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

AMICUS CURIAE BRIEF OF THE CAPITAL PUNISHMENT CENTER OF THE UNIVERSITY OF TEXAS SCHOOL OF LAW IN SUPPORT OF THE PETITIONER

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Buck v. Davis, 137 S. Ct. 759 (2017).....23, 24, 26, 27

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Raby v. Davis, 907 F.3d 880 (5th Cir. 2018)..... 24, 25, 27

Trevino v. Thaler, 569 U.S. 413 (2013).....*passim*

STATE CASES

Ex parte Martinez, 977 S.W.2d 589 (Tex. Crim. App. 1998).....13, 16

Ex parte Medina, 361 S.W.3d 633 (Tex. Crim. App. 2011).....14, 21

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Ex parte Raby, No. 9407130-A (248th Dist. Ct., Harris Cty., Tex. Nov. 14, 2000) 22

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FEDERAL STATUTES AND RULES

Antiterrorism and Effective Death Penalty Act of 1996 .....5, 10

Fed. Rule Civ. Proc. 60(b)(6) .....*passim*

STATE STATUTES AND RULES

Tex. Code Crim. Proc. art. 11.071 (1995) .....*passim*

SECONDARY SOURCES

American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*, Sept. 2013 19

Mark Ballard, *New Habeas Scheme Off to Slow Start*, TEX. LAWYER, Vol. 11, Jan. 8, 1996.... 6, 7, 8, 16

Janet Elliott, *Habeas Surprise: Court Orders 48 to Take Death Penalty Cases*, TEX. LAWYER, Vol. 12, Dec. 2, 1996.....8, 10

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Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* (2002) 6, 11, 13, 20

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INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief is submitted by the Capital Punishment Center at the University of Texas School of Law ("the Center"). The Center was established in 2006 to promote research and training in death penalty law. The Center sponsors symposia and academic events; pursues research projects concerning the administration of the death penalty, particularly in Texas; provides training and assistance to Texas lawyers involved in capital cases; and houses the Capital Punishment Clinic, which has provided direct representation and assistance to indigent prisoners on Texas's death row since 1987.

The Center's interest in this case arises from its longstanding concern about problems in the administration of state postconviction review in Texas. Through our work in the Capital Punishment Clinic, we have represented clients seeking to overcome the consequences of deficient state habeas representation. We have studied and written extensively about the systemic problems afflicting state postconviction review in Texas and have recommended reforms to remedy them.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for both parties received timely notice, under Sup. Ct. R. 37.2(a), of the intent to file this brief. The parties have consented to this filing.

This Court's decisions in *Martinez v. Ryan*[2] and *Trevino v. Thaler*[3] were an important step towards ensuring review of substantial ineffective assistance of trial counsel ("IATC") claims.

Federal Rule of Civil Procedure 60(b)(6) vests power in courts "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klaprott v. United States*, 335 U.S. 601, 615 (1949). The Rule is "simply the recitation of pre-existing judicial power" to set aside judgments which are unfair. *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211, 234–35 (1995). But the United States Court of Appeals for the Fifth Circuit has categorically foreclosed invocation of its equitable power in the *Martinez* and *Trevino* context.

As Petitioner demonstrates, the United States Courts of Appeals are split over this issue. We file this brief to offer additional contextual information about the Texas state habeas system at the time of Petitioner's initial postconviction proceedings. We believe such information is relevant to an appropriate equitable judgment contemplated by Rule 60(b)(6).

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[2] 566 U.S. 1 (2012).

[3] 569 U.S. 413 (2013).

SUMMARY OF ARGUMENT

Rule 60(b)(6) embodies a case-specific, equitable remedy. Application of the rule requires a contextualized analysis of all relevant considerations. Here, Petitioner sought to reopen his federal habeas corpus proceedings for merits review of a procedurally defaulted ineffective assistance of trial counsel ("IATC") claim. The state's failure over many years to adequately fund state habeas representation, appoint qualified attorneys, and monitor their performance is among the factors relevant to the analysis, and it is the focus of this brief. The default in Petitioner's case was not merely the product of a single wayward lawyer; it was a consequence of Texas's longstanding failure to ensure adequate capital habeas representation.

