have the courts acknowledged and rejected the contrary holdings of their sister circuits, but the Fifth, Sixth, and Eleventh

Circuits have begun denying COAs in Rule 60(b)(6) cases raising *Martinez*/*Trevino* claims, such as in this case, holding that their precedents on this point are not even subject to reasonable debate. No consensus on this issue will emerge going forward. *See, e.g.*, *In re Paredes*, 587 F. App'x at 825; *Hamilton*, 793 F.3d at 1266. These denials evince a fixed and binding *per se* rule against granting Rule 60(b)(6) motions premised on *Martinez*. No further information will emerge even if this Court gives time for additional percolation. Indeed, even this Court's decision in *Buck* has not moved the courts that have embraced a categorical rule. *See, e.g.*, *Raby*, 907 F.3d at 884; *Zagorski*, 907 F.3d at 906–07.

Only this Court can resolve this conflict, as it is grounded in a broader disagreement about the meaning of *Gonzalez*. On the one hand, the Fourth, Fifth, Sixth, and Eleventh Circuits incorrectly read *Gonzalez* to establish the principle that changes in decisional law are categorically unable to establish "extraordinary circumstances" in a Rule 60(b)(6) inquiry. *See*, *e.g.*, *Arthur*, 739 F.3d at 631 (citing *Gonzalez*, 545 U.S. at 535–38); *Adams*, 679 F.3d at 319 (similar).

On the other hand, the Third, Seventh, and Ninth Circuits correctly read *Gonzalez* as reaching a very different conclusion—namely, that a change in decisional law is an important factor in a Rule 60(b)(6) analysis, and one that can call for relief in the presence of other equitable considerations. *See, e.g.*, *Cox*, 757 F.3d at 123; *Ramirez*, 799 F.3d at 850.

C. The Issue Warrants This Court's Attention

This conflict among the courts of appeals implicates issues of vital importance to both capital habeas petitioners and the states. Many capital habeas petitioners

who have invoked *Martinez* must do so in a Rule 60(b)(6) posture because their initial habeas petitions were already denied when *Martinez* issued. Indeed, at least sixty-five capital petitioners have filed Rule 60(b)(6) motions premised on *Martinez*'s intervening change of law. Pet. App. G.

Because first federal habeas review has already expired for so many individuals on death row, *Martinez* and *Trevino* would be largely nullified in the capital context if they could not be invoked in Rule 60(b)(6) motions. For example, every substantial claim of capital-sentencing-phase IATC deemed defaulted under *Coleman* is categorically excluded from the *Martinez* cause standard unless it is at least *possible* to raise through Rule 60(b)(6). Consequently, *Martinez*'s pronouncement that every prisoner deserves an opportunity to present an IATC claim will ring hollow in many cases in which it should apply most forcefully.

Capital petitioners, moreover, should have the best chance to actually obtain Rule 60(b)(6) relief premised on *Martinez*. That is because a capital sentence represents a critical equitable factor that militates in favor of reopening a judgment. As this Court has explained, the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Accordingly, those circuits that (correctly) recognize the need to conduct a holistic, equitable review of Rule 60(b)(6) motions deem a capital sentence a "special" equitable consideration. *See, e.g.*, *Cox*, 757 F.3d at 126. To be sure, these courts recognize that Rule 60(b)(6) motions—even in capital cases—will "*rarely*" be granted. *Id.* at 121. But *Martinez* stands for the principle that individuals

with substantial IATC claims should at least be afforded the *opportunity* to have these claims heard—an opportunity the Fourth, Fifth, Sixth, and Eleventh Circuits currently deny.

This opportunity matters. At least one district court applying the correct approach has granted a Rule 60(b)(6) motion urged by a capital habeas petitioner. That court relied upon the capital nature of the petitioner's case, the fact that he had "diligently pursued the underlying substantive claim of [IATC]," and the "underlying strength" of that claim, which featured "powerful testimony that was never presented." *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1116–21 (E.D. Mo. 2013). After this Rule 60(b)(6) motion was granted, Barnett received an evidentiary hearing and was ultimately granted habeas relief—vacating his death sentence. Order Granting Habeas Relief, *Barnett*, 4:03-cv-00614-ERW (E.D. MO. Aug. 15, 2015). Had Barnett's case arisen in one of the four circuits that *per se* reject Rule 60(b) motions based in part on *Martinez*, his death sentence would remain or he may have been executed. Thus, while such grants will be rare given *Gonzalez*'s "extraordinary circumstances" standard, it is vital that petitioners have the *chance* to reopen their habeas petitions where such circumstances exist.

