No. 18-8429

IN THE
Supreme Court of the United States

TRACY LANE BEATTY,
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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Tracy Lane Beatty was found guilty of capital murder and sentenced to death. While Beatty's federal habeas petition was pending in the district court, this Court issued its opinions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Beatty's then-counsel, Jeff Haas, who had also represented him in state habeas proceedings, alleged a conflict arising from *Trevino* and moved to withdraw. Weeks later, the district court denied Beatty's petition and all pending motions. Haas moved again to withdraw, asking that new counsel be appointed for the appeal. The district court granted the motion and, on August 30, 2015, appointed Scott Smith for the appeal.

Smith represented Beatty for eleven months and thirteen days before he asserted that a remand was necessary to "cure" Haas's conflict. And he represented Beatty for twenty-six months before he incorporated that argument into a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). In that motion, Beatty asserted that *Martinez*, *Trevino*, and *Christeson*,[1] along with other factors, warranted relief from judgment. The district court denied the motion as untimely and failing to demonstrate extraordinary circumstances, and the Fifth Circuit denied a certificate of appealability (COA). Both courts considered Beatty's allegations of "other factors" but found that they did not demonstrate the necessary extraordinary circumstances. Both courts also considered Beatty's reasons for filing his motion twenty-nine months after *Trevino* but found that they did not justify his delay. Unhappy with the outcome, Beatty complains that the Fifth Circuit refused to consider his "other factors" and diligence.

The questions before the Court are thus:

1. Does the Fifth Circuit's rejection of Beatty's allegations of extraordinary circumstances—where his motion was premised on *Trevino*, mischaracterizations of his diligence, an insubstantial ineffective-assistance claim, and a conclusory assertion of his innocence—reflect a categorical denial of the motion for its reliance on *Trevino*?

2. Did the Fifth Circuit err in calculating the timeliness of Beatty's motion by counting the days that elapsed between the *Trevino* opinion and his motion and then considering and rejecting his excuses for the delay?

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[1] *Christeson v. Roper*, 135 S. Ct. 891 (2015).

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BRIEF IN OPPOSITION

Petitioner Tracy Lane Beatty has unsuccessfully challenged his conviction and sentence in state and federal courts. The district court denied Beatty's federal petition in July of 2013. ROA.240. He filed a motion for relief from judgment pursuant to Rule 60(b) in October of 2015. ROA.285–323. He argued that this Court's opinions in *Martinez*, *Trevino*, and *Christeson*, along with "other factors" constituted extraordinary circumstances warranting relief. The district court denied Beatty's motion, finding that it was untimely and failed to demonstrate extraordinary circumstances. Pet. Appx. B, at 5–8; *Beatty v. Director*, No. 4:09-cv-225, 2017 WL 1197112, at *3–5 (E.D. Tex. 2017). The Fifth Circuit denied COA on both issues. Pet. Appx. A, at 7–12; *Beatty v. Davis*, 755 F. App'x 343, 347–50 (5th Cir. 2018).

Beatty now seeks certiorari review. He alleges that the Fifth Circuit's consideration of extraordinary circumstances and approach in calculating timeliness reflect a circuit split. With regard to extraordinary circumstances, he asserts that the Fourth, Fifth, and Eleventh Circuits hold that a petitioner can never obtain relief from judgment for motions premised on *Martinez* and *Trevino*, whereas the Third, Seventh, and Ninth Circuits leave open the

possibility. Pet. Cert. 22–25.[2] He argues that he has demonstrated extraordinary circumstances because he was diligent in asserting that *Martinez* and *Trevino* entitled him to remand; he is the lone petitioner in Texas who has not been allowed to return to district court with conflict-free counsel; there are legitimate concerns of his innocence; and Haas admitted his error in failing to raise the guilt-phase claim in state habeas proceedings. Pet. Cert. 26–26. Regarding timeliness, Beatty alleges that the Fifth Circuit does not consider a petitioner's other efforts in obtaining relief through more direct means. He asserts that its approach conflicts with Rule 60(b)'s equitable purposes and is inconsistent with the approaches of the Third, Sixth, Ninth, and Eleventh Circuits. Pet. Cert. 28–35. Finally, Beatty argues that this Court should grant certiorari because, in denying his various requests for remand, the Fifth Circuit "[f]undamentally . . . held" that a petitioner's right to 18 U.S.C. § 3599 counsel does not include a right to conflict-free counsel in the pre-petition phase. Pet. Cert. 35–40.