Not every Texas prisoner deprived of effective habeas counsel who invokes *Martinez* and *Trevino* is entitled to equitable relief. Indeed, categorical rules—such as the Fifth Circuit's blanket refusal to consider the equities in cases invoking *Martinez* or *Trevino* in Rule 60(b)(6) proceedings—are contrary to the case-specific analysis required by this Court's decisions. In Petitioner's case, the relevant factors include Texas's responsibility for providing ineffective habeas representation, Petitioner's unusual diligence in seeking competent counsel while still in state court, Petitioner's invocation of a *Martinez* argument a decade before *Martinez*, the purposes underlying this Court's decisions in *Martinez* and *Trevino*, and the compelling facts of his IATC claim.

In addition to providing an appropriate vehicle for resolving the entrenched circuit split Petitioner identifies, this case would also allow this Court to address the Fifth Circuit's inappropriately siloed, piecemeal analysis of factors supporting Rule 60(b)(6) relief, and its continued practice of improperly inverting the certificate of appealability ("COA") and merits determinations.

ARGUMENT

I. Texas's well-documented failure to provide effective capital state habeas corpus counsel created a class of death-sentenced prisoners—including Petitioner—for whom default of IATC claims was a near certainty.

The State of Texas sentenced Charles Raby to death on June 17, 1994. At the time, Texas did not provide state habeas corpus counsel to death-sentenced prisoners, who routinely faced execution without representation.[4] This changed on September 1, 1995, when Texas enacted a separate postconviction scheme for capital cases that included a right to counsel appointed by the Texas Court of Criminal Appeals ("CCA").[5]

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[4] As Justice Blackmun noted on June 30, 1994, "[t]he lack of attorney compensation and Texas' aggressive practice of '[d]ocket control by execution date,' . . . have left an estimated 75 capital defendants in Texas who currently are facing execution dates without any legal representation." *McFarland v. Scott*, 512 U.S. 1256, 1262 (1994) (Blackmun, J., dissenting from denial of *certiorari*).

[5] Tex. Code Crim. Proc. art. 11.071 § 2 (1995).

A perfect storm of adverse circumstances immediately overwhelmed implementation of the new statute: the system was woefully underfunded; few qualified lawyers were willing to take appointments in light of the absence of adequate resources; and the CCA had no standards for screening capital habeas counsel or overseeing their performance. Yet, the CCA pressed forward because a new statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") placed scores of death-sentenced prisoners at risk of waiving federal habeas review unless they filed a state habeas application before the federal limitations period expired. When few qualified counsel stepped forward to accept appointments, the CCA simply conscripted and appointed lawyers who lacked even minimal qualifications. Consequently, many death-sentenced prisoners were processed through this new state habeas system without meaningful postconviction review.

Texas's fledgling system for appointment of counsel in state habeas proceedings was widely criticized for failing to deliver adequate representation in postconviction proceedings. The representation Petitioner received in state postconviction was typical of this period: his lawyer conducted no investigation of his case whatsoever and filed a habeas application that consisted largely of noncognizable, record-based appellate issues.

A. Chronic underfunding and systemic problems hobbled effective capital habeas representation.

1. The State failed to appropriate sufficient funding to provide adequate capital habeas representation.

Prior to enactment of Texas's new postconviction system, a 1993 study commissioned by the State Bar of Texas "found that the average lawyer spent nearly 350 hours representing a death-sentenced inmate in state postconviction proceedings."[6] In light of this study, the defense bar estimated that $5 million (or $25,000 per case) would be necessary to fund capital habeas representation in the approximately 200 cases in immediate need of representation.[7] However, because "[m]ost attorneys and judges, including [then-CCA Presiding Judge Michael] McCormick, estimated the habeas actions would cost about $20,000 each," the requested appropriation was reduced to $3.8 million.[8] Then, "[d]uring the closing hours of the legislative session, House and Senate conferees slashed the original $3.8 million budget to $2 million for the 1996-97 biennium."[9] Presiding Judge McCormick "scrambled to

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[6] Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals*, at 53 (2002) (hereinafter "*Lethal Indifference*") (http://texasdefender.org/wp-content/uploads/Lethal-Indiff_web.pdf).

[7] Mark Ballard, *New Habeas Scheme Off to Slow Start*, TEX. LAWYER, Vol. 11, Jan. 8, 1998, at 16 (hereinafter "*Slow Start*").

[8] *Slow Start*, *supra* note 7.