Given the life-or-death importance of this issue to capital petitioners and the states, this conflict among the courts of appeals calls for immediate review.

II. This Case Is An Ideal Vehicle To Resolve The Circuit Split

This case provides an ideal vehicle to address the question of whether a Rule 60(b)(6) motion premised on *Martinez* may ever be granted. First, an insurmountable obstacle preventing Raby's IATC claims from being reopened, so that they can be

decided on the merits for the first time, is the Fifth Circuit's position that a Rule 60(b)(6) motion premised on *Martinez* must be categorically denied.

Second, Raby's IATC claim has merit. His trial counsel chose the same charlatan future-dangerousness expert that this Court condemned in granting relief in *Buck v. Davis,* a case that presented in the same Rule 60(b)(6) posture as here. Raby's trial counsel called an expert witness who applied inflammatory and unscientific factors in opining that Raby was a psychopath. His trial counsel also failed to adequately investigate basic, but crucial, mitigation evidence.

Lastly, this is a capital case in which Raby has diligently pursued the same IATC claim since 2002 but has never been allowed to develop it on the merits. His case presents the right opportunity to address the circuit conflict on the availability of relief under *Martinez* to capital habeas petitioners.

A. *Martinez* Represented A Remarkable Change In The Law

Martinez represented a "remarkable" change in the law. *Lopez*, 678 F.3d at 1136. Raby's case illustrates as much. Under *Coleman*, however, the negligence of post-conviction counsel in failing to raise the claim in the initial state habeas application categorically excluded the federal courts from considering this claim on the merits.

Martinez then "modif[ied] th[is] unqualified statement in *Coleman*," by establishing that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default" of an IATC claim. *Martinez*, 566 U.S. at 9. In dissent, Justice Scalia recognized *Martinez*'s importance, proclaiming that the holding represented "a repudiation of the longstanding principle

governing procedural default, which Coleman and other cases consistently applied." *Id*. at 23 (Scalia, J., dissenting). And the courts of appeals that apply a broad equitable approach under Rule 60(b)(6) have made similar acknowledgments, characterizing *Martinez* as a "remarkable" change (*Lopez*, 678 F.3d at 1136); as an "important" change that "altered Coleman's well-settled application" (*Cox*, 757 F.3d at 124); and as a "significant[] change[] [in the Court's] approach to claims of ineffective assistance of counsel at initial-review collateral proceedings." (*Ramirez*, 799 F.3d at 848). After *Martinez*, this Court's precedent clearly would have allowed Raby to at least attempt to establish cause for the procedural default by showing that postconviction counsel was ineffective in failing to raise this important claim.

B. The Fifth Circuit's COA Denial Presents A Clean Record

The Fifth Circuit denied Raby's request for a COA based on its categorical rule disallowing review of *Martinez* claims asserted in a motion under Rule 60(b)(6). The court's opinion was a mere six pages long and began with its rejection of Raby's *Martinez* argument under *Adams v. Thaler*, stating that "the change in decisional law effected by *Martinez* and *Trevino*, without more, did not amount to an extraordinary circumstance." Pet. App. F at 4. Yet Raby did not argue that the change in law should be considered on its own; he argued specifically that it was just one of several equitable considerations that collectively establish extraordinary circumstances.[7] Appl. for Certificate of Appealability at 32–33 and Resp. in Opp'n at 9, *Raby v. Davis*, 18-70018 (5th Cir. July 2, 2018).

[7] By failing to "give full consideration to the substantial evidence" of extraordinariness presented by Raby, the Fifth Circuit repeated an error in its COA analysis that this Court previously corrected. *See*

The additional considerations presented by Raby included trial counsel's presentation of the methodologically unreliable expert testimony of Dr. Quijano grossly exaggerating the risk that Raby would commit future acts of violence, and the State's exploitation of that testimony in its arguments to the jury, which the Fifth Circuit also rejected as not independently constituting extraordinary circumstances. Pet. App. F at 5. The Fifth Circuit noted Raby's allegation that his own lawyers hired an expert on future dangerousness who labeled him a psychopath.[8] Pet. App. F at 4. This was, indeed, one of the factors Raby named as supporting the extraordinary nature of his circumstances. But the court refused to consider it except to decide whether this allegation fit through the pinhole path that it considered was opened by *Buck v. Davis*. The only exception to the categorical rule that a *Martinez* claim is not cognizable through Rule 60(b)(6), according to the Fifth Circuit panel below, is "racial discrimination" or similar "pernicious injury" that impacts "communities at large." Pet. App. F. at 5.

