No. 18-8214

IN THE

Supreme Court of the United States

CHARLES RABY,
Petitioner,

v.

LORIE DAVIS, DIRECTOR TDCJ-CID
Respondent.

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

PROOF OF SERVICE

I hereby certify that on the 3rd day of May, 2019, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari** was sent by electronic mail to: Sarah Frazier, sfrazier@bafirm.com. All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400

Counsel for Respondent

No. 18-8214

IN THE
Supreme Court of the United States

CHARLES RABY,
Petitioner,

vs.

LORIE DAVIS, DIRECTOR TDCJ-CID
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
jay.clendenin@oag.texas.gov

Counsel for Respondent

QUESTION PRESENTED

Petitioner Charles Raby was found guilty and sentenced to death in 1994 for the murder of seventy-two-year-old Edna Franklin. Thirteen years after his federal habeas proceedings concluded, Raby filed a motion under Federal Rule of Civil Procedure 60(b)(6) for relief from judgment in which he re-asserted two previously-rejected, procedurally defaulted claims of ineffective assistance of trial counsel (IATC). Raby's motion alleged this Court's intervening decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), along with other factors, warranted relief from judgment. The district court denied the motion and the Fifth Circuit denied a certificate of appealability (COA), holding that *Martinez* and *Trevino*, without more, did not warrant relief from judgment. The Fifth Circuit considered whether additional equitable considerations posed by Raby warranted such relief and concluded they did not. In so doing, the Fifth Circuit did not hold—and has never held—that Rule 60(b)(6) motions based on *Martinez* must be categorically rejected.

These facts raise the following question:

> Should the Court expend its limited resources on a case where the asserted justifications for granting a writ of certiorari falter—it is based on an illusory circuit split, the purported existence of which is based on a mischaracterization of Fifth Circuit precedent, and where Raby's IATC claims were wholly unextraordinary and he failed to diligently pursue relief?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

BRIEF IN OPPOSITION 1

STATEMENT OF JURISDICTION 3

STATEMENT OF THE CASE 3

I. Facts of the Crime 3

A. The capital murder 3

B. Punishment facts 4

1. The State's punishment case 4

2. Raby's punishment evidence 9

II. Procedural History 14

ARGUMENT 15

I. The Court Should Deny Raby's Petition for a Writ of Certiorari Because It Is Founded Upon an Illusory Circuit Split 15

A. The Fourth, Fifth Sixth, and Eleventh Circuits do not categorically bar Rule 60(b)(6) motions based on *Martinez* 16

B. The Third, Seventh, and Ninth Circuits also consider equitable factors when considering Rule 60(b)(6) motions based on *Martinez* 27

C. Raby is not entitled to a remand 30

II. Raby Fails to Identify Any Reason Warranting this Court's Use of Its Limited Resources 30

A. The issuance of *Martinez* did not warrant relief from judgment 31

B. Raby's IATC claims were far from extraordinary 31

1. Trial counsel's presentation of Dr. Quijano's testimony did not render Raby's case extraordinary 32

2. Trial counsel presented extensive mitigating evidence 37

C. Raby was not diligent 39

CONCLUSION 40

TABLE OF AUTHORITIES

Cases **Page**

Abdur-Rahman v. Carpenter, 805 F.3d 710, 714 (6th Cir. 2015) 26

Adams v. Thaler, 679 F.3d 312 (5th Cir. 2012) ..... *passim*

Arthur v. Thomas, 739 F.3d 611 (11th Cir. 2014) 24, 25

Balentine v. Davis, 2018 WL 2298987 (N.D. Tex. 2018) 23

Balentine v. Davis, 2017 WL 9470540 (N.D. Tex. 2017) 23, 28

Balentine v. Stephens, 553 F. App'x 424 (5th Cir. 2014) 23

Barnett v. Roper, 941 F. Supp. 2d 1099 (E.D. Mo. 2013) 23

Beatty v. Stephens, 755 F. App'x 343 (5th Cir. 2018) 20, 21

Buck v. Davis, 137 S. Ct. 759 (2017) ..... *passim*

Buck v. Davis, 623 F. App'x 668 (5th Cir. 2015) 22

Clark v. Stephens, 627 F. App'x 305 (5th Cir. 2015) 22

Coleman v. Thompson, 501 U.S. 722 (1991) 17

Cox v. Horn, 757 F.3d 113 (3d Cir. 2014) 27, 28, 29

Davis v. Kelley, 855 F.3d 833 (8th Cir. 2017) 34

Diaz v. Stephens, 731 F.3d 370 (5th Cir. 2013) 19, 20, 21, 29

Gonzalez v. Crosby, 54 U.S. 524 (2005) 17, 18

Griffin v. Sec'y, Fla. Dep't of Corr., 787 F.3d 1086 (11th Cir. 2015) 25

Hall v. Stephens, 579 F. App'x 282 (5th Cir. 2014) 19

Hamilton v. Sec'y, 2014 WL 11455982 (M.D. Fla. 2014) 25

Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261 (11th Cir. 2015)..... 25

Haynes v. Davis, 733 F. App'x 766 (5th Cir. 2018) 21, 22

Haynes v. Stephens, 576 F. App'x 364 (5th Cir. 2014) 22

Haynes v. Thaler, 133 S. Ct. 2764 (2013) 22

Howell v. Sec'y, Fla. Dep't of Corr., 730 F.3d 1275 (11th Cir. 2013) 25

In re Paredes, 587 F. App'x 805 (5th Cir. 2014) 18

Jennings v. Davis, 2019 WL 384943 (5th Cir. 2019) 22

Jones v. Lebo, 2017 WL 4317144 (6th Cir. 2017) 26

King v. Davis, 703 F. App'x 320 (5th Cir. 2017)..... 34

King v. Davis, 883 F.3d 577 (5th Cir. 2018) 34

King v. Davis, 139 S. Ct. 413 (2018) 34

Lambrix v. Sec'y, 851 F.3d 1158 (11th Cir. 2015) 25, 34

Martinez v. Ryan, 566 U.S. 1 (2012) .....*passim*

Matter of Al Copeland Enters., Inc., 153 F.3d 268 (5th Cir. 1998)..... 21

McGuire v. Warden, 738 F.3d 741 (6th Cir. 2013) 26

Miller v. Mays, 879 F.3d 691 (6th Cir. 2018)..... 26, 34

Moses v. Joyner, 815 F.3d 163 (4th Cir. 2016) 25

Nash v. Hepp, 740 F.3d 1075 (7th Cir. 2014) 29

Neathery v. Stephens, 746 F.3d 227 (5th Cir. 2014)..... 22

Parr v. Quarterman, 472 F.3d 245 (5th Cir. 2006) 39

Ramirez v. United States, 799 F.3d 845 (7th Cir. 2015) 28, 29

Rayford v. Davis, No. 18-10121 (5th Cir. Jan. 30, 2018) 22

Seven Elves v. Eskenazi, 635 F.2d 396 (5th Cir. 1981) 2, 19, 20

Slack v. McDaniel, 529 U.S. 473 (2000) 32

Strickland v. Washington, 466 U.S. 668 (1984) 35, 39

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

Ward v. Stephens, 777 F.3d 250 (5th Cir. 2015) 36

Zagorski v. Mays, 907 F.3d 901 (6th Cir. 2018) 26

Statutes and Rules

28 U.S.C. § 1254.....3

Federal Rule of Civil Procedure 60(b)(6) .....*passim*

Secondary Sources

Diagnostic and Statistical Manual of Mental Disorders 660 (5th ed. 2013) .. 35

BRIEF IN OPPOSITION

Petitioner Charles Raby was convicted and sentenced to death for the murder of seventy-two-year-old Edna Franklin. Raby filed a federal habeas petition, which the district court denied in 2002. In his petition, Raby raised IATC claims alleging, *inter alia*, that counsel were ineffective for (1) presenting the testimony of Dr. Walter Quijano and (2) inadequately investigating and presenting mitigating evidence. The claims were dismissed as unexhausted and procedurally defaulted. Pet. App. A at 14. The Fifth Circuit denied a COA and this Court denied certiorari review. Pet. App. C, D.