[9] *Id*.

establish a system to appoint attorneys and to figure out a way to pay them given a budget far lower than expected."[10] After "pencil was put to paper," the CCA decided to limit attorney's fees to $7,500—75 hours at $100/hour—and funding for all other expenses, including investigation and experts, to $2,500.[11] Though experienced capital habeas counsel estimated that typical capital habeas applications required 400 attorney hours and that "[r]eading the voir dire and the trial records alone takes about 50 hours,"[12] the CCA announced that, as a general rule, it would "not compensate counsel for fees in excess of $7,500."[13]

In January 1998, the CCA raised the cap on attorney's fees to compensate 150 hours of work at $100/hour,[14] still less than half of what was needed in the average capital case. Judge Charles Baird, one of few judges on the CCA with capital defense experience, recognized the funding was still insufficient: "I don't think it's adequate. I think it's very difficult to get competent counsel in cases like these for $15,000."[15] The Texas defense bar agreed. On June 6, 1998, the board of directors for the Texas Criminal Defense Lawyer's Association ("TCDLA") passed a resolution encouraging members not to seek appointment to represent death-sentenced inmates in state habeas corpus proceedings

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[10] *Slow Start*, *supra* note 7.

[11] *Id*.

[12] *Id*.

[13] *Id.*

[14] Muriel L. Sims, *Deathtrap*, DALL. OBSERVER, Jul. 9, 1998.

[15] *Id*.

"until such time as it appears that the procedure is interpreted and applied by the [CCA] to provide meaningful review in death penalty cases."[16] In the absence of sufficient funding to provide adequate representation, the TCDLA board presciently concluded that accepting appointments under the CCA's restrictions would "provide no other service but to hasten the execution of citizens sentenced to death without any meaningful review."[17]

2. Because most qualified counsel were unwilling to accept appointments without sufficient funding for adequate representation, the CCA resorted to conscripting and appointing inexperienced lawyers.

In January 1996, there were 414 people on Texas's death row; approximately 185 of them, including Petitioner, needed state habeas counsel.[18] By the end of 1996, there were 441 people on death row, but the CCA "ran out of volunteer lawyers after making 50 appointments."[19] The volunteers included former CCA staff attorneys who left the court and were immediately

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[16] *TCDLA Urges Members to Pass on Accepting Habeas Cases*, TEX. LAWYER, Vol. 14, Jun. 22, 1998, at 28.

[17] *Id*.

[18] *Slow Start*, *supra* note 7.

[19] Janet Elliott, *Habeas Surprise: Court Orders 48 to Take Death Penalty Cases*, TEX. LAWYER, Vol. 12, Dec. 2, 1996, at 24 (hereinafter "*Habeas Surprise*").

appointed to a large number of cases.[20] One former CCA staffer left the court in December 1996 and was appointed in six cases, five of which shared the same filing deadline. He subsequently acknowledged that "the workload was too burdensome and that he did not do critical work" on his cases.[21]

Another volunteer, a former CCA clerk, had been licensed to practice law less than three years when he agreed to take two capital habeas cases.[22] In one case, he filed a document purporting to be an application for habeas relief that failed to raise a single claim challenging the client's conviction or death sentence.[23] The lawyer subsequently acknowledged mistakenly believing he could not file any such challenges until the client's conviction was final,[24] and admitted that he was probably not competent to accept the appointment because he had "never tried or appealed a capital case, even as second chair."[25] Many lawyers who volunteered to take capital habeas cases in this period lacked even

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[20] Christy Hoppe, *22 Inmates on Texas Death Row Lack Lawyers*, DALL. MORNING NEWS, Mar. 4, 1997, at 16A (hereinafter "*Inmates Lack Lawyers*").

[21] Steve Mills, *Texas Grants 11th-Hour Reprieve*, CHI. TRIB., Aug. 16, 2001.

[22] Janet Elliott, *Habeas System Fails Death Row Appellant*, TEX. LAWYER, Vol. 13, Mar. 9, 1998, at 14 (hereinafter "*Habeas System Fails*").

[23] *Id*.

[24] *Id*.

[25] *Id*.

rudimentary understanding of what postconviction representation entails.

The CCA remained under tremendous pressure to appoint counsel who would file petitions quickly. The AEDPA's one-year statute of limitations began to run on April 24, 1996, and by early 1997 Texas had "445 people on death row, and hundreds of those fac[ing] the April 24[, 1997] deadline."[26] Thus, the CCA "conscripted 48 defense lawyers, some of whom hadn't handled a capital case in 15 years and others who had never been connected to a capital murder case."[27] In one case, the CCA "unknowingly appointed a long-time prosecutor" who was still serving as a prosecutor at the time of his appointment.[28]

Ultimately, the CCA "managed to appoint [habeas] lawyers for hundreds of death row inmates" in Texas before April 24, 1997, the one-year anniversary of AEDPA.[29] But "some of the appointed attorneys . . . had only a few weeks to file an appeal on behalf of their clients, and most of those assigned to the life-or-death cases have never handled such criminal matters."[30] An experienced criminal lawyer reported "field[ing] calls

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[26] *Inmates Lack Lawyers*, *supra* note 20.