Beatty's petition does not raise any issue warranting this Court's attention, as his arguments are all based on mischaracterization of circuit precedent. There is no circuit split. Neither the Fifth Circuit nor any other applies a categorical bar to Rule 60(b) motions predicated on *Martinez* and

[2] This Court denied certiorari on this issue in *Raby v. Davis* (No. 18-8214) on June 10, 2019.

Trevino. Nor does the Fifth Circuit refuse to consider an individual's diligence in seeking relief through other means. Nor did the Fifth Circuit hold in this case—or any other—that petitioners' § 3599 right to counsel does not include the pre-petition phase of federal habeas proceedings. The Fifth Circuit considered Beatty's allegations of extraordinary circumstances and diligence but denied his motion for COA because he failed to demonstrate the debatability of either. He still fails to do so. This Court should deny certiorari.

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 Fifth Circuit summarized the facts of Beatty's crime as follows:

> Beatty murdered his mother, Carolyn Click, on November 25, 2003. Beatty and Click had a "volatile and combative relationship." According to witnesses Betty McCarty and Lieanna Wilkerson, each a neighbor and friend to Click, Beatty had assaulted Click several times in the past. Indeed, Wilkerson testified that once Beatty "had beaten [Click] so severely that he had left her for dead."
>
> Nevertheless, Beatty, an adult who had been out on his own, moved back in with his mother in October 2003. The relationship never improved. McCarty testified that Click told Beatty to leave in October 2003. The separation was short, however; Beatty soon returned to his mother's home. McCarty testified that Click again told Beatty to leave on November 25, 2003, the day of Click's murder. At approximately 4:00 p.m. that day, Click said to

> McCarty: "I told [Beatty] to leave today." According to McCarty, Click said about Beatty: "I put up with all I'm going to put up with."
>
> Wilkerson testified that Beatty and Click fought daily when they lived together and that "[s]everal times [Beatty] had said he just wanted to shut [Click] up, that he just wanted to choke her and shut her up." Wilkerson described a conversation she had with Beatty in which he expressed his anger about Click refusing to drive him to a job interview because "she just didn't feel like it." Beatty told Wilkerson that he had thought about killing Click with a hammer and shoving her under the house but that he "couldn't do it" because she would have "started stinking." Despite Beatty's obvious troubles, Wilkerson befriended Beatty, sometimes allowing him to stay at her house to give Beatty and Click an opportunity for some time apart. The night of November 25, 2003, Beatty ate dinner at Wilkerson's house, arriving at approximately 6:00 p.m. and leaving at approximately 10:00 p.m.
>
> In the days that followed, Beatty told differing stories about Click's murder. The most succinct version—and the final version put forth in the Texas Court of Criminal Appeals' narrative—came from Wilkerson. Wilkerson testified that the "last thing" that Beatty told her about the night of Click's murder was that "when he left [Wilkerson's] house, he went directly across the street to [Click's] house and that [Click] was waiting for him, and that when he came through the door, they had a horrible fight." Beatty told Wilkerson that he "chok[ed] Click until she fell to the floor" and that he did not realize that she was dead "until he woke up the next morning." Beatty then crudely buried his mother behind the home.
>
> The day after Click's murder, Beatty took a turkey to Wilkerson's house. Beatty told Wilkerson that he had picked up the turkey for Thanksgiving but that he no longer needed it because Click had gone out of town. In the weeks after Click's death, Beatty used Click's credit and debit cards to make purchases and disposed of her belongings.

Beatty v. Stephens, 759 F.3d 455, 458–59 (5th Cir. 2014) (internal citations omitted).

B. Punishment facts

In the punishment phase, the State presented evidence regarding Beatty's criminal history, including drug possession, theft, weapons possession, a brutal assault against a child under two years of age, and assaults against his mother, a correctional officer, and others. 46 Reporter's Record (RR) 49–59; State's Exhibit (SX) 64, 150, 151, 152, 153, 156, 157. When Beatty was booked into jail on the instant offense, a handcuff key was found in his personal property. 42 RR 77–78; SX 155. A correctional officer testified about the prevalence of violence in prison and specifically discussed Beatty's membership in a prison gang, physical altercation with him, and possession of a shank. 46 RR 127–130, 134–135; SX 158, 161–169. Royce Smithey, an investigator, testified about the potential for inmate violence in prison. 47 RR 25–35. Dr. Tynus McNeel and Dr. Edward Gripon testified that Beatty would likely pose a future danger to society. 47 RR 160–179, 190–201.