Thirteen years later, Raby filed a motion under Federal Rule of Civil Procedure 60(b)(6) for relief from the district court's judgment dismissing as procedurally defaulted his two IATC claims. He argued that this Court's opinions in *Martinez*,[1] *Trevino*,[2] and *Buck v. Davis*,[3] along with the merits of his claims and other factors constituted extraordinary circumstances warranting Rule 60(b)(6) relief. The district court denied Raby's motion,

---

[1] 566 U.S. at 9 (2012) (recognizing exception to the procedural default doctrine where state habeas counsel was ineffective for failing to raise a substantial IATC claim in the petitioner's initial state habeas proceedings).

[2] 569 U.S. at 423 (2013) (holding that the *Martinez* exception applies to cases arising from Texas).

[3] 137 S. Ct. 759, 778 (2017) (holding that petitioner established IATC and an entitlement to relief from judgment where trial counsel presented testimony of Dr. Quijano that the petitioner's race predisposed him to violence).

holding that Raby failed to establish extraordinary circumstances because Dr. Quijano's testimony at Raby's trial "did not in any way inject a racial component into the sentencing decision" and his IATC claim alleging trial counsel failed to investigate and develop mitigating evidence was "common, not extraordinary." Pet. App. E at 4–5. The Fifth Circuit later denied a COA because the change in decisional law effected by *Martinez* and *Trevino*, "without more, did not amount to an extraordinary circumstance." Pet. App. F at 4. The Fifth Circuit also held *Buck* was inapplicable because race did not play any role in Raby's trial. Pet. App. F at 4–5. Lastly, the Fifth Circuit rejected Raby's argument that various equitable factors weighed in favor of Rule 60(b)(6) relief. Pet. App. F at 6–7 (citing *Seven Elves v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)).

Raby now seeks certiorari review. He alleges that the Fifth Circuit's holding in this case reflects a circuit split. Pet. Cert. at 14–35. The Fourth, Fifth, Sixth, and Eleventh Circuits, Raby argues, hold that a petitioner seeking Rule 60(b)(6) relief can never obtain relief from judgment if the Rule 60(b)(6) motion is based on this Court's holdings in *Martinez* and *Trevino*. Pet. Cert. at 15–17. He argues that the Third, Seventh, and Ninth Circuits hold that such motions may be granted if extraordinary circumstances exist. Pet. Cert. at 14–15. Raby also argues that he demonstrated extraordinary circumstances

because his IATC claims had merit, he is serving a death sentence, and he was diligent in pursuing his claims. Pet. Cert. at 29–31.

Raby's petition does not raise any issue warranting this Court's attention. First, Raby identifies nothing but an illusory circuit split—based on a mischaracterization of circuit precedent—regarding the impact of this Court's holdings in *Martinez* and *Trevino*. Contrary to Raby's assertion, the Fifth Circuit does *not* apply a categorical bar to Rule 60(b)(6) motions that are based on *Martinez* and *Trevino*. Second, Raby's IATC claims were plainly meritless, much less extraordinary. Third, Raby failed to identify any equitable consideration that would justify the relief he sought. Lastly, the Fifth Circuit has already considered and rejected Raby's argument that equity favors relief from judgment. He is, therefore, not entitled to a remand so that the lower court can consider the same argument again. Consequently, Raby's petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

The Texas Court of Criminal Appeals (CCA) summarized the facts of the capital murder as follows:

> Edna May Franklin, the 72-year-old [victim], lived with her two grandsons, who were [Raby's] friends. Although [Edna] had barred [Raby] from her home, her grandsons often snuck him in through a window and allowed him to spend the night. On the night of the offense, the two grandsons left their grandmother at home and went out. Upon their return, one of them discovered [Edna] dead on the living room floor. She had been severely beaten and repeatedly stabbed, and her throat was cut. Her attacker had undressed her below the waist. The contents of her purse had been emptied onto her bedroom floor. Police concluded the attacker's point of entry was the same window through which the grandsons had previously ushered [Raby]. After further investigation, police arrested [Raby] for the offense, and he confessed to the killing.

Raby v. State, 970 S.W.2d 1, 2 (Tex. Crim. App. 2009).

B. Punishment facts

1. The State's punishment case

As summarized by the CCA, "[w]itnesses testified to a series of assaults committed by [Raby], with the victims including [Raby's] girlfriend, his stepfather, a ten-year-old boy, a two-year-old girl, a friend's mother, and others. While incarcerated, [Raby] repeatedly attacked jailers and sheriff's deputies, fought with other inmates, and was found in possession of weapons on more than one occasion." *Id*. at 2.

Karianne Wright began dating Raby when she was thirteen years old and Raby was sixteen years old. 32 RR 174.[4] Karianne described Raby as the

[4] "RR" will refer to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). "CR" refers to the "Clerk's Record," the transcript of

most violent person she knew. 32 RR 177. Karianne described how Raby beat her on a regular basis, dragging her by her hair, and kicking her. 32 RR 189, 203–08. On one occasion, Raby beat her so badly she thought she might die. 32 RR 212. Raby threatened to kill her if she reported him to the police or if she left him for another man. 32 RR 214, 218.

Raby's abusive outbursts against Karianne occurred three to five times a week for the nearly four years their relationship lasted. 32 RR 177, 189. When she was fourteen, Karianne became pregnant with Raby's baby. 32 RR 174. Nonetheless, Raby continued to abuse her; after the baby was born, he hit her while she was holding the child. 32 RR 202–03, 216–17. After many of the assaults, Raby forced Karianne to perform oral sex on him, then he would hit her on the face while she was doing it. 32 RR 190. Although she tried to turn her head away from him during intercourse, Raby would force her to look at him, slapping her until she complied. 32 RR 190–91. Karianne's mother and Raby's friends testified about beatings they witnessed Raby administer to Karianne. 31 RR 8, 23, 36; 32 RR 164.

The jury also heard about two convenience store robberies in which Raby participated. In the first, Raby and two friends were attempting to steal a sandwich when the clerk noticed what they were doing. 31 RR 30–31. The clerk

---

pleadings and documents filed in the trial court. The State and Defense exhibits will be cited to as "SX" and "DX," respectively.

came out from behind the counter with a pole and told the young men to give back the sandwich. 31 RR 32. Raby grabbed the pole and repeatedly struck the clerk on his head and shoulders. 31 RR 32–33. The young men grabbed beer and t-shirts from a display and ran from the store. 31 RR 33.

In the second robbery, Paul Autry was working at a Diamond Shamrock when a young man came into the store, grabbed two twelve packs of beer, and fled. 33 RR 302. Mr. Autry yelled at the man and chased him into the parking lot. 33 RR 305. As they scuffled, a car pulled up, and Raby jumped out. 33 RR 306. He was wielding a knife with a five- or six-inch blade. 33 RR 305–06. Raby ordered Mr. Autry to release the other man. 33 RR 306. Mr. Autry backed away and returned to the store. 33 RR 307–08. Raby and his cohorts sped away from the store, driving sixty or seventy miles per hour. 33 RR 16. The car soon crashed. 33 RR 316. Raby attempted to flee but was soon caught by police. 33 RR 316. Raby was convicted and received a ten-year sentence for aggravated robbery of which he served two and a half years. SX 117; CR 38.

The jury also heard testimony regarding several of the assaults Raby committed. Ten-year-old Sean McGovern was riding his bicycle on the sidewalk outside his apartment complex when he encountered Raby drinking with a friend. 32 RR 75. Raby ordered Sean to "get off [his] sidewalk," but Sean ignored him. 32 RR 75. Raby stepped in front of Sean's bike and began punching him in the chest. 32 RR 76.

After Sean told his mother what Raby had done to him, Kathy Ann McGovern called Raby's mother, Betty Wearstler. 32 RR 85–86. The two women found Raby drinking beer near the front of the property. 32 RR 87. Raby screamed violently at his mother and doubled up his fist as if he intended to hit her. 32 RR 87. Ms. McGovern went to get Raby's stepfather, Bruce, but as she neared the door to the apartment, Raby rushed past her and got a large knife from the kitchen. 32 RR 88. Ms. McGovern fled to her apartment to call the police. 32 RR 91. She later learned that Raby had knocked out Bruce's front teeth and stabbed him in the neck. 32 RR 92.

In another unprovoked assault, Raby attacked Alicia Jordan. Ms. Jordan, whose son James was a friend of Raby's, had come home from work to discover Raby and Karianne in her home without her permission. 32 RR 106. Ms. Jordan had previously stated Raby was not welcome in her home. 32 RR 107. Ms. Jordan told Raby to leave and picked up the phone to call the police. 32 RR 108. Raby punched her, jerked the phone off the wall, struck Ms. Jordan three or four times, threw her on floor, and kicked her. 32 RR 108.