The court also dismissed, again as *independently* insufficient to establish extraordinary circumstances, the fact that Raby had been diligent in bringing his

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Miller-El, 537 U.S. at 341. In *Buck*, the petitioner demonstrated that in the Fifth Circuit, in the period 2011 to 2015, a COA was denied on all claims in capital § 2254 cases by either the district court or the court of appeals 59% of the time. During that same period, a COA was denied on all claims by either the district court or the court of appeals in only 6.25% of such cases in the Eleventh Circuit and 0% of such cases in the Fourth Circuit. Even since this Court in *Buck* urged correction (*Buck*, 137 S. Ct. at 773–75), the trend has continued. *See* Appendix H (noting approximate denial rates in the Fifth Circuit (60.2%), Eleventh Circuit (9.5%), and Fourth Circuit (0%).

[8] Dr. Quijano also labeled Mr. Raby a sociopath, antisocial, and likely, because of borderline personality disorder, to do violence to those who show him kindness. He did not mention at all the positive factor Raby possessed whose absence he was quick to use against Buck as supposedly predicting violence: white skin. *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-26 (Quijano Psychological Eval.).

IATC claim. Pet. App. F at 6 ("[P]ersistence alone does not warrant relief from judgment.").

Lastly, the court opined that finality is paramount here because it had previously "found [Raby's] claims to lack merit," despite the procedural bar. Pet. App. F at 6. Of course, the 2003 Fifth Circuit panel did not have jurisdiction to reach beyond default to dismiss the merits of the claims, as emphasized by this Court in *Buck*:

> We reiterate what we have said before: A "court of appeals should limit its examination [at the COA state] to a threshold inquiry into the underlying merits of [the] claims," and ask "only if the District Court's decision was debatable."

Buck, 137 S. Ct. at 774 (citing *Miller-El*, 537 U.S. at 327, 348). Moreover, the earlier panel's "finding" was not based on a hearing or record and amounted to little more than the comment that "[a]n unresponsive, insensitive lawyer does not excuse a procedural default under § 2254(b)(1)(B)(ii)." Pet. App. C at 4. The 2018 Fifth Circuit panel therefore improperly relied on an extra-jurisdictional finding made without a hearing or record. There has been no proper, full merits review of Raby's IATC claims.

No impediment exists to squarely addressing the circuit split issue. Indeed, the Fifth Circuit has already determined that *Martinez* applies in Texas after *Trevino*. *Clark v. Davis*, 850 F.3d 770, 781 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 358 (2017). The Fifth Circuit's order denying Raby a COA did not dispute that *Martinez* applies to Raby's case. Pet. App. F at 4.

The denial of Raby's COA request thus presents a clean record for resolving the acknowledged conflict among the courts of appeals on the issue of whether a Rule 60(b)(6) motion premised on *Martinez* may ever be granted.

C. Raby's IATC Claims Have Obvious Merit

Raby's IATC claims have obvious merit, although they do not fit through the pinhole-sized exception (racial discrimination) that the Fifth Circuit acknowledged based on *Buck*. Nevertheless, Raby's claim regarding trial counsel's presentation of testimony from Dr. Quijano is analogous to that in *Buck* in key respects. In both cases, trial counsel called an expert witness who opined to some probability that the petitioner would be a continuing danger to society based on various factors. Such an opinion from a well-credentialed psychologist with experience in evaluating capital petitioners unquestionably carried weight with the jury. It was ineffective assistance for any defense lawyer to call such an expert. Indeed, Dr. Quijano's testimony here was more obviously prejudicial than that in *Buck*, because Dr. Quijano testified that only a death sentence could render society safe from Raby. *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-21, pp. 37–39 (Trial Tr.).