After the State rested, an ex parte hearing took place on the record between defense counsel, Beatty, and the trial court. 48 RR 3–22. Beatty's trial counsel explained the steps they had taken to prepare for the penalty phase. A psychiatrist and a psychologist had been appointed to assist the defense, but neither found any mitigating factors and, in fact, indicated that they believed Beatty would pose a future danger. *Id.* at 4–7. Trial counsel pointed out that they, their investigator, and their mitigation expert all attempted to locate any

possible mitigation witnesses without success. *Id.* at 7–10. Beatty understood the position his defense team was in and indicated that he did not want to testify and that he did not want two possible witnesses called. *Id.* at 17–21. Before the jury, the defense rested without presenting any punishment evidence. 49 RR 18.

II. Direct Appeal and Postconviction Proceedings

Beatty was convicted and sentenced to death for murdering his mother. 2 Clerk's Record (CR) 241. The Texas Court of Criminal Appeals (CCA) affirmed his conviction on direct appeal. *Beatty v. State*, No. 75,010, 2009 WL 619191 (Tex. Crim. App. Mar. 11, 2009).

Jeff Haas represented Beatty in state habeas proceedings. While the direct appeal was pending, Beatty filed a state application for writ of habeas corpus. *Ex parte Beatty*, No. 59-939-02, 2009 WL 1272550, at *1 (Tex. Crim. App. May 6, 2009) (per curiam).[3] After an evidentiary hearing, the trial court entered findings of fact and conclusions of law recommending that relief be denied. *Id.* The CCA adopted the trial court's findings, with some exceptions, and denied Beatty's application for writ of habeas corpus. *Id.*

[3] The first state writ of habeas corpus was related to the trial court's finding of contempt against Beatty for failing to comply with the court's order to give a handwriting exemplar.

Jeff Haas continued to represent Beatty in federal habeas proceedings.[4] On June 9, 2010, Beatty filed a federal habeas petition, raising an exhausted *Wiggins*[5] claim and an unexhausted ineffective-assistance claim asserting that trial counsel failed to prove that the murder did not constitute capital murder (guilt-phase claim). ROA.50. On March 15, 2011, the Director responded. ROA.103–53. And on July 28, 2011, Beatty replied. ROA.166–204. After both parties had completed their briefing, the petition sat on the court's docket unadjudicated for nearly two years. *See* ROA.212–39.

During the years in which Beatty's petition was pending, this Court issued its opinion in *Trevino*. Three weeks later, Haas filed a motion to withdraw as counsel. *See* ROA.209–11. Less than a month later, the district court denied relief on Beatty's long-pending petition. ROA.212–39. It applied *Trevino* to Beatty's unexhausted guilt-phase claim but found that it did not excuse default because the claim was insubstantial. ROA.237–38.[6] Beatty then filed a motion for reconsideration, reurging his claims based on *Trevino*. ROA.241–43. He also asked for a new attorney on appeal:

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[4] This was not over protest, but with express approval from Beatty. *See* ROA.241.

[5] *Wiggins v. Smith*, 539 U.S. 510 (2003).

[6] The district court did not directly address Haas's motion to withdraw but denied "all motions not previously ruled on" when it denied Beatty's petition. ROA.239.

> Beatty further requests that present counsel be allowed to withdraw and other court appointed counsel continue *with the prosecution of this appeal*.

ROA.245 (emphasis added). The district court denied his motion for reconsideration but *granted* his motion for a new attorney for the appeal:

> ORDERED that Beatty's motion to appoint counsel for appeal (docket entry #33) is GRANTED and Mr. Thomas Scott Smith . . . is appointed to represent Beatty on appeal.