Finally, the jury heard about multiple disturbances and assaults Raby committed while in the Harris County jail. While in jail awaiting trial, Raby was reported to have been screaming and beating on his cell door. 33 RR 327. When a deputy went to investigate, Raby swung a broomstick—attached to the end of which was a sharp piece of metal—under the cell door. 33 RR 328–31.

Later, deputies received information that Raby had a shank in his cell. Deputy Jeffrey Powell searched Raby's cell while another deputy waited outside with Raby. 33 RR 358, 370. Deputy Powell found the weapon—a four-to-six-inch blade—taped to the bottom of the bed. 33 RR 360. Deputy B.K. Morgan attempted to handcuff Raby, but Raby became violent. 33 RR 363. Three deputies were needed to subdue him. 33 RR 363, 370–71.

On another occasion, Deputy John Garner was instructed to transport Raby from the classification division of the jail to administrative segregation. 33 RR 380. Deputy Garner escorted Raby, who was handcuffed and shackled. 33 RR 381. Despite the restraints, Raby leaned forward and then lunged his head backward and struck Deputy Garner in the face with the back of his head. 33 RR 380–84.

Lastly, Deputy H.M. Bradley was overseeing security in the Harris County Jail's law library when a fight broke out between two inmates. 33 RR 426, 430. As Deputy Bradley lined the inmates up in the hall, Raby called him a "sorry mother fucker." 33 RR 431. Deputy Bradley intended to handcuff Raby in case he became hostile and ordered him to get on his knees. 33 RR 432. Raby refused to put his hands behind his back. 33 RR 432. Raby then jumped up, grabbed Deputy Bradley by the shirt collar, and tried to gouge out his eye. 33 RR 432; 36 RR 953–57.

2. Raby's punishment evidence

As summarized by the CCA, Raby "offered testimony . . . relating to his troubled upbringing, including his mother's mental health problems, his commitment to foster care and institutions, and episodes of physical abuse. Other witnesses testified that [Raby] had a peaceful disposition and that his problems during incarceration had been provoked by jailers." *Raby v. State*, 970 S.W.2d at 2.

Raby's mother, Betty, told the jury that she had been molested by her father when she was a child, which ultimately led to her parents' divorce. 34 RR 463, 580 (testimony of Betty's mother Wanda Robinson). She met and married Raby's father when she was about sixteen; they were divorced by the time Raby was two and his sister Wanda was just a baby. 34 RR 465, 501. Betty's sister, Mary Lanclos, testified that Raby's father was not a nice man and that he whipped Raby. 34 RR 651. Betty remarried Harry Butler when Raby was six, but Butler "didn't really show them he loved" Betty's children. 34 RR 468. As Raby's sister told the jury, Butler "would make [Raby] stay in his room or kneel on the floor," and he "whopped us so hard that he couldn't sit down for awhile."[5] 34 RR 598, 600; *see* 34 RR 587–88 (Butler called Raby "ugly, dirty names" such as "M-F'er" and "cocksucker"), 654.

---

[5] Butler also testified regarding his discipline of Raby when Raby built a fire in their backyard and when he refused to go to school. 34 RR 603. He blamed Raby's

Betty's next husband, Howard Wearstler, unsuccessfully tried to help Raby get a job. 34 RR 490. But, like Butler, Wearstler also mistreated Raby. 34 RR 505, 506. Wearstler testified that Raby was a heavy drinker but was respectful when he was not drunk. 35 RR 719.

At some point, Betty and her children moved in with her mother. Taking care of all of them and trying to hold down multiple jobs led to a nervous breakdown, so Betty committed herself to a mental institution. 34 RR 471. She also committed her mother because she too was having "real mental" issues.[6] 34 RR 471–72. It was then that CPS became involved: she "was unable to care for [Raby]. She had a lot of emotional problems and she couldn't control [him]." 35 RR 671.

Betty also testified that Raby began drinking alcohol with his friends when he was twelve years old. 34 RR 502. Her brother (Raby's uncle) smoked marijuana with Raby, which prompted a report to CPS. 34 RR 504. Reports were also made to CPS when Betty's relatives learned she was using her gas stove to warm her home and when Butler "whipped" Raby's sister. 34 RR 468–69, 509.

---

mother and grandmother for calling Child Protective Services (CPS) when he tried to discipline Raby, stating they allowed Raby to get away with his poor behavior. 34 RR 606, 614.

[6] Betty also briefly told the jury about her brother's psychiatric problems. 34 RR 500. Betty's mother testified that she had been hospitalized due to her poor mental health. 34 RR 579.

Raby's CPS caseworker, Jeff Page, testified regarding his experience with Raby and Betty. Mr. Page met Raby in 1983 at a facility in which Raby was placed due to his behavioral problems. 35 RR 669–70. Raby had already been involved with CPS since the late 1970s because his mother was unable to care for her children due to her poor mental health. 35 RR 671. During Raby's various placements at boys' schools and treatment camps, he ran away often and hitchhiked back to his mother's home. 35 RR 678. Nonetheless, Raby adjusted well at a facility called New Horizons. 35 RR 680. However, the personnel at that facility told Raby he would be moved to another facility. 35 RR 680. Mr. Page testified he believed Raby should have been allowed to remain at New Horizons because he was at a crucial stage of his treatment. 35 RR 694–95, 700.

In all, Raby was placed in eleven or twelve different facilities.[7] 35 RR 700. Mr. Page testified as to the regrettable state of Raby's upbringing: "I thought he would end up institutionalized.[8] I didn't see how he would be able to really make it, given all the problems that his family had and all the problems that he had had." 35 RR 684.

---

7 On cross-examination, Mr. Page testified that Raby stole money, a truck, a motorcycle, and a shotgun during his time in CPS placements. 34 RR 688–90. Raby also verbally abused a teacher, attempted a burglary, threatened his aunt with a knife, and evaded arrest. 34 RR 691.

8 Mr. Page clarified that by institutionalized he was referring to prison, not a mental institution. 35 RR 684.

The jury also heard positive character testimony regarding Raby's relationships with women. Betty talked about Raby's relationship with Karianne, testifying that Raby seemed to "care a lot about" Karianne and was not violent toward her. 34 RR 493, 505. He worked to save money so they could get their own home. 34 RR 493. Raby also had a relationship with Mary Gomez, which she and her mother told the jury was good. 34 RR 630–31. Raby was "kind and supportive," and "always nice." 34 RR 630, 647; 35 RR 726. Mary gave birth while she knew Raby, and he helped her care for the baby although he was not the baby's father. 34 RR 628–31. Raby's relationship with Seria McRae was also good; he treated her with "a great deal of respect and courtesy," and he was never abusive; rather, he was "very protective when he spoke of women." 35 RR 726.

Regarding Raby's misconduct during his incarceration, the defense presented testimony of several of Raby's fellow inmates and jail personnel to demonstrate that Raby had a peaceful disposition and that his problems during incarceration had been provoked by jailers. 35 RR 737–41, 745, 746, 750, 767–68, 770–71, 813–15, 817, 838, 885, 953–55. The defense also reached a stipulation, which was read to the jury, as to the fact that Raby received no disciplinary reports from February 10, 1990, to June 4, 1990, when he was in jail awaiting trial on an aggravated robbery charge and that he had been a

"model prisoner" in the few months leading up to his capital murder trial. 37 RR 1002; DX 7.

In addition to these lay witnesses, the defense called psychologist Dr. Walter Quijano. Dr. Quijano met with and observed Raby prior to trial and evaluated his mental status. 34 RR 533. During his time with Raby, Dr. Quijano administered the Millon Clinical Multiaxial Inventory (MCMI) and conducted a mental status and clinical interview. 34 RR 533. The MCMI indicated Raby was "very down on himself," "socially incompetent," and "very withdrawn." 34 RR 534. The results also suggested that Raby was passive/aggressive and "had some anti-social personality features."[9] 34 RR 534. Dr. Quijano testified Raby also had borderline personality disorder, meaning that his moods switch unpredictably. 34 RR 535.

Dr. Quijano reassured the jury that "[t]here are resources in the prison system that if applied to this person can control this person." 34 RR 535; *see* 34 RR 539–40, 543–44. These included proper classification, housing restrictions, "ranges of physical restraints . . . medical and psychiatric intervention . . . and just aging him in the prison would also contribute to controlling him." 34 RR 536. Dr. Quijano testified that the prisons monitor the inmates' classification

[9] On cross-examination, Dr. Quijano corrected the prosecutor's use of the term "sociopath," explaining that "we have become mellow and we use the term anti-social." 34 RR 545.

and are able to make corrections if an inmate is improperly classified. 34 RR 542.