[27] *Id*.

[28] *Habeas Surprise*, *supra* note 19.

[29] Christy Hoppe, *Death Row Inmates Get Lawyers Before Deadline But Attorneys Lack Expertise, Some Say*, DALL. MORNING NEWS, Apr. 24, 1997, at 17A (hereinafter "*Attorneys Lack Expertise*").

[30] *Id*.

from dozens of lawyers assigned to the cases" who "asked for a writ of habeas corpus, so they could know what one looks like."[31]

Lawyers who accepted multiple capital habeas appointments subsequently confessed to not understanding the most basic duties of habeas counsel, such as investigating beyond the trial record. One lawyer appointed in at least six capital habeas cases acknowledged that:

> [a]t the time I was appointed, I was not familiar with how to litigate a capital habeas corpus case and was not aware of the need to investigate facts outside of the trial record. I also did not have enough time to devote to the case. As such, my representation of [the inmate] consisted of reading the trial record, meeting with [the inmate], conducting legal research on the claims I had identified from the record and drafting an application.[32]

Another lawyer appointed in multiple capital habeas cases subsequently admitted that, when appointed to a case in September 1999, he "did not know . . . that a state habeas proceeding is not another direct appeal" or that he needed to conduct a mitigation investigation in order to substantiate a penalty-phase IATC claim.[33]

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[31] *Attorneys Lack Expertise*, *supra* note 29.

[32] *Lethal Indifference*, *supra* note 6, at 20.

[33] *Balentine v. Davis*, No. 03-cv-00039-D-BR (N.D. Tex. Jul. 12, 2012) (ECF# 112-1).

3. Although CCA judges were aware of inadequate lawyering in capital habeas cases, the court took no steps during Petitioner's state proceedings to establish standards for counsel, monitor the quality of capital habeas representation, or strike from its appointment list the lawyers whose work was facially deficient.

While the 1995 Texas statute required the CCA to "appoint competent counsel" under "rules and standards adopted by the court,"[34] the CCA never promulgated standards for capital habeas counsel.[35]

From the beginning, CCA judges were aware of serious problems with state habeas representation. Then-Presiding Judge McCormick conceded in a 1999 interview that he "would have been ashamed to file" some of the habeas applications he had seen.[36] Some CCA judges dissented from the adjudication of facially

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[34] Tex. Code Crim. Proc. art. 11.071 § 2(d) (1995).

[35] *See Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997). Texas has amended its capital scheme several times over the last two decades and, as of 2010, a new statewide capital postconviction defender office represents most death-sentenced inmates, with the balance represented by counsel appointed from a list maintained by presiding judges of Texas's eleven administrative judicial regions. Tex. Code Crim. Proc. art. 11.071 § 2(f) (as amended by 2009 Tex. Sess. Law Serv. Ch. 781 (S.B. 1091)).

[36] Bill White, *An Interview with Presiding Judge Michael J. McCormick*, 28 VOICE FOR THE DEFENSE 1, at 17 (Jan./Feb. 1999).

deficient applications. In *Ex parte Martinez*, Judge Baird dissented, noting:

> Applicant is represented by counsel appointed by this Court. The instant application is five and one half pages long and raises four challenges to the conviction. The trial record is never quoted. Only three cases are cited in the entire application, and no cases are cited for the remaining two claims for relief. Those claims comprise only 17 lines with three inches of margin.[37]

Noting that appointed counsel's voucher reflected no investigative or expert expenses, and that counsel spent less than 50 hours preparing the habeas application,[38] Judge Baird argued that the CCA should not reach the merits of the application and instead should remand for an inquiry into counsel's representation. The appointed lawyer himself recognized he was not qualified to accept the case, and wrote to his client: "I am trying to get off your case and get you someone who is familiar with death penalty postconviction habeas corpus."[39]

The CCA judges who dissented repeatedly over the poor quality of capital representation in the cases before them were in the minority that believed death-sentenced prisoners deprived of adequate

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[37] 977 S.W.2d 589, 589 (Tex. Crim. App. 1998) (Baird, J., dissenting) (footnotes omitted).

[38] *Id*. at 589 n.2.

[39] *Lethal Indifference*, *supra* note 6, at 30.

representation deserved another chance at habeas review with competent counsel.