ROA.252. Scott Smith began representing Beatty on August 30, 2013. Three months later, Smith filed an application for COA, asserting that *Trevino* excused the default of Beatty's unexhausted guilt-phase claim. He admitted that Haas's state habeas investigation was adequate but complained instead about Haas's failure to exhaust the guilt-phase claim. Appellant's Brief Supporting Application for Certificate of Appealability at 23–25, *Beatty v. Stephens* (No. 13-70026). The Fifth Circuit rejected Beatty's *Trevino* argument because he failed to demonstrate that the underlying claim was substantial and that state habeas counsel was ineffective. *Beatty v. Stephens*, 759 F.3d 455, 465 (5th Cir. 2014). Smith then filed a petition for rehearing, requesting remand to the district court so he could investigate state habeas counsel's investigation. The Fifth Circuit denied his petition for rehearing:

> Petitioner argues that because he may seek relief pursuant to *Trevino* . . . , he is entitled to different counsel at his federal habeas proceeding. Petitioner further argues that rehearing is appropriate because the panel did not adequately consider the

> petitioner's lack of conflict-free counsel in his initial federal habeas petition.
>
> On appeal, and now on petition for rehearing, petitioner was, and is, represented by indisputably conflict-free counsel. In both his petition for rehearing and his initial briefing before this panel, petitioner fails to state what his conflicted counsel in the district court habeas proceeding did improperly, or what his current, conflict-free counsel would have done differently. Likewise, Petitioner does not assert any error by his state habeas counsel that undermined his underlying ineffective-assistance-of-counsel claims.

Beatty v. Stephens, No. 13-70026, slip op. at 2 (5th Cir. Nov. 3, 2014).

Shortly thereafter, this Court issued its opinion in *Christeson*, and Beatty moved the Fifth Circuit to recall its mandate. It declined to do so:

> *Christeson* held that a petitioner was entitled to new counsel to pursue his federal habeas corpus relief because his original counsel would have to argue his own ineffectiveness. In this case, however, petitioner was, and is, represented by indisputably conflict-free counsel in his federal appeal. Moreover, appellate counsel raised the ineffective-assistance-of-counsel claims under *Martinez* . . . which we held did not warrant a COA, assuming arguendo that there was no procedural bar.

Beatty v. Stephens, No. 13-70026, slip op. at 1–2 (5th Cir. Feb. 26, 2015). Beatty then petitioned this Court for certiorari, alleging that Haas was conflicted. But that too was denied. *Beatty v. Stephens*, 135 S. Ct. 2312 (2015).

The State set Beatty's execution for August 13, 2015. Seven days before his scheduled execution, Beatty filed a successive state habeas application, raising three claims for relief. The CCA stayed his execution but ultimately

dismissed the application as an abuse of the writ. *Ex parte Beatty*, No. WR-59,939-03, 2015 WL 6442730 (Tex. Crim. App. 2015).

On October 30, 2015, Beatty filed in the district court a motion for Rule 60(b) relief from judgment. ROA.285–323. The district court denied the motion and denied COA, finding that it was untimely and failed to demonstrate extraordinary circumstances. ROA.416–24. Beatty then filed in the district court a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e). ROA.429–61. The district court denied that motion too. ROA.544–54. From there, Beatty sought a COA in the Fifth Circuit on his Motion for Rule 60(b) relief but was denied.

Finally, Beatty filed a petition for writ of certiorari in this Court on the Fifth Circuit's denial of COA on the district court's rejection of his Rule 60(b) motion. The Director's response follows.

REASONS FOR DENYING THE WRIT

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

Beatty argues the Court should grant certiorari to resolve a split among the circuit courts regarding whether relief from judgment under Rule 60(b) is available where the motion is premised, in any part, on this Court's holdings in *Martinez* and *Trevino*. He asserts that the Fourth, Fifth, Sixth, and Eleventh Circuits hold that Rule 60(b) relief is categorically precluded under such

circumstances, whereas the Third, Seventh, and Ninth Circuits do not. Pet. Cert. 22–27. But his argument is based on a mischaracterization of circuit precedent.

A. Every court to consider the issue has held that *Martinez* and *Trevino*, alone, are insufficient to demonstrate extraordinary circumstances.