II. Procedural History

Raby was convicted and sentenced to death in 1994 for the murder of Edna Franklin. 30 RR 476; 37 RR 1073. The CCA upheld Raby's conviction and death sentence on direct appeal. *Raby v. State*, 970 S.W.2d at 9, *cert. denied*, 525 U.S. 1003 (1998). Raby filed a state application for a writ of habeas corpus, which was denied. *Ex parte Raby,* No. 48,131-01 (Tex. Crim. App. Jan. 31, 2001) (unpublished order).

Raby then filed a federal habeas petition, which the district court denied. Pet. App. A at 1–34. The Fifth Circuit Court denied a COA and this Court denied Raby's petition for a writ of certiorari. *See generally* Pet. App. C, D.

During his federal habeas proceedings, Raby moved in state court for DNA testing. *Raby v. State*, 2005 WL 8154134 (Tex. Crim. App. 2005). The motion was ultimately granted in part. *Raby v. State*, 2005 WL 8154134, at *8 (Tex. Crim. App. 2005). Testing was conducted and the trial court conducted an evidentiary hearing after which the CCA denied relief. *Raby v. State*, 2015 WL 1874540, at *8–9 (Tex. Crim. App. 2015).

Raby challenged via 42 U.S.C. § 1983 the method by which his execution would be carried out. Raby's lawsuit was rejected. *Raby v. Livingston*, 600 F.3d 552 (5th Cir. 2010).

In 2016, Raby filed a subsequent state habeas application raising IATC claims he later presented in a motion for relief from judgment. The CCA dismissed the application as an abuse of the writ. *Ex parte Raby*, No. 48,131-02 (Tex. Crim. App. May 17, 2017) (unpublished order).

Raby then filed in the district court a motion for relief from judgment. Following briefing, the district court denied the motion. Pet. App. E at 1–7. Raby requested a COA from the Fifth Circuit, which was denied. Pet. App. F at 1–7.

Raby next filed in the Fifth Circuit a motion seeking authorization to file a successive habeas petition. Raby's motion remains pending. *In re Charles Raby*, No. 18-20826 (5th Cir.).

Raby then filed a petition for a writ of certiorari following the Fifth Circuit's denial of a COA regarding the district court's rejection of his Rule 60(b)(6) motion. The instant Brief in Opposition follows.

ARGUMENT

I. The Court Should Deny Raby's Petition for a Writ of Certiorari Because It Is Founded Upon an Illusory Circuit Split.

Raby argues the Court should grant certiorari to resolve a split among the circuit courts regarding whether relief from judgment under Federal Rule of Civil Procedure 60(b)(6) is available where a Rule 60(b)(6) motion is based on this Court's holding in *Martinez* (i.e., a motion seeking to reopen the

proceedings to establish cause and prejudice under *Martinez* for the procedural default of an IATC claim). Pet. Cert. at 14–35. He asserts that the Fourth, Fifth, Sixth, and Eleventh Circuits hold that, in such a situation, Rule 60(b)(6) relief is categorically precluded. Pet. Cert. at 16–17. The Third, Seventh, and Ninth Circuits, Raby argues, hold that relief may be granted in such situations if a petitioner demonstrates extraordinary circumstances. Pet. Cert. at 4, 14. Raby's argument fails because it is based on a mischaracterization of circuit precedent. Consequently, the premise of his request for certiorari review is unfounded and his petition should be denied.

A. The Fourth, Fifth Sixth, and Eleventh Circuits do not categorically bar Rule 60(b)(6) motions based on *Martinez*.

Raby's argument that a circuit split exists regarding the availability of Rule 60(b)(6) relief for motions based on *Martinez* rests on his assertion that the Fifth Circuit imposes a "categorical" rule *requiring* the denial of such motions. Pet. Cert. at 5, 13, 15, 32–35. Raby references this "categorical" and "automatic" rule on several occasions. Pet. Cert. at 5, 13, 15, 32–35. But Raby does not cite any holding from the Fifth Circuit (or the Fourth, Sixth, and Eleventh Circuit) that reflects any such rule. Nor could he, because no such rule exists in the Fifth Circuit.

Raby first cites to the Fifth Circuit's holding in *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012). Pet. Cert. at 15–16. In *Adams*, the petitioner's

IATC claim was dismissed during his initial federal habeas proceedings as procedurally defaulted. *Id.* at 315. That holding was based on the then-controlling precedent in *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), which held that ineffective assistance of state habeas counsel did not constitute cause to excuse the procedural default of a claim. This Court later issued its opinion in *Martinez*, which qualified *Coleman*'s holding by recognizing a narrow equitable exception that permits a petitioner to establish cause and prejudice for the default of a substantial IATC claim that was not raised during the initial state habeas proceedings due to ineffective assistance of state habeas counsel. *Martinez*, 566 U.S. at 17–18. The petitioner filed a motion for relief from judgment arguing that his death sentence along with the issuance of *Martinez* constituted extraordinary circumstances warranting relief from judgment. *Adams*, 679 F.3d at 319.

The Fifth Circuit held that, under its precedent and under this Court's reasoning in *Gonzalez v. Crosby*, 54 U.S. 524, 536 (2005), the intervening decision in *Martinez* did not constitute an extraordinary circumstance.[10] *Id.* at

---

[10] Contrary to Raby's assertion, this Court in *Buck* did not reject the conclusion that *Martinez* was not an extraordinary circumstance. Pet. Cert. at 4; *Buck*, 137 S. Ct. at 787 (Thomas, J., dissenting) (recognizing that the majority opinion did "not even count [*Martinez* and *Trevino*] in its tally of extraordinary circumstances"). *Martinez* did not factor into the Court's analysis in *Buck* of whether the petitioner's circumstances were extraordinary. The Court only looked to *Martinez* after determining that other circumstances rendered the petitioner's situation extraordinary and, even then, it was solely to determine the feasibility of granting relief from judgment. *Buck*, 137 S. Ct. at 780. The Court "reach[ed] no broader

319–20. In so holding, the Fifth Circuit did not state that a Rule 60(b)(6) motion based on *Martinez* could never be granted. As the petitioner posed only one other facially insubstantial ground—his capital sentence—as an extraordinary circumstance, it is unsurprising the Fifth Circuit did not discuss whether the petitioner identified any other justification for Rule 60(b)(6) relief.

The fact that *Adams* did not lay down a categorical rule mandating denial of Rule 60(b)(6) motions based on *Martinez* is reflected in the Fifth Circuit's opinions that followed. Raby's assertion that "in *Adams* and subsequent cases, . . . the Fifth Circuit did not consider any of the petitioner's individual equities" is flatly untrue. Pet. Cert. at 16. Even in the post-*Adams* cases Raby cites, the Fifth Circuit did not categorically reject Rule 60(b)(6) motions based on *Martinez*. For example, the Fifth Circuit in *In re Paredes* affirmed the denial of the petitioner's Rule 60(b)(6) motion, holding that *Martinez* and *Trevino*, "do not by themselves, constitute 'extraordinary circumstances.'" 587 F. App'x 805, 825 (5th Cir. 2014). The Fifth Circuit went on, as this Court did in *Gonzalez*, to consider whether the petitioner's purported diligence rendered his case extraordinary. *Id*. at 826. The Fifth

---

determination concerning the application of" *Martinez* and *Trevino*. *Id*. The Court in *Buck* did not hold that *Martinez* and *Trevino* were anything other than changes in decisional law. Pet. Cert. at 4–5. If a petitioner is to demonstrate extraordinary circumstances, they must exist independent of *Martinez*. As illustrated in *Buck*, a finding regarding the reviewability of a claim is not exceptional, rather it is simply a precondition of Rule 60(b)(6) relief.

Circuit held that, as in *Gonzalez*, the petitioner exhibited a lack of diligence. *Id*. In *Hall v. Stephens*, the Fifth Circuit stated it was "not remotely evident" what extraordinary circumstances the petitioner believed justified Rule 60(b)(6) relief. 579 F. App'x 282, 283 (5th Cir. 2014). The court noted that the petitioner sought to relitigate an IATC claim that had been denied on the merits but did not identify anything other than the issuance of *Martinez* and *Trevino* as constituting extraordinary circumstances. *Id*. Consequently, the Fifth Circuit denied his application for a COA. *Id*.