Other members of the court acknowledged "appalling deficiencies" in capital representation, but objected to providing a remedy.[40]

While the CCA denied second chances to nearly all of the death-sentenced "victims of deficient and inadequate lawyering," the same is not true for the deficient lawyers.[41] CCA judges repeatedly asserted that there was no mechanism for removing ineffective lawyers from its list of approved capital habeas counsel. In 2003, three CCA judges lamented that "[w]e have failed to police the [appointments] list to be certain that the attorneys who appear on the list are competent to represent capital defendants."[42] The following year, in an article noting that at least six lawyers on the list were ineligible for appointment, Judge Johnson stated that, "[a]t some point, we're going to

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[40] *Ex parte Medina*, 361 S.W.3d 633, 647 (Tex. Crim. App. 2011) (Keasler, J., joined by Hervey, J., 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, which, under today's decision, should have been characterized as non-cognizable applications. The applicants in those cases were victims of deficient and inadequate lawyering that was a result of ignorance but not necessarily incompetent [sic]. . . .").

[41] *Id.*

[42] *Ex parte Rojas*, No. WR-39,062-01, 2013 WL 1825617, at *6 n.4 (Tex. Crim. App. Feb. 12, 2003) (Price, J., joined by Johnson and Holcomb, JJ., dissenting).

start looking at whether they should be on [the list]."[43] But by 2006, "only one lawyer ha[d] been kicked off the [CCA] habeas list for poor job performance."[44] CCA judges conceded that "[o]ther underperforming lawyers need to be removed from the list as well," but "the court ha[d] no criteria for identifying and removing poor habeas lawyers."[45] A 2006 review of Texas capital habeas counsel by the Austin American-Statesman concluded that "lackadaisical work is tolerated by the [CCA], which manages a list of lawyers eligible for court-appointed habeas work but does not review their legal work for quality or competence."[46]

B. Texas's provision of capital habeas representation was widely acknowledged as deeply flawed.

Texas's capital habeas representation scheme as it existed before, during, and after Petitioner's case has been widely condemned.

State and federal judges alike have expressed serious concerns about the quality of counsel and the

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[43] Mary Alice Robbins, *Ineligible Lawyers on Habeas Corpus Appointment List*, TEX. LAWYER, Vol. 20, Jul. 5, 2004, at 17 (hereinafter "*Ineligible Lawyers*").

[44] Chuck Lindell, *Sloppy Lawyers Failing Clients on Death Row*, AUSTIN AMERICAN-STATESMAN, Oct. 29, 2006, at A1 (hereinafter "*Sloppy Lawyers*").

[45] *Id*.

[46] Chuck Lindell, *When $25,000 is the Limit on a Life*, AUSTIN AMERICAN-STATESMAN, Oct. 30, 2006, at A1 (hereinafter "*Limit on a Life*").

court's failure to monitor the system. In January 1996, Harris County District Court Judge Jay Burnett remarked that "[i]f you have a law license and can cast a shadow on a sunny day, you get on the [CCA's] list."[47] Recently, a retired federal district judge, who served from 2002 to 2015, noted that capital habeas cases "were oftentimes not thoroughly or completely worked up at the state court level," and "[i]t was not infrequent that petitioners would come before my Court without a single claim that would be cognizable on collateral review having been exhausted in the state courts."[48] Based on his experience with Texas capital habeas cases, the judge concluded that the state must "develop more stringent standards for the representation of death-sentenced prisoners in state habeas, or it must be more diligent in identifying—and removing from cases—state habeas counsel that have demonstrably failed to perform their duties to their clients."[49] Other federal judges in Texas have expressed exasperation over the poor quality of state capital habeas representation. The district judge who presided over the federal habeas proceedings that followed *Ex parte Martinez*, *supra*, was left to wonder: "I don't know what's holding up the State of Texas giving competent counsel to

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[47] *Slow Start*, *supra* note 7.

[48] Department of Justice Policy Docket No. OLP 167, *Comment of Federal Judge Leonard Davis on Request for Certification of Texas Capital Counsel Mechanism* (Feb. 23, 2018), https://www.regulations.gov/contentStreamer?documentId=DOJ-OLP-2017-0010-0037&attachmentNumber=1&contentType=pdf.