Here, Dr. Quijano characterized Raby as a psychopath and a sociopath, in addition to possessing other inflammatory, even conflicting personality disorders, which he said were raised in test results merely based on some findings suggesting possible anti-social personality disorder. *Id.* ECF No. 31-21, pp. 37–38 (Trial Tr.). Dr. Quijano met once with Raby for ninety minutes, only four days prior to his testimony. *Id.* ECF No. 31-21, p. 42 (Trial Tr.). He did not produce a report until months after the trial had ended. *Id.* ECF No. 31-24, p. 6 (Cunningham Aff. ¶ 20).

Trial counsel either permitted Dr. Quijano to testify knowing that Dr. Quijano held such inflammatory, methodologically unsound opinions, or trial counsel was unprepared to an extent that he did not know what Dr. Quijano might say. Indeed, there is every indication that trial counsel did not adequately prepare for the future-dangerousness question, and, therefore, conceivably, did not know Dr. Quijano's opinions or that he in fact was a longtime expert for the State on future dangerousness.

Furthermore, as this Court acknowledged in *Buck*, Dr. Quijano's role as a *defense* expert made him all the more prejudicial: "When damaging evidence is introduced by a defendant's own lawyer, it is in the nature of an admission against interest, more likely to be taken at face value." *Buck*, 137 S. Ct. at 766, 776–77. The severe prejudice caused by Dr. Quijano's testimony was then compounded by trial counsel's failure to object or attempt to limit the testimony, and the State's unsurprising decision to emphasize in closing arguments that Raby's own expert deemed him a continuing threat to society and a sociopath. *Raby v. Davis*, 4:02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF No. 31-23, pp. 7–9 (Trial Tr.). The damage that Dr. Quijano's testimony inflicted at the sentencing phase of Raby's trial is beyond serious debate.

There is no discernible strategic advantage in trial counsel's reliance on Dr. Quijano, his failure to understand the significant flaws and obviously prejudicial nature of Dr. Quijano's testimony before advancing it, or his failure to contain the damage that Dr. Quijano caused Raby. No competent defense attorney would have

allowed this to happen. In effect, Dr. Quijano acted as a powerful, albeit scientifically unreliable, expert for the State.

Trial counsel further conducted no significant assessment of Raby's medical, educational, family, and social history as part of a competent mitigation case. The forms that trial counsel submitted for reimbursement show no time or expenses attributed to out-of-court investigation. *Id*. ECF No. 31-27, pp. 2–8 (trial counsel timesheets). Going into the sentencing phase, trial counsel therefore knew virtually nothing about Raby's background or what his available family and friends could offer in terms of critical mitigation evidence. A reasonably competent attorney would have realized that further investigation of available sources was necessary to make informed choices about presentation of the mitigation case.

D. Raby Has Diligently Pursued His IATC Claim

Raby first notified the state district court of the potential default of his IATC claims in 1999, after his initial state habeas counsel refused to file extra-record claims. He first raised the *Martinez* argument in his 2002 federal habeas petition (*Raby v. Cockrell*, 4:02-cv-00349 (S.D. Tex. Jan. 30, 2002), ECF No. 4, pp. 30–70 (Pet. for Writ Habeas Corpus)), though *Coleman* rendered that argument futile. Post-*Martinez* and *Buck*, Raby has diligently pursued his efforts to reopen his petition. As in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), where the Ninth Circuit granted a Rule 60(b)(6) motion premised on an intervening decision of law, here, Raby has "pressed all possible avenues of relief" at "every stage of this case." *Id*. at 1137. While the Fifth Circuit dismissed Raby's diligence, noting that "persistence alone does not

warrant relief from judgment" Pet. App. F at 6, this misses the point. Rule 60(b)(6) must be available in every case "to accomplish justice" where the totality of the extraordinary case-specific circumstances warrants such relief.

E. Capital Cases Are By Nature Compelling Vehicles For Resolution Of Circuit Conflicts

The capital nature of Raby's case is a compelling equitable factor that weighs in favor of reopening his petition. Indeed, this Court has recognized that the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger*, 483 U.S. at 785. This is especially so given that Raby's principal claim is for ineffective assistance of trial counsel at his capital sentencing.