Recognizing that changes in the judicial interpretation of federal habeas rules are common and that petitioners might use Rule 60(b) motions to circumvent AEDPA's requirements, this Court cabined Rule 60(b) in the habeas context. It held in *Gonzalez v. Crosby* that a change in the interpretation of a federal statute setting forth the requirements for habeas does not provide cause for reopening cases long since final. 545 U.S. 524, 536 (2005). Extraordinary circumstances "will rarely occur in the habeas context." *Id.*

Applying *Gonzalez*, the circuit courts agree: *Martinez* and *Trevino* do not, on their own, constitute extraordinary circumstances. *E.g.*, *Cox v. Horn*, 757 F.3d 113, 115 (3d Cir. 2014) (stating that "much more" than the change in law brought about by *Martinez* is required); *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016); *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013) ("[T]his court has held that '[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not *alone* grounds for relief from judgment' under Rule 60(b)(6).") (emphasis added); *McGuire v. Warden*, 738

F.3d 741, 750–51 (6th Cir. 2013) (holding that the change in procedural default rules worked by *Martinez* and *Trevino* is not an exceptional circumstance warranting Rule 60(b)(6) relief); *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015) ("A change in law alone will not suffice" to show extraordinary circumstances…"); *Nash v. Hepp*, 740 F.3d 1075, 1078–79 (7th Cir. 2014) (affirming the denial of petitioner's Rule 60(b)(6) motion since he presented "the 'mundane' and 'hardly extraordinary' situation in which the district court applied the governing rule of procedural default at the time of its decision and the caselaw changed after judgment became final"); *Jones v. Ryan*, 733 F.3d 825, 839 (9th Cir. 2013); *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) (declaring that "the change in the decisional law effected by the *Martinez* rule is not an extraordinary circumstance" sufficient to invoke Rule 60(b)(6)).

"Indeed, the law on this issue reflects an admirable consistency, as the decisions of [the] circuits attest." *Moses*, 815 F.3d at 169. Beatty disagrees.

B. No circuit categorically bars Rule 60(b) relief for motions predicated on *Martinez*.

1. The Fifth Circuit

Beatty's circuit-split argument rests on his assertion that the Fifth Circuit imposes a "categorical" rule requiring the denial of any motion premised on *Martinez*. But he does not cite any holdings from the Fifth Circuit that reflect such a rule. Instead, he cites to *Adams v. Thaler*, 679 F.3d 312, 319

(5th Cir. 2012), in which the Fifth Circuit applied *Gonzalez* to find that *Martinez* did not *itself* constitute an extraordinary circumstance.

Beatty asserts that the Fifth Circuit has "repeatedly relied on [*Adams*] to avoid balancing the equities." Pet. Cert. 22. But in fact, the Fifth Circuit's post-*Adams* jurisprudence demonstrates the opposite. *In Diaz*, the petitioner argued that *Martinez* alongside other equitable factors weighed in favor of relief from judgment. 731 F.3d at 377.[7] While the court noted that *Martinez* was itself insufficient to establish extraordinary circumstances, it considered whether *Martinez* plus the *Seven Elves* factors did. *Id.* The court ultimately denied COA because Diaz made a "poor showing of the equitable factors necessary to reopen judgment"—not because he cited *Martinez*. *Id.* at 377–79.

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[7] The equitable considerations under Rule 60(b)(6) identified by the Fifth Circuit—the factors from *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981)—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 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).

Since *Diaz*, the Fifth Circuit has continued to consider petitioners' allegations of equitable factors where their motions were premised on *Martinez*. In fact, the Fifth Circuit remanded two petitioners' Rule 60(b) motions to district court for reconsideration in light of *Trevino*. Its remand order in *Haynes v. Stephens* afforded the district court "especially broad" discretion to reconsider the motion. 576 F. App'x 364, 365 (5th Cir. 2014).[8] And its remand in *Balentine v. Stephens* occurred over the State's argument that *Adams* precluded the court from finding extraordinary circumstances because his motion was predicated on *Martinez*. 553 F. App'x 424, 424–25 (5th Cir. 2014). Balentine's district court then held an evidentiary hearing, in which he was given the opportunity to substantiate his motion and underlying claim. *Balentine v. Davis*, 2017 WL 9470540, at *1–2 (N.D. Tex. 2017). While the district courts ultimately found that Haynes and Balentine failed to demonstrate extraordinary circumstances, they did not do so as a matter of course. *See Haynes v. Stephens*, No. H-05-3424, 2015 WL 6016831 (S.D. Tex. 2015); *Balentine v. Davis*, 2018 WL 2298987, at *1 (N.D. Tex. 2018) (order adopting magistrate judge's recommendation).

[8] 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).