Conspicuously absent from Raby's petition is any mention of the Fifth Circuit's opinion in *Diaz v. Stephens*, 731 F.3d 370 (5th Cir. 2013). In *Diaz*, the Fifth Circuit affirmed the denial of a Rule 60(b)(6) motion where the petitioner argued that *Martinez*, along with a number of equitable factors, weighed in favor of relief from judgment.[11] *Id*. at 375–78. The Fifth Circuit stated that

---

[11] The equitable considerations under Rule 60(b)(6) identified by the Fifth Circuit are:

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether[,] if the judgment was a default or a dismissal in which there was no consideration of the merits[,] the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether[,] if the judgment was rendered after a trial on the merits[,] the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that

Martinez and *Trevino*, alone, were not grounds for Rule 60(b)(6) relief. *Id*. at 375–76. The court went on to consider whether the *Seven Elves* factors weighed in favor of granting relief from judgment. Unlike the petitioner in *Adams*, the petitioner in *Diaz* argued his diligence, the "extensive documentation" of state habeas counsel's ineffectiveness, and the merit of his IATC claims warranted relief. *Id*. at 377. The Fifth Circuit considered those factors and concluded that the petitioner made a "poor showing of equitable factors necessary to reopen his judgment." *Id*. at 377–79.

Consistent with its approach in *Diaz*, the Fifth Circuit has continued to consider whether equitable factors posed by petitioners, in addition to *Martinez*, justify Rule 60(b)(6) relief. In *Beatty v. Davis*, the Fifth Circuit considered whether the petitioner's Rule 60(b)(6) motion that was based on *Martinez* established extraordinary circumstances. 755 F. App'x 343, 349 (5th Cir. 2018). The petitioner argued that he was the only petitioner not to have been allowed to litigate his claims in district court with "conflict-free" counsel,[12] he raised "legitimate concerns" regarding his innocence, his state

---

> would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Diaz, 731 F.3d at 377 (citing *Seven Elves*, 635 F.2d at 402).

[12] "Conflict-free" counsel refers to the argument that counsel who represented a petitioner in both state and federal habeas proceedings suffers a conflict of interest in arguing his or her own ineffectiveness to establish cause and prejudice under *Martinez*. *Beatty*, 755 F. App'x at 346.

habeas counsel admitted his own ineffectiveness, and he was diligent in seeking appointment of conflict-free counsel. *Id*. The Fifth Circuit found those circumstances insufficient. *Id*. at 349–50 ("[T]he combination of *Martinez/Trevino*'s change in decisional law and these 'other factors' would not allow reasonable jurists to conclude that the district court abused its discretion in determining that Beatty failed to show the 'extraordinary circumstances' required for Rule 60(b)(6) relief.").

In *Haynes v. Davis*, the Fifth Circuit affirmed the denial of a Rule 60(b)(6) motion that was based on *Martinez*. 733 F. App'x 766, 767 (5th Cir. 2018). The Fifth Circuit recognized that it had applied its *Seven Elves* factors in evaluating the strength of Rule 60(b)(6) motions. *Id*. at 769 (citing *Diaz*, 731 F.3d at 377; *Matter of Al Copeland Enters., Inc.*, 153 F.3d 268, 272 (5th Cir. 1998)). Additionally, the court stated that in the habeas context, comity and federalism "elevate the concerns of finality." *Id*. at 769. The Fifth Circuit also stated that the merits of a petitioner's underlying constitutional claim may be relevant to the Rule 60(b)(6) analysis. *Id*. The court considered the petitioner's argument that the "balance of individual equities" weighed in favor of relief from judgment; it concluded they did not. *Id*. at 769–70. Specifically, the Fifth Circuit considered the fact that the merits of the petitioner's IATC claim had been reviewed previously and were, in any event, "not particularly compelling."

Id. at 769. The remaining factors were similarly insufficient to warrant Rule 60(b)(6) relief.[13] *Id*. at 769–70.

Importantly, the Fifth Circuit's opinion in *Haynes* followed a remand for reconsideration of the petitioner's Rule 60(b)(6) motion in light of *Trevino*.[14] *Haynes v. Stephens*, 576 F. App'x 364, 365 (5th Cir. 2014). In its remand order, the Fifth Circuit noted that the district court would have "especially broad" discretion in considering the Rule 60(b)(6) motion, and it did not give the district court any limiting instructions. *Id*. The Fifth Circuit did *not* simply hold that the petitioner's Rule 60(b)(6) motion must be categorically denied because it was based on *Martinez* and *Trevino*, as one would expect if the Fifth Circuit applied the "categorical" rule Raby suggests. Pet. Cert. at 5, 13, 15.

Similarly, the Fifth Circuit remanded a Rule 60(b)(6) motion based on *Martinez* and *Trevino* despite the State's argument that the *Adams* decision

---

[13] The Fifth Circuit has similarly considered Rule 60(b)(6) motions based on *Martinez* on a case-by-case basis, rather than by summary dismissal, in several other cases. *Jennings v. Davis*, 2019 WL 384943, at *4 (5th Cir. 2019); *Rayford v. Davis*, No. 18-10121, slip op. at 8–11 (5th Cir. Jan. 30, 2018); *Clark v. Stephens*, 627 F. App'x 305, 307–08 (5th Cir. 2015) (granting a COA as to the district court's denial of petitioner's Rule 60(b)(6) motion based on *Martinez* and the assertion that federal habeas counsel suffered a conflict of interest due to *Martinez*); *Buck v. Davis*, 623 F. App'x 668, 672–74 (5th Cir. 2015); *Neathery v. Stephens*, 746 F.3d 227, 229 (5th Cir. 2014) (non-capital case).

[14] Haynes's Rule 60(b)(6) motion was first denied in 2012. *Haynes*, 576 F. App'x at 365. The Fifth Circuit denied a COA as to that denial. *Id*. This Court later granted certiorari, vacated the Fifth Circuit's judgment, and remanded the case for further consideration following *Trevino*. *Haynes v. Thaler*, 133 S. Ct. 2764 (2013).

meant that the petitioner could not demonstrate extraordinary circumstances.[15] *Balentine v. Stephens*, 553 F. App'x 424, 425 (5th Cir. 2014). The district court then conducted an evidentiary hearing on the petitioner's Rule 60(b)(6) motion that sought to raise a defaulted IATC claim. *Balentine v. Davis*, 2017 WL 9470540, at *1–2 (N.D. Tex. 2017). Based on the evidence presented at the evidentiary hearing, the district court concluded that the IATC claim did not satisfy the *Martinez* exception and, consequently, Rule 60(b)(6) relief was inappropriate. *Id.* at 16; *Balentine v. Davis*, 2018 WL 2298987, at *1 (N.D. Tex. 2018) (order adopting magistrate judge's recommendation). Again, belying Raby's assertion that the Fifth Circuit categorically rejects Rule 60(b)(6) motions based on *Martinez* such that "Rule 60(b)(6) petitioners relying on *Martinez* can simply never prevail," Pet. Cert. at 15, the petitioner in *Balentine* was permitted the opportunity to substantiate his motion and his IATC claim in an evidentiary hearing.[16]

---

[15] Raby acknowledges this Court's remand of *Balentine* and *Haynes*, but he fails to acknowledge what happened after those remands. Pet. Cert. at 34.

[16] Raby refers to a case in which a petitioner received relief from judgment after filing a Rule 60(b)(6) motion based, in part, on *Martinez* and after an evidentiary hearing on his underlying IATC claim. Pet. Cert. at 24 (citing *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1116–21 (E.D. Mo. 2013)). Raby asserts that the petitioner in that case would not have had that opportunity if his case arose in the Fifth Circuit. The fact that the petitioner in *Balentine* received such an evidentiary hearing plainly belies Raby's assertion.

Indeed, the Fifth Circuit's opinion in this very case belies Raby's assertion that the court categorically denies any Rule 60(b)(6) motion that is based on *Martinez*. Rather than categorically rejecting Raby's Rule 60(b)(6) motion, the Fifth Circuit considered the factors Raby posed as warranting relief from judgment. Pet. App. F at 4–6. The Fifth Circuit stated 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. The court then went on to address whether Raby presented "more." Pet. App. F at 4. It considered whether Dr. Quijano's testimony, Raby's diligence, or the purported fact that no court had considered the merits of his IATC claims rendered his case extraordinary. Pet. App. F at 4–6. The Fifth Circuit determined that the factors Raby identified were insufficient to demonstrate extraordinary circumstances. Pet. App. F at 4–6. Raby's assertion that "the Fifth Circuit did not consider any of the petitioner's individual equities" in his case is plainly incorrect. Pet. Cert. at 16.