[49] *Id.*

persons who have been sentenced to die."[50] The federal district judge who presided over the case botched by the former CCA clerk who failed to challenge his client's conviction or sentence described the appointment of unqualified counsel as "a cynical and reprehensible attempt to expedite petitioner's execution at the expense of all semblance of fairness and integrity."[51]

Both the State Bar of Texas and the American Bar Association ("ABA") carefully examined Texas's capital postconviction counsel system and concluded it was deeply flawed. In October 2006, the State Bar of Texas appointed a twelve-member Task Force on Habeas Counsel Training and Qualifications—comprised of judges, prosecutors, and defense counsel—"to study capital habeas practice in Texas and to recommend measures to effectively address any problems and issues which the Task Force might identify."[52] The Task Force identified a troubling list of problems that "undermine the integrity of capital habeas practice in the Texas courts,"[53] including:

- Lawyers on the CCA's appointment list accepted appointments and then "farmed

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[50] Hearing transcript at 19, *Martinez v. Johnson*, No. C-98-CV-00300 (S.D. Tex. Apr. 16, 1999).

[51] *Kerr v. Johnson*, No. SA-98-CA-151-OG, Slip op. at 1, 16–17 (W.D. Tex. Feb. 24, 1999).

[52] State Bar of Texas Task Force on Habeas Counsel Training and Qualifications, *Task Force Report*, Apr. 27, 1997, at 1 (hereinafter "*State Bar Report*").

[53] *Id*. at 4.

out" the cases to other lawyers not on the court's approved list.

- Lawyers with a history of serious disciplinary problems were appointed and failed to carry out their obligations to their clients.
- Lawyers accepted appointments and subsequently admitted to being unqualified, inexperienced and/or overburdened.
- Lawyers filed petitions only two to four pages in length that raised no cognizable issue.
- Lawyers filed petitions that reflected a clear failure to investigate and present evidence outside of the trial record, misunderstanding the state habeas proceeding to be a second direct appeal.
- Substantial portions of some petitions were cut and pasted *verbatim* from petitions in other cases without any regard to the facts or the legal issues of the case.[54]

The Task Force concluded that "[c]apital habeas applicants are not receiving consistently competent representation."[55] The failings of defense counsel were compounded by inadequate funding and the inability of the judges appointing counsel "to determine which lawyers on the [CCA's] approved appointment list are

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[54] *State Bar Report*, *supra* note 52, at 5.

[55] *Id*. at 4.

overburdened, poorly trained, unmotivated, or are under confidential investigation for disciplinary violations."[56] The Task Force recommended replacing the capital habeas counsel system with a statewide public defender office and a new system for appointing counsel in cases the office cannot accept.[57]

A comprehensive ABA assessment found that "[t]he criteria for appointing counsel are not sufficiently specific to ensure . . . counsel possess the knowledge and skills required for effective capital-case representation, and that "virtually any attorney who has not previously been found ineffective" can "qualify to represent a capital habeas petitioner."[58]

In 2006, the Austin American-Statesman conducted a study of capital habeas representation and published a series of articles chronicling widespread deficient lawyering, the absence of adequate resources, and the lack of judicial oversight.[59] The study concluded that:

> [s]heltered by an indifferent [CCA], lawyers appointed to handle appeals for death row

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[56] *State Bar Report*, *supra* note 52, at 5, 7–8.

[57] *Id*. at 1–2.

[58] American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*, Sept. 2013, at 236.

[59] *Sloppy Lawyers*, *supra* note 44; Chuck Lindell, *Attorney Cuts*, *Pastes Convicted Client's Letter*, AUSTIN AMERICAN-STATESMAN, Oct. 29, 2006, at A11; *Limit on a Life*, *supra* note 46; Chuck Lindell, *Lawyer's Writs Come Up Short*, AUSTIN AMERICAN-STATESMAN, Oct. 30, 2006, at A11; Chuck Lindell, *New Appeals, Old Arguments*, AUSTIN AMERICAN-STATESMAN, Oct. 30, 2006, at A11.

> inmates routinely bungle the job, submitting work that falls far below professional standards, frequently at taxpayer expense. Some appeals are incomplete, incomprehensible or improperly argued. Others are duplicated, poorly, from previous appeals."[60]

Similarly, a 2002 report by the Texas Defender Service ("TDS"), a non-profit law office, documented numerous cases of shockingly deficient representation between 1995 and 2001, which resulted in no repercussions for counsel.[61] TDS found that approximately 28 percent of the state habeas applications during this period raised only record-based claims, which are not cognizable grounds for relief. In approximately 39 percent of cases, the applications were supported with no extra-record evidence, all but guaranteeing that the CCA would deny relief.[62] TDS found that "even today, lawyers known to be inexperienced and untrained or known for their poor work in past cases continue to receive appointments, file perfunctory habeas petitions and turn over cases without proper investigation."[63]

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[60] *Sloppy Lawyers*, *supra* note 44.