When Haynes's motion reached the Fifth Circuit again, the court set out the standard for its consideration of extraordinary circumstances: It explained that the inquiry considers "a 'wide range of factors,' which may include 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Haynes v. Davis*, 733 F. App'x 766, 769 (5th Cir. 2018) (quoting *Buck v. Davis*, 137 S. Ct. 759, 778 (2017)). The court also set out the *Seven Elves* factors and noted that the merits of the petitioner's underlying claim may be relevant to the analysis. *Id.* Then, applying the standard, the court considered Haynes's argument that the "balance of individual equities" weighed in his favor. *Id.* at 769–70. But it concluded that they did not. It explained that the merits of Haynes's ineffective-assistance claim had been reviewed and were, in any event, "not particularly compelling." *Id.* at 769. The remaining factors were similarly insufficient to warrant Rule 60(b)(6) relief. *Id.* at 769–70.[9]

Significantly, the Fifth Circuit also granted a COA on one petitioner's allegations of extraordinary circumstances. *Clark v. Stephens*, 627 F. App'x 305, 307–08 (5th Cir. 2015). Even though Clark's motion was premised on *Martinez*, the court considered his individual circumstances and found that

[9] Balentine is currently seeking a COA in the Fifth Circuit on the district court's denial of his motion.

reasonable jurists could debate whether they were extraordinary. *Id.*[10] The Fifth Circuit's analyses in other cases further underscore its case-by-case consideration of each petitioner's circumstances. *See e.g.*, *Jennings v. Davis*, 760 F. App'x 319, 323–24 (5th Cir. 2019); *Rayford v. Davis*, No. 18-10121, slip op. at 8–11 (5th Cir. Jan. 30, 2018); *Buck v. Davis*, 623 F. App'x 668, 672–74 (5th Cir. 2015); *Raby v. Davis*, 907 F.3d 880, 885 (5th Cir. 2018); *see infra* Part I.C (discussing the Fifth Circuit's consideration of Beatty's "other factors").

The Fifth Circuit's jurisprudence on this issue—to include two remands, a COA grant, and a long list of cases considering petitioner's "other factors"—makes clear that it did not create a categorical rule in *Adams*. Nor has it applied one since.

2. The Fourth, Sixth, and Eleventh Circuits

Beatty's characterization of Fourth, Sixth, and Eleventh Circuits' precedent is similarly flawed. *See* Pet. Cert. 23. While all have held that *Martinez* itself is insufficient to warrant Rule 60(b) relief, none have held that reliance on it categorically precludes such relief. And like the Fifth Circuit, the Eleventh and the Sixth Circuits have explicitly considered petitioners' allegations of other factors.

[10] The Fifth Circuit later affirmed the district court's denial of relief because the motion was untimely. *Clark v. Davis*, 850 F.3d 770, 783 (5th Cir. 2017).

The Eleventh Circuit considered in *Arthur v. Thomas* whether the petitioner's death sentence and never-reviewed ineffective-assistance claims rendered his case extraordinary. 739 F.3d 611, 633 (11th Cir. 2014). And the Sixth Circuit in *Zagorski v. Mays* 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). Both courts, however, concluded that the petitioner's circumstances were not extraordinary. *Arthur*, 739 F.3d at 633; *Zagorski v. Mays,* 907 F.3d 912 at 906–08 (6th Cir. 2018); *see also Miller v. Mays*, 878 F.3d 691, 698–706 (6th Cir. 2018) (affirming denial of Rule 60(b) motion based on *Martinez* after extensively considering whether equitable factors posed by petitioner demonstrated extraordinary circumstances).

Beatty overlooks these courts' analyses for their outcomes: Because similarly-situated petitioners have not yet alleged anything extraordinary, he accuses the courts of applying a categorical rule against them. He supports his assertion of such in the Sixth Circuit with Judge Coles's dissent in *Abdur'Rahman v. Carpenter*, 805 F.3d 710 (6th Cir. 2015). Pet. Cert. 23. But Judge Coles's criticism of the majority in that case was different from Beatty's criticism today.

In *Abdur'Rahman*, the district court denied the petitioner's motion for Rule 60(b) relief on the erroneous ground that *Martinez* and *Trevino* did not

apply in Tennessee. 805 F.3d at 712–13. The Sixth Circuit noted the district court's error but ultimately found the petitioner was not entitled to relief because (1) his claims were not eligible for the *Martinez/Trevino* exception; and (2) he failed to allege anything extraordinary beyond *Martinez*. *Id.* at 714. Judge Coles criticized the majority on the second point, suggesting that the case should have been remanded so the district court could conduct the case-by-case inquiry that Rule 60(b) requires. *Id.* at 718 (Coles, J., dissenting in part). The crux of his criticism was that the majority considered the issue in the first instance: He would have remanded the case to the district court for it to make the extraordinary circumstances determination, whereas the majority apparently found the answer in the record. Judge Coles never indicated that the majority's approach (or finding) was wrong. His dissent, therefore, does not support Beatty's assertion that the Sixth Circuit applies a categorical rule. And the Sixth Circuit's consideration of the petitioners' "other factors" in *Zagorski* and *Miller* demonstrates conclusively that it does not.