Raby's characterization of the Fourth, Sixth, and Eleventh Circuits' precedent is similarly flawed. For instance, the Eleventh Circuit in *Arthur v. Thomas* explained that the petitioner sought to improperly use the *Martinez* exception to excuse his failure to timely file a federal habeas petition. 739 F.3d 611, 630 (11th Cir. 2014). But assuming *Martinez* applied so as to potentially render a petition timely, the court held that, consistent with this Court's

analysis in *Gonzalez*, *Martinez* did not constitute an extraordinary circumstance. *Id*. at 633. The Eleventh Circuit went on to consider whether "other factors"—the petitioner's death sentence and the fact that no court had reviewed the merits of his IATC claims—rendered his case extraordinary. *Id*. But the Eleventh Circuit had concluded in a materially indistinguishable case that the same factors did not constitute extraordinary circumstances. *Id*. (citing *Howell v. Sec'y, Fla. Dep't of Corr.*, 730 F.3d 1275, 1262 (11th Cir. 2013) (Jordan, J., concurring)). The Eleventh Circuit did not, as Raby asserts, *refuse* to account for those factors.[17] Pet. Cert. at 16.

The Sixth Circuit also considers equitable factors posed by petitioners when considering Rule 60(b) motions based on *Martinez*. In *Zagorski v. Mays*,

---

[17] Similarly, the Eleventh Circuit in *Hamilton v. Sec'y, Fla. Dep't of Corr.* held that the petitioner's Rule 60(b)(6) motion did not demonstrate extraordinary circumstances where it was based *only* on the issuance of *Martinez* and sought to excuse his failure to timely file a petition. 793 F.3d 1261, 1266 (11th Cir. 2015); *Hamilton v. Sec'y*, 2014 WL 11455982, at *2 (M.D. Fla. 2014). In *Lambrix v. Sec'y*, the Eleventh Circuit affirmed the denial of a Rule 60(b)(6) motion based on *Martinez* because the petitioner's claims were not defaulted and, consequently, *Martinez* had no applicability. 851 F.3d 1158, 1170 (11th Cir. 2015). The court went on to consider the factors posed by the petitioner—his death sentence and his allegations that the State obstructed his case—and found that the petitioner failed to demonstrate extraordinary circumstances. *Id*. at 1171–73. The Eleventh Circuit affirmed the denial of a Rule 60(b)(6) motion in *Griffin v. Sec'y, Fla. Dep't of Corr.*, that sought application of *Martinez*. 787 F.3d 1086, 1087 (11th Cir. 2015). It does not appear, however, that the petitioner in that case posed any factors other than *Martinez* that constituted extraordinary circumstances. *Id*. Notably, the court extensively discussed whether the issuance of *Martinez* was sufficient to warrant relief from judgment under Rule 60(b)(5). *Id*. at 1089–96. The Fourth Circuit similarly affirmed the denial of a Rule 60(b)(6) that was based solely on the issuance of *Martinez* and *Trevino*. *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016).

the Sixth Circuit considered whether the petitioner's death sentence and the merits of his underlying claims constituted extraordinary circumstances. 907 F.3d 901, 906–08 (6th Cir. 2018). The court concluded they did not.[18] *Id.*; *see also Miller v. Mays*, 879 F.3d 691, 698–706 (6th Cir. 2018) (affirming denial of Rule 60(b)(6) motion based on *Martinez* after extensively considering whether equitable factors posed by the petitioner demonstrated extraordinary circumstances).

As demonstrated above, Raby's argument that the Fifth Circuit (along with the Fourth, Sixth and Eleventh Circuits) apply a categorical bar to Rule 60(b)(6) motions based on *Martinez*, which prohibits the consideration of other equitable factors posed by petitioners, is flatly incorrect. Raby's argument that a circuit split exists is founded on this supposed categorical bar. But since that categorical bar does not exist, no such circuit split exists. Consequently, Raby's petition should be denied.

---

[18] In *Abdur-Rahman v. Carpenter*, the Sixth Circuit concluded that *Martinez* did not apply to the claims the petitioner sought to raise in his Rule 60(b)(6) motion because the first claim was not an IATC claim and the other was not procedurally defaulted. 805 F.3d 710, 714 (6th Cir. 2015). Moreover, the petitioner did not identify any factor other than the issuance of *Martinez* that he argued constituted extraordinary circumstances. *Id.* Similarly, the Sixth Circuit in *McGuire v. Warden* affirmed the denial of a Rule 60(b)(6) motion where the motion was based solely on the issuance of *Trevino*. 738 F.3d 741, 750 (6th Cir. 2013); *see also Jones v. Lebo*, 2017 WL 4317144, at *2 (6th Cir. 2017). The Sixth Circuit explained that Rule 60(b)(6) motions must be considered on a "case-by-case" basis. *Id.* Notably, the court went on to consider the merits of the petitioner's IATC claim. *McGuire*, 738 F.3d at 752–59.

B. The Third, Seventh, and Ninth Circuits also consider equitable factors when considering Rule 60(b)(6) motions based on *Martinez*.

Raby argues that the Third, Seventh, and Ninth Circuits take a contrary approach to Rule 60(b)(6) motions based on *Martinez* because those courts permit case-by-case consideration of factors beyond *Martinez* in determining whether relief from judgment is warranted. Pet. Cert. at 18–21. But as discussed above, the Fourth, Fifth, Sixth, and Eleventh Circuits similarly consider equitable factors posed by petitioners and do not impose a categorical bar to such motions.

Raby argues that the Third Circuit's opinion in *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), demonstrates the existence of a circuit split. Pet. Cert. at 18–19. In *Cox*, the Third Circuit vacated the district court's denial of the petitioner's Rule 60(b)(6) motion in which the petitioner sought to raise previously defaulted claims after *Martinez*. 757 F.3d at 115. The district court based its rejection of the petitioner's motion on its conclusion that *Martinez* did not constitute an extraordinary circumstance relying, in part, on the Fifth Circuit's holding in *Adams* to that effect. *Id*. In vacating the district court's order, the Third Circuit agreed that *Martinez* was insufficient on its own to warrant relief from judgment. *Id*. However, the court concluded that "*Adams* [did] not square with [its] approach to Rule 60(b)(6)" because the Fifth Circuit in *Adams* did not examine "the petitioner's individual circumstances." *Id*. at

121. Nonetheless, the Third Circuit acknowledged that the Fifth Circuit in *Diaz* did consider equitable factors in determining whether relief from judgment was warranted. *Id*. at 122 n.5.

The Third Circuit in *Cox* largely cordoned its review of Fifth Circuit precedent to *Adams*. And because *Cox* predated much of the Fifth Circuit's post-*Adams* caselaw, the Third Circuit did not have the benefit of that caselaw when it opined that the Fifth Circuit's approach to Rule 60(b)(6) motions based on *Martinez* differed from its approach. Indeed, the Seventh Circuit acknowledged that the Fifth Circuit's approach as reflected in *Diaz* may not have been inconsistent with *Cox*. *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015). Consequently, Raby's assertion based on *Cox* that the purported circuit split is "entrenched" and "unlikely to benefit from further percolation" is belied by the post-*Adams* caselaw that he fails to even acknowledge. Pet. Cert. at 21–22; *see, e.g., Balentine*, 2017 WL 9470540, at *5 ("If Balentine's claim comes within the *Martinez* exception and would warrant relief from his death sentence, that would be a factor supporting Rule 60(b) relief.").

The absence of a circuit split is also reflected in the fact that the circuit courts agree that *Martinez* and *Trevino* do not, on their own, constitute extraordinary circumstances. Even the Circuits whose approaches Raby endorses reject the argument that *Martinez* and *Trevino* warrant relief from

judgment. The Seventh Circuit, for example, has stated that "[a] change in law alone will not suffice" to show extraordinary circumstances, and the Third Circuit has stated that "much more" than the change in law brought by *Martinez* is required. *Ramirez*, 799 F.3d at 850; *Cox*, 757 F.3d at 115; *see also Nash v. Hepp*, 740 F.3d 1075, 1078–79 (7th Cir. 2014) (describing the district court's application of *Coleman* prior to *Martinez* as a "mundane" and "hardly extraordinary" situation). Consistent with those opinions, the Fifth Circuit has stated that *Martinez*, alone, does not suffice to show extraordinary circumstances. *See, e.g., Diaz*, 731 F.3d at 376. Consequently, the circuit courts are aligned regarding the insufficiency of *Martinez* and *Trevino*, standing alone, to warrant relief from judgment.[19] Raby does not raise an issue warranting this Court's attention.