III. Categorical Rejection Of Rule 60(b)(6) Motions Premised On A Change In Decisional Law Is Irreconcilable With The Purposes Of Rule 60(b)(6) And Other Binding Precedent

Given the plain circuit split on the question presented—and the importance of that split to the disposition of numerous capital cases—the merits are not particularly relevant to the decision whether to grant certiorari. But to the extent the merits are relevant, the categorical position of the Fourth, Fifth, Sixth, and Eleventh Circuits against Rule 60(b)(6) motions premised on *Martinez* is irreconcilable with the purposes of Rule 60(b)(6) and this Court's binding precedents.

Rule 60(b)(6) "permits reopening [a final judgment] when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rule 60(b)(1)–(5)." *Gonzalez*, 545 U.S. at 529. Rule 60(b)(6) was thus intended to be a broad, catchall provision for achieving justice in extraordinary cases; a holistic, equitable inquiry is essential to accomplishing that

objective. *See* Wright and Miller, Other Reasons Justifying Relief, 11 *Fed. Prac. & Proc. Civ*. § 2864 (3d ed.) (Rule 60(b)(6) "gives the courts ample power to vacate judgments whenever that action is appropriate to accomplish justice."); 7 J. Lucas & J. Moore, *Moore's Federal Practice* ¶ 60.27[2] at 375 (2d ed. 1982) (Rule 60(b)(6) is a "grand reservoir of equitable power to do justice in a particular case"). This Court has explained that the language of subsection 60(b)(6), "[i]n simple English . . . vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott*, 335 U.S. at 615. A categorical rule foreclosing certain petitioners from Rule 60(b)(6) relief, even in extraordinary equitable circumstances, is inconsistent with these established principles.

This Court's own opinion in *Gonzalez* confirms the point. Correctly read, *Gonzalez* shows that equitable considerations are always relevant—and, while some changes in decisional law may be insufficient on their own to require Rule 60(b)(6) relief, it remains necessary for the court to evaluate the specific equities to determine whether relief is appropriate. *See Gonzalez*, 545 U.S. at 536–38. Thus, while this Court determined in *Gonzalez* that its new interpretation of AEDPA's statute of limitations in *Artuz v. Bennett*, 531 U.S. 4 (2000), was not itself an "extraordinary circumstance," it nonetheless went on to examine other equitable considerations, such as the petitioner's diligence, to determine whether reopening the case was warranted. *Id*. at 537. *Gonzalez* therefore did not create a *per se* rule that a change in decisional law is *never* an extraordinary circumstance warranting Rule 60(b)(6) relief for habeas petitioners. If anything, it *rejects* precisely the *per se* approach that the

Fourth, Fifth, Sixth, and Eleventh Circuits have read into it. *See, e.g.*, *Gonzalez*, 545 U.S. at 534 ("Rule 60(b) has an unquestionably valid role to play in habeas cases.").

Moreover, *Martinez* and *Trevino* themselves suggest that they are an appropriate basis for the courts to at least consider granting Rule 60(b)(6) relief. As explained above, *Martinez* and *Trevino* (and even their dissents) expressly recognize the critical importance of their change in *Coleman*'s rule. *See supra* p. 25. Indeed, the whole point of that change was to prevent meritorious IATC claims from being defaulted simply because there was never an adequate attorney to develop them. As this case shows, cutting off all Rule 60(b)(6) claims rooted in *Martinez* and *Trevino* brings about essentially the result that those cases sought to avoid.

This is confirmed by this Court's own actions in the wake of *Martinez* and *Buck*. Taking *Martinez*'s invitation at its word, two Texas petitioners sought Rule 60(b)(6) relief, which the Fifth Circuit denied. After *Trevino* clarified that *Martinez* applied in Texas, this Court apparently rejected Texas's argument that Rule 60(b)(6) relief is categorically unavailable when premised on *Martinez*—granting certiorari, vacating, and remanding those cases for further consideration. *Haynes v. Thaler*, 133 S. Ct. 2764 (2013) (mem.); *Balentine v. Thaler*, 133 S. Ct. 2763 (2013) (mem.). Indeed, it even stayed one petitioner's execution to allow him to raise a *Martinez* claim on remand. *Haynes v. Thaler*, 133 S. Ct. 639 (2012).