Beatty fails to identify any case in which the Fourth, Sixth, or Eleventh Circuit has taken a categorical approach to *Martinez*-based Rule 60(b) motions.

3. The Third, Seventh, and Ninth Circuits

Beatty also supports his assertion of a circuit split with the Third Circuit's early misinterpretation of *Adams*. Pet. Cert. 24. In *Cox v. Horn*, a Pennsylvania district court rejected the petitioner's motion for relief from

judgment, finding that *Martinez* was not extraordinary. 757 F.3d 113, at 120–21 (3d Cir. 2014). It cited to *Adams* for the proposition that "a change in law, including the change announced in *Martinez*, *can never* be the basis of 60(b) relief." *Id.* at 120 (emphasis added). Although the Fifth Circuit never said "never" in *Adams*, the Third Circuit accepted its district court's misinterpretation of the case. It rejected what it termed *Adams*'s "never" approach and adopted instead its own "rarely" approach. *Id.* at 121–22. It distinguished its approach for its consideration of a petitioner's circumstances. *Id.*

But the cases that followed in the Fifth Circuit refute the Third Circuit's early interpretation of *Adams*. The Fifth Circuit has since considered the petitioners' circumstances in *Diaz*, *Haynes*, *Rayford*, *Raby*, *Clark*, and in this case. *See* Part. I.C. *infra*. To the extent that *Adams* could have ever been interpreted as employing a "never" approach, it certainly cannot now. Notably, the Seventh Circuit acknowledged that the Fifth Circuit's approach is not inconsistent with that of the Third. *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015). And the Fourth Circuit has described the law of the circuits on this issue as reflecting "admirable consistency." *See Moses*, 815 F.3d at 168.

There is no circuit split and, thus, nothing for this Court to resolve. It should deny certiorari review.

C. The Fifth Circuit considered Beatty's allegations of equitable factors.

Seemingly abandoning his assertion that the Fifth Circuit applies a categorical-rule to motions premised on *Martinez* and *Trevino*, Beatty admits that the court reviewed the other factors that he posed. He attacks the appellate court's review as disingenuous, asserting that it "paid lip service to the requirement that it consider the case-specific equities." Pet. Cert. 22. He goes on to say that the court faulted him for raising such equitable factors. *Id.* Essentially, his complaint is that the court (considered and) rejected his alleged equitable factors. That, it did.

As the first equitable factor, Beatty alleged that he was the lone petitioner who had not been allowed to return to district court with conflict-free counsel. Motion for Certificate of Appealability 27, *Beatty v. Davis* (No. 17-70024). The Fifth Circuit found that he was not. Pet. Appx. A, at 11. As the second equitable factor, Beatty alleged legitimate concerns of his innocence. Motion for Certificate of Appealability 29–30. The Fifth Circuit found that his argument was conclusory and insufficient to get past AEDPA's successive-petition bar. Pet. Appx. A, at 11. As the third equitable factor, Beatty alleged that state habeas counsel admitted error in failing to raise the guilt-phase claim. Motion for Certificate of Appealability 30–31. The Fifth Circuit found that the claim lacked merit, so state habeas counsel's failure to raise the claim

was harmless. Pet. Appx. A, at 12. As the fourth equitable factor, Beatty alleged that he had been prompt and diligent in asserting his right to conflict-free counsel (at the claim development phase of the proceedings). Motion for Certificate of Appealability 31–32. The Fifth Circuit found that he was not. Pet. Appx. A, at 12. After reviewing each of Beatty's equitable factors, the Fifth Circuit stated: "[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) relief." *Id.* at 12. Consistent with its approach to Rule 60(b) motions, the Fifth Circuit conducted a case-specific inquiry in this case.