---

[19] Raby briefly asserts that the purported circuit split is "grounded in a broader disagreement about the meaning of *Gonzalez*," i.e., whether a change in decisional law can warrant relief from judgment under Rule 60(b)(6). Pet. Cert. at 22. But as discussed above, the Fifth Circuit's holding in this case that "*Martinez* and *Trevino*, without more, did not amount to an extraordinary circumstance" is consistent with the other circuit courts' treatment of those opinions in the Rule 60(b)(6) context. And the fact that the Fifth Circuit went on to address the particular circumstances of Raby's case—including the equitable factors he posed—belies his argument that the Fifth Circuit's opinion in his case reflects a circuit split. The Fifth Circuit's opinion did not rest on the notion that a change in decisional law can never warrant Rule 60(b)(6) relief. Consequently, Raby's case simply does not present an appropriate vehicle for addressing any "broader disagreement" as to whether changes in decisional law in the habeas context can warrant relief under Rule 60(b)(6). Pet. Cert. at 22. Nor does Raby's petition pose that "broader disagreement" as an issue for this Court to consider. Pet. Cert. at i. Any opinion in this case regarding that purported disagreement would be purely advisory.

C. Raby is not entitled to a remand.

Raby asks that, if the Court does not grant certiorari, the Court remand his case to the Fifth Circuit "for full briefing and argument on the proper treatment" of his *Martinez*-based Rule 60(b)(6) motion. Pet. Cert. at 35–37. Again, his argument is based on the spurious notion that the Fifth Circuit "foreclose[es] any case-specific consideration of the equities." Pet. Cert. at 35. As discussed above, Raby is simply wrong regarding the Fifth Circuit's approach to motions like his. And as the Fifth Circuit's opinion in this case shows, it has already considered the equities posed by Raby—including the purported "strength of his IATC claim." Pet. Cert. at 36. Raby fails to justify a waste of judicial resources by way of a remand to allow the Fifth Circuit to conduct a redundant analysis. Therefore, his petition should be denied.

II. Raby Fails to Identify Any Reason Warranting this Court's Use of Its Limited Resources.

Raby next argues his case presents "an ideal vehicle" for resolving the non-existent circuit split discussed above essentially because he presented extraordinary circumstances in his Rule 60(b)(6) motion. Pet. Cert. at 25–32. Specifically, he argues that his extraordinary circumstances consist of this Court's opinion in *Martinez*, the merits of his IATC claims, his diligence in pursuing those claims, and the fact that his claim has not been reviewed on

the merits. Pet. Cert. at 25–32. But none of Raby's assertions, individually or cumulatively, constitute extraordinary circumstances.

A. The issuance of *Martinez* did not warrant relief from judgment.

First, Raby argues again that the Fifth Circuit's purported "categorical" bar against Rule 60(b)(6) motions based on *Martinez* should be addressed by this Court. Pet. Cert. at 25–26. But as discussed above, no such bar exists. Nothing prevented Raby from "at least attempt[ing] to establish cause for the procedural default [of his IATC] claim[s] by showing that postconviction counsel was ineffective for failing to raise" the claims. Pet. Cert. at 26. That Raby's circumstances (and the merits of his IATC claims) fell far short of extraordinary does not mean that Fifth Circuit precedent deprived him of the opportunity to seek Rule 60(b)(6) relief.

B. Raby's IATC claims were far from extraordinary.

Second, Raby asserts the merits of his IATC claims rendered his case extraordinary. Pet. Cert. at 27, 29–31. Relatedly, he asserts that the Fifth Circuit's opinion in this case shows that it recognizes only one exception to its supposedly "categorical rule" in *Adams* where a petitioner alleges "racial discrimination" or other "pernicious injury" that impacts "communities at large." Pet. App. F at 5 (citing *Buck*, 137 S. Ct. at 778). But it was Raby who sought application of *Buck* to his case. That the Fifth Circuit considered, at

Raby's invitation, whether *Buck* indicated his case was extraordinary simply because the same expert—Dr. Quijano—testified in Raby's trial, does not reflect that the Fifth Circuit would *only* consider racial discrimination to present an extraordinary circumstance.[20] Moreover, as discussed below, Raby's IATC claims were flatly and undebatably meritless.[21]

1. Trial counsel's presentation of Dr. Quijano's testimony did not render Raby's case extraordinary.

In his Rule 60(b)(6) motion, Raby argued his case was extraordinary because his trial counsel presented the testimony of Dr. Quijano. Raby's argument and his underlying IATC claim paled in comparison to *Buck* and was plainly insufficient to warrant relief from judgment.

---

[20] As discussed above, the Fifth Circuit remanded two cases—*Haynes* and *Balentine*—involving Rule 60(b)(6) motions based on *Martinez*. Neither of those cases involved allegations of racial discrimination.

[21] Relatedly, Raby argues that the Fifth Circuit improperly rejected his argument that his case was extraordinary because no court had considered the merits of his IATC claims. Pet. Cert. at 28. The Fifth Circuit rejected Raby's argument because it had, in fact, considered the merits of the very same IATC claims in 2003. Pet. App. F at 6; Pet. App. C at 5. Raby seems to assert that the Fifth Circuit was without jurisdiction to consider the merits of his IATC claims because the district court had dismissed them as procedurally defaulted and, consequently, the Fifth Circuit could only consider whether the district court's procedural ruling was debatable. Pet. Cert. at 28. He is incorrect. When a district court denies a claim on procedural grounds without reaching the claim's merits, a circuit court may only grant a COA if it finds the district court's procedural ruling is debatable *and* that it is debatable that the petition states a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Buck's trial was one of several in which psychologist Dr. Quijano testified that the defendant's race increased his propensity for violence. *Buck*, 137 S. Ct. 767. The Court found trial counsel deficient for presenting Dr. Quijano's testimony and report despite knowing Dr. Quijano's "view that race disproportionately predisposed him to violent conduct." *Id*. at 775. The Court also found that Buck was prejudiced by the testimony because Dr. Quijano's testimony told the jury that Buck's immutable characteristic, "the color of [his] skin, . . . carried with it an increased probability of future violence." *Id*. at 776 (quotation marks and alteration omitted).

The Court determined that extraordinary circumstances existed where (1) ineffective assistance of trial counsel may have led to the death sentence based, in part, on the defendant's race and (2) the Texas Attorney General's Office took "remarkable steps" in confessing error in the cases of six similarly-situated defendants, but not in Buck's case. *Id*. at 777–79. As the Court made clear, Buck's IATC claim was uniquely meritorious—one that represented a "disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Id*. at 778.

No comparable testimony was presented in Raby's case. Dr. Quijano did not testify that Raby's race (Caucasian) predisposed him to violence. The absence of *any* impermissible, racially charged testimony by Dr. Quijano

negates the assertion that his testimony rendered Raby's case extraordinary.[22] Simply put, Raby cannot extend the rationale of *Buck* to render improper and inadmissible *any* testimony Dr. Quijano provided in *any* trial irrespective of the actual testimony presented. *See King v. Davis*, 703 F. App'x 320, 329–30 (5th Cir. 2017) (denying a COA on petitioner's claim that trial counsel were ineffective for presenting Dr. Quijano's testimony where Dr. Quijano conceded the petitioner would be a danger to society).[23]

In attempting to make *Buck* applicable, Raby argued that his severe personality disorder can be likened to the sort of "immutable characteristic" that formed the basis of the Court's holding in *Buck*. But as this Court explained,

> Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." Relying on race to impose a criminal sanction "poisons public confidence in the judicial process." It thus injures not just the defendant, but "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the process of our courts.

---

[22] *See Miller*, 879 F.3d at 702 (declining to review the petitioner's IATC claims raised in a Rule 60(b) motion under *Buck* because "the *Buck* Court . . . was focused on the injection of race into the sentencing determination"); *Davis v. Kelley*, 855 F.3d 833, 836 (8th Cir. 2017) ("*Buck* focused on the race-based nature of the case and its far reaching impact on the community by the prospect of a defendant having been sentenced to death because of his race. These extraordinary facts have no application to the present case."); *Lambrix*, 851 F.3d at 1172 (distinguishing facts of *Buck*).