A proper application of Rule 60(b)(6) in motions premised on *Martinez* would not be overly burdensome or broad. This Court need recognize only that an exception to finality remains available for extraordinary cases—and only those cases. Courts

can readily determine when such extraordinary circumstances are absent (for example, where the underlying claims are weak, the sentence is less severe, or the petitioner failed timely to invoke *Martinez* after it became available). Moreover, many habeas petitioners cannot invoke *Martinez* at all: their IATC claim may not have been defaulted in state habeas; they may lack a substantial IATC claim; they may be unable to show IAC in state collateral review; or there may be an alternative merits disposition in their first federal habeas petition. *Trevino*, 133 S. Ct. at 1918; *Martinez*, 566 U.S. at 13–14, 16–17. But, where the equities weigh strongly in petitioner's favor, it flies in the face of Rule 60(b)(6) to cut off the equitable inquiry before it has even begun.

IV. The Court Should At Least Summarily Reverse The Denial Of Raby's COA

Fully *nine* "reasonable jurists" on three *unanimous* panels of the Third, Seventh, and Ninth Circuits have determined that a holistic, equitable inquiry is necessary in Rule 60(b)(6) motions premised on *Martinez*, yet the Fifth Circuit denied a COA here—in effect concluding that jurists cannot reasonably debate the equities of such a Rule 60(b)(6) motion and foreclosing any case-specific consideration of the equities. Given the acknowledged conflict among the courts of appeals on the question of whether a Rule 60(b)(6) motion premised on *Martinez* as an intervening decision of law must be categorically denied, this Court should grant plenary review. Short of that, the Court should summarily reverse the denial of Raby's request for a COA to allow for full briefing and argument on the proper treatment of Raby's *Martinez*-based Rule 60(b)(6) motion. *Cf. Buck*, 137 S. Ct. at 780.

A holistic, equitable inquiry into Raby's case-specific circumstances would confirm the strength of his IATC claim. Raby's trial counsel failed to perform even the most basic investigation of Raby's background to identify available, compelling mitigating evidence and elicited expert opinions from Dr. Quijano—a doctor of clinical psychology—that established the *State's case for future dangerousness*. In *Porter v. McCollum*, this Court recognized that a failure "to conduct a thorough investigation of the defendant's background" constitutes ineffective assistance of counsel in violation of the Sixth Amendment. 558 U.S. 30, 39 (2009). Likewise, in *Buck*, this Court likened Dr. Quijano's testimony that the defendant's race was an immutable characteristic that carried with it increased probability of future violence to a toxin that "can be deadly in small doses." 137 S. Ct. at 777. Dr. Quijano's factually insupportable and methodologically unsound testimony that Raby was a sociopath was pernicious for all the same reasons that this Court found persuasive in *Buck*—the testimony came from a well-credentialed defense expert experienced in evaluating capital cases.

Moreover, this Court has held that a court should permit briefing and conduct plenary review when a circuit split exists. *See Lozada v. Deeds*, 498 U.S. 430 (1991) (per curiam) (regarding certificates of probable cause). Several courts of appeals have similarly concluded that, in the presence of a circuit conflict, a COA should be granted. *See, e.g.*, *United States v. Doe*, 810 F.3d 132, 147 (3d Cir. 2015); *Kramer v. United States*, 797 F.3d 493, 502 (7th Cir. 2015); *United States v. Gomez-Sotelo*, 18 F. App'x 690, 692 (10th Cir. 2001); *Lambright v. Stewart*, 220 F.3d 1022, 1027–28 (9th

Cir. 2000); *Franklin v. Hightower*, 215 F.3d 1196, 1200 (11th Cir. 2000). There is thus no question that the district court and Fifth Circuit both erred in finding that reasonable jurists could not debate whether "the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Reasonable jurists among the courts of appeals are engaged in an ongoing debate on precisely this subject.

Because reasonable jurists could debate the district court's ruling, the Fifth Circuit should not have denied a COA.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari or summarily reverse the denial of Raby's COA.

Respectfully submitted,

KEVIN D. MOHR
TRACEY M. ROBERTSON
KING & SPALDING LLP
1100 Louisiana, Suite 4000
Houston, TX 77002
(713) 751-3200

SARAH M. FRAZIER
Counsel of Record
BERG & ANDROPHY
3704 Travis Street
Houston, TX 77002
(713) 529-5622

Counsel for Petitioner Charles D. Raby

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