[61] *Lethal Indifference*, *supra* note 6, at 17, 19–20, 28–30, 34–40.

[62] *Id.* at 15.

[63] *Id*. at xiv.

C. Petitioner's state habeas representation was emblematic of the "deficient and inadequate lawyering"[64] prevalent under the Texas capital postconviction scheme.

The CCA took more than two years to appoint a lawyer for Petitioner, and what he received was not worth the wait. On January 19, 1998, the CCA appointed attorney James Keegan to represent Petitioner and ordered him to file a habeas application in six months. Keegan's billing for the case[65] demonstrates that, like so many other lawyers at the time, he regarded Petitioner's habeas case as a second direct appeal. Keegan failed to hire an investigator, a mitigation specialist, or any other experts.[66] He failed to interview a single witness or to conduct any independent investigation into the facts of the case or Petitioner's background and social history.

The habeas application Keegan filed on Petitioner's behalf reflected his wholesale failure to investigate the case. While the application contained 31 claims for relief, many were alternative versions of the same claim pled under various federal and state law theories. All but six of the claims for relief were record-based issues—challenges to the sufficiency of the evidence at trial, comments by the prosecution during

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[64] *Ex parte Medina*, 361 S.W.3d at 647 (Keasler, J., joined by Hervey, J., dissenting).

[65] *Raby v. Davis*, 02-cv-00349 (S.D. Tex. Aug. 4, 2017), ECF# 31–54 (Keegan's billing records).

[66] *Id*. at 2.

voir dire, the trial court's jury instructions, and limitations on defense voir dire of prospective jurors[67]—all of which are not cognizable in state habeas proceedings because they should have been (or were) raised on direct appeal.[68] Of the remaining six issues, Keegan raised two boilerplate challenges to Texas Board of Pardons and Parole procedures that are similarly not cognizable in habeas proceedings.[69] The remaining claims alleged that trial and direct appeal counsel were ineffective for failing to raise the record-based issues raised by Keegan.[70]

Even without conducting any investigation, Keegan still should have been able to identify one glaring deficiency in trial counsel's representation apparent from the trial record itself: *defense* counsel's future dangerousness expert at trial, Dr. Walter Quijano, testified that Petitioner was "a psychopath," "a sociopath," or "anti-social." Dr. Quijano went on to testify that these terms all mean the same thing: a person with "no conscience," who "can't follow the rules," and "doesn't care about anybody but himself."[71] Just as this Court recently observed in another Texas case involving Dr. Quijano: "Given that the jury had to make a finding of future dangerousness before it could impose a death

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[67] Findings of Fact and Conclusions of Law and Order, *Ex parte Raby*, No. 9407130-A (248th Dist. Ct., Harris Cty., Tex. Nov. 14, 2000), at 6–9.

[68] *Id*. at 6–8.

[69] *Id*. at 9.

[70] *Id*. at 9–11.

[71] 34 RR 545–46.

sentence, . . . [n]o competent defense attorney would introduce such evidence about his own client."[72] This red flag alone should have triggered an extra-record investigation of trial counsel's preparation for trial.

II. Petitioner's case is an appropriate vehicle for deciding whether courts must consider the totality of the circumstances—including new judicial decisions—when applying Rule 60(b)(6).

Petitioner's case warrants this Court's consideration for multiple reasons. First, despite widespread recognition that the capital habeas system in place at the time of Petitioner's state habeas proceedings was beset by inadequate lawyering, the State of Texas has never fashioned a remedy for the scores of prisoners who were deprived of meaningful postconviction review. This inequity is compounded by the Fifth Circuit's categorical ban on Rule 60(b)(6) relief for prisoners, like Petitioner, who seek to rely on the Court's decisions in *Martinez* and *Trevino* to excuse default of IATC claims resulting from grossly deficient state postconviction counsel.[73] Unless this Court intervenes, Petitioner and others similarly situated will be executed without any review of their IATC claims.

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[72] *Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (finding trial counsel ineffective for sponsoring Dr. Quijano as a future dangerousness expert in light of his race-based views on the issue).

[73] *See, e.g., Adams v. Thaler*, 679 F.3d 312, 319–20 (5th Cir. 2012).

Second, as Petitioner documents,[74] there is an entrenched, persistent split among the courts of appeals as to whether litigants can invoke *Martinez* and *Trevino* in Rule 60(b)(6) proceedings, which calls for this Court's intervention.