[23] The Fifth Circuit in *King* granted a COA on an unrelated IATC claim after which it affirmed the district court's denial of that claim. *King v. Davis*, 883 F.3d 577, 595 (5th Cir. 2018). This Court then denied the petitioner's request for certiorari review of, *inter alia*, his IATC claim regarding Dr. Quijano's testimony. *King v. Davis*, 139 S. Ct. 413 (2018).

Buck, 137 S. Ct. at 778 (citations and internal quotation marks omitted). Personality disorder is simply—and obviously—not in the same category as race. *See id*. This is especially true where anti-social personality disorder (ASPD) describes individuals who repeatedly disregard the rights of others and "repeatedly perform acts that are grounds for arrest." Diagnostic and Statistical Manual of Mental Disorders 660 (5th ed. 2013) (DSM-V).

Raby argued that Dr. Quijano's testimony made a finding of future dangerousness more likely because he testified that Raby had ASPD, lacked a conscience, and would need to be medicated and segregated in prison to render him non-violent. But Raby could not show that trial counsel performed ineffectively. Trial counsel faced the difficult challenge of convincing the jury Raby was not a future danger where Raby had a long history of violence in the free world and while incarcerated. In light of Raby's history, trial counsel presented Dr. Quijano's testimony to demonstrate that an inmate like Raby could be adequately controlled in a prison setting. 34 RR 541–44.

Buck does not undermine the lower courts' decisions in any way. This Court in *Buck* did not condemn trial counsel for calling Dr. Quijano *generally*. Rather, the Court condemned counsel—and Dr. Quijano—for injecting race into the punishment proceedings. *Buck*, 137 S. Ct. at 777–79. And the hindsight Raby now urges is insufficient to establish deficiency. *Strickland v.*

Washington, 466 U.S. 668, 689 (1984). Even if counsel should not have called Dr. Quijano, Raby cannot establish prejudice. Raby's future dangerousness was established by his own behavior. Witness after witness described his violent tendencies, his short temper, and his cruelty. *Raby v. State*, 970 S.W.2d at 2. Raby's victims were family, friends, and complete strangers. *Id.* His assaults happened in and out of prison. *Id.* He viciously tormented his girlfriend, Karianne, throughout their relationship. *Id.*

Raby also took issue with Dr. Quijano's diagnosis of ASPD. But he failed to show that the diagnosis was incorrect.[24] And to the extent Raby asserts that trial counsel should have avoided presenting testimony that Raby had been diagnosed with ASPD, he cannot show prejudice because the jury was well aware of the factual bases underlying the diagnosis. *See Ward v. Stephens*, 777 F.3d 250, 264 (5th Cir. 2015) ("Ward does not direct this Court to evidence in the record indicating [the diagnosis of ASPD] was wrong, and we are aware of none."), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

For these reasons, Raby cannot show that trial counsel were deficient for presenting Dr. Quijano's testimony or that he was prejudiced by the testimony. He also fails to show that his IATC claim is in any way extraordinary.

---

[24] Notably, Raby's CPS caseworker Jeff Page acknowledged that Raby's records indicated Raby had an anti-social personality as evidenced by his "several instances of theft" and fights he engaged in. 35 RR 679; DX 3.

Therefore, the district court's conclusion that Raby failed to show extraordinary circumstances is not debatable, and he does not raise an issue warranting this Court's attention.

2. Trial counsel presented extensive mitigating evidence.

Raby next contends that trial counsel were constitutionally ineffective for failing to investigate and present mitigating evidence. Pet. Cert. at 31. He has characterized trial counsels' purported failure to adequately investigate and present mitigating evidence as "near total." Ignoring the extensive mitigation presentation trial counsel put on, Raby extrapolates from trial counsel's timesheets to conclude counsel "knew virtually nothing" regarding Raby's upbringing. Pet. Cert. at 31. Belying Raby's reliance on trial counsels' vouchers is the fact that trial counsel presented testimony of more than twenty witnesses during the punishment phase of trial and demonstrated through their questioning of those witnesses a deep understanding of Raby's background. Raby's IATC fails and is wholly unextraordinary because trial counsel investigated and presented such evidence.

Raby's jury knew that his family suffered domestic abuse, including his mother being raped by her father and her step-father molesting his other daughters. 34 RR 463, 580. The jury knew that several members of Raby's immediate family had been institutionalized in mental hospitals. 34 RR 471,

473, 500, 579. The jury knew that Raby's mother was young when she gave birth to him, he was abandoned at two years of age by his father, and he suffered abuse at the hands of his later father figures. 34 RR 465, 468, 587, 598, 651. The jury knew of Raby's mother's inadequacy as a provider and caretaker, which was supported by voluminous CPS records. 34 RR 658, 35 RR 671; DX 3. The jury knew of the purported failure of institutions, like CPS, to provide him the help he needed as a child. 34 RR 369; 35 RR 695–700. And the jury was presented with positive character testimony. 34 RR 493, 628–31, 646–47, 726. Raby fails to explain how trial counsel could have presented that evidence while knowing "virtually nothing" about his background. Pet. Cert. at 31. Simply put, the record flatly contradicts Raby's argument that trial counsel failed to adequately investigate or present mitigating evidence.

For much the same reason, Raby failed to show prejudice. As discussed above, almost all the evidence Raby has proffered was before the jury. Much of Raby's proffered post-conviction evidence—concerning Raby's turbulent childhood, his mother's mental illness, the fact that he was involved in drugs and street crime at a young age, and the fact the he suffered mental and physical abuse—was presented to the jury in some form. Even assuming the presentation of evidence was not as "effective[ ] as it might have been, the jury did hear evidence regarding [Raby's] unstable childhood," and counsel cannot

be constitutionally ineffective in such a case. *Parr v. Quarterman*, 472 F.3d 245, 258 (5th Cir. 2006).

Lastly, Raby cannot show that the marginal additional mitigating evidence that was not presented to the jury would have changed its verdict. Raby's history of violence against family members, a longtime girlfriend, friends, and strangers culminated with the murder of seventy-two-year-old Edna Franklin, the grandmother of two of Raby's childhood friends, and then continued in jail. When the totality of the case in mitigation is weighed against the totality of the case in aggravation—including everything that Raby presented in his Rule 60(b) motion—Raby could not establish prejudice. *See Strickland*, 466 U.S. at 700. Consequently, Raby cannot show that his trial counsel were ineffective or that his IATC claim was extraordinary. The district court's conclusion in that regard is not debatable, and Raby fails to raise an issue warranting this Court's attention.

C. Raby was not diligent.

Raby argues that his diligence in pursuing relief, along with the other factors discussed above, renders his case extraordinary. Pet. Cert. at 31–32. But Raby was anything but diligent. Raby's Rule 60(b) motion—which raised claims identical to those raised in his original federal habeas petition—came nearly fifteen years after the district court denied Raby's petition. By any measure, fifteen years is an unreasonable time to wait. This is especially true

where the postconviction affidavits Raby relied upon to support his claim that trial counsel failed to adequately investigate and present mitigating evidence were all signed in 2002 *before* he filed his amended federal habeas petition.

Even giving Raby the benefit of the intervening ten years until this Court issued its opinions in *Martinez* and *Trevino*, he still cannot show that he was diligent. First, Raby's motion came *four years* after *Trevino* was decided. Second, as discussed above, Raby's reliance on *Buck* is of no moment.[25] For the same reason, nothing prevented Raby from attempting to exhaust his two IATC claims many years ago, as nothing of import has changed since the district court's denial of his petition in 2002. The Fifth Circuit rightly concluded Raby's purported diligence did not weigh in favor of relief from judgment. Pet. App. F at 6.

The equitable factors posed by Raby were plainly insufficient to warrant relief from his long-final judgment. The district court's conclusion in that regard was not debatable, and the Fifth Circuit properly denied Raby's request for a COA. Therefore, Raby's petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

---

[25] That Raby filed his subsequent state habeas application that exhausted his IATC claim regarding Dr. Quijano's testimony well before *Buck* was decided belies any assertion that he could not have pressed that claim before *Buck*.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1800
Fax: (512) 320-8132
e-mail: jay.clendenin@oag.texas.gov

Counsel for Respondent