Beatty lists his "other factors" for this Court, too, but they are still not extraordinary. *See* Pet. Cert. 26–27. As discussed in greater detail below, he was not diligent as he purports to be. *See infra* Part II. Nor was he the lone petitioner who was not allowed to return to district court for a second round of federal habeas proceedings. *See, e.g.*, *Roberson v. Stephens*, No. 14-70033 (5th Cir. June 30, 2015); *Freeney v. Davis*, No. 16-70007, slip op. (5th Cir. Aug. 3, 2017). Nor does his guilt-phase claim remain "uninvestigated," as he contends. *See* Pet. Cert. 27. In fact, Smith asserted his guilt-phase claim in August of 2015 in a successive application in state court and supported it with new affidavits. Application for Postconviction Writ of Habeas Corpus By a Person

Sentenced to Death 29–37, *Ex parte Beatty*, No. 59,939-03. Despite his investigation, the guilt-phase claim that Smith asserted in state court was the same one he had previously sought a COA on in the Fifth Circuit (and the same one the Fifth Circuit found insubstantial). *See Beatty v. Stephens*, 759 F. App'x at 467. It is undebatable Beatty's circumstances are less than extraordinary. The Fifth Circuit got it right.

II. The Fifth Circuit Calculates Rule 60(b)'s Timeliness Requirement on a Case-by-Case Basis.

Beatty asserts that the Fifth Circuit's timeliness calculation is too rigid. Pet. Cert. 28. He complains that the court's calculation from the triggering change in law to the filing of a Rule 60(b) motion ignores a petitioner's efforts to secure relief through direct review. He argues that such an approach contravenes equity and is fallacious, even. Pet. Cert. 28–32. Here again, Beatty's complaints about the court's "approach" do not speak to its approach. It is his argument that is fallacious.

A. The Fifth Circuit's case-specific approach for calculating timeliness

The Fifth Circuit set out in this case its standard for determining the timeliness of a Rule 60(b) motion:

> A Rule 60(b) motion "must be made within a reasonable time," unless good cause can be shown for the delay." *In re Edwards*, 865 F.3d 197, 208 (5th Cir. 2017) (quoting Fed. R. Civ. P. 60(c)(1); *see also Preyor v. Davis*, 704 F. App'x 331, 342 (5th Cir. 2017). "'Good cause' for a reasonable delay must be 'evaluated on a case-by-case

> basis.'" *In re Edwards*, 865 F.3d at 208 (quoting *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004)). "The timeliness of the motion is measured as of the point in time when the moving party has grounds to make such a motion, regardless of the time that has elapsed since the entry of judgment." *Id.* (quoting *First Republic Bank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 120 (5th Cir. 1992)).

Beatty, 755 F. App'x at 347. In its consideration of good cause, then, the Fifth Circuit may find that a petitioner's unique circumstances contributing to delay operate to excuse same.

1. Beatty's delay in seeking remand

Because the Fifth Circuit found that Beatty's circumstances did not excuse his delay, he complains that they were ignored. But his account is misleading. He would have this Court believe that he requested conflict-free counsel for claim development when *Trevino* issued, yet never received it. *See* Pet. Cert. 31. Such is not the case:

- June 9, 2010: Haas filed a petition for writ of habeas corpus on behalf of Beatty. ROA.47–92.
- March 15, 2011: The Director filed a Motion for Summary Judgment. ROA.103–54.
- July 28, 2011: Haas filed a response to Director's Motion for Summary Judgment on behalf of Beatty. ROA.166–204.
- May 28, 2013: This Court issued its opinion in *Trevino*.
- June 19, 2013: Haas filed a motion to withdraw as counsel. ROA.209–10.

- July 16, 2013: The district court denied habeas relief and all other motions not previously ruled upon. ROA.239.

- **August 9, 2013: Haas filed a notice of appeal and, in it, requested that he "be allowed to withdraw and other court appointed counsel continue with the prosecution of [the] appeal." ROA.245.**

- **August 30, 2013: The district court "GRANTED" Haas's motion to withdraw and appointed Scott Smith to represent Beatty in appellate proceedings. ROA.252.**

- November 22, 2013: Smith filed a motion for COA in the Fifth Circuit, in which he represented that state habeas counsel's investigation was adequate. Motion for Certificate of Appealability 24 (No. 17-70026).

- August 12, 2014: Smith filed a petition for rehearing in the Fifth Circuit, in which he requested a remand so that he could investigate state habeas counsel's investigation. Petition for Rehearing 10–14 (No. 17-