Third, Petitioner's case demonstrates that the Fifth Circuit adheres to the same piecemeal "extraordinary circumstances" analysis repudiated by this Court in *Buck*. In his petition to this Court, Buck argued that "the Fifth Circuit panel in this case 'went through the factors one by one, and determined that each was "not extraordinary"'; and, in so doing, it improperly 'dilut[ed] [the] full weight' of the circumstances identified."[75] As it did in *Buck*, the Fifth Circuit here addressed each of several factors individually and determined that not one was extraordinary. The court held that the arrival of *Martinez* and *Trevino*, "without more, did not amount to an extraordinary circumstance."[76] The court next found that the *defense* calling Dr. Quijano as an expert on future dangerousness and his testimony that Petitioner is a "psychopath" was not extraordinary. The court rejected this factor because, unlike in *Buck*, where this Court found that Dr. Quijano's similarly damaging testimony regarding future

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[74] Petition for a Writ of *Certiorari*, at 14–22, *Raby v. Davis*, No. 18-8214.

[75] Petition for Writ of *Certiorari*, at 27, *Buck*, *supra* note 72 (quoting *Buck v. Stephens*, No. 14-70030 (5th Cir. Nov. 6, 2015) (Dennis and Graves, JJ., dissenting from the denial of en banc review)).

[76] *Raby v. Davis*, 907 F.3d 880, 884 (5th Cir. 2018).

dangerousness was "extraordinary," his testimony in Petitioner's case did not involve racial discrimination.[77] Likewise, the court found that Petitioner's diligent efforts to get his appointed counsel to pursue his claims, and his invocation of *Martinez*-related arguments ten years before *Martinez*, were not extraordinary: "persistence *alone* does not warrant relief from judgment."[78]

When considering whether Petitioner's case for Rule 60(b)(6) relief was at least debatable among reasonable jurists, the court should have considered the totality of the circumstances presented here, including:

- The CCA's botched implementation of its counsel system and recognition that it rendered state and federal habeas corpus proceedings meaningless for scores of death row inmates;
- The perfunctory state habeas representation Petitioner received pursuant to the discredited counsel system;
- Petitioner's remarkable *pro se* efforts to secure adequate habeas counsel while still in state court;
- Petitioner's diligent efforts to press his *Martinez*-cause argument in federal court, more than a decade before *Martinez* was decided;

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[77] *Raby*, 907 F.3d at 884–85.

[78] *Id.* at 885 (emphasis added).

- The advent of the *Martinez* and *Trevino* decisions and their underlying purposes; and
- Petitioner's compelling IATC claims.

The appropriate inquiry is whether jurists of reason could debate whether these factors "set up an extraordinary situation."[79] As in *Buck*, the Fifth Circuit failed to ask or answer this question.

III. This Court's intervention is necessary to correct the Fifth Circuit's flawed approach to COA determinations, which, in violation of *Buck*, continues to "place[] too heavy a burden on the petitioner *at the COA stage*."[80]

This Court has warned the Fifth Circuit against "invert[ing] the statutory order of operations and 'first decid[ing] the merits of an appeal, . . . then justif[ying] its denial of a COA based on its adjudication of the actual merits.'"[81] In *Buck*, the "court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief . . . —but it reached that conclusion only after essentially deciding the case on the merits."[82] The Court noted that the Fifth Circuit's improperly inverted approach was evident "in the second sentence of its opinion: 'Because [Buck] has not shown extraordinary circumstances

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[79] *Ackermann v. United States*, 340 U.S. 193, 199 (1950).

[80] *Buck*, 137 S. Ct. at 774.

[81] *Id*.

[82] *Id*. at 773.

that would permit relief under Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA.'"[83]

The Fifth Circuit followed precisely the same inverted approach in Petitioner's case, using the same language in its opinion denying COA: "Because there are no extraordinary circumstances meriting Rule 60(b)(6) relief, Petitioner's application for a COA is DENIED."[84] Given the circuit split over whether such a showing can qualify for Rule 60(b)(6) relief, the Fifth Circuit's inverted approach clearly "placed too heavy a burden on the prisoner *at the COA stage*."[85]

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[83] *Buck*, 137 S. Ct. at 773.

[84] *Raby v. Davis*, 907 F.3d at 885.

[85] *Buck*, 137 S. Ct. at 774.

CONCLUSION

For the reasons stated above, *amici* urge the Court to grant the petition for a writ of *certiorari* and reverse the judgment below. In the alternative, *amici* respectfully ask that the Court grant *certiorari* and allow full briefing and argument.

Respectfully submitted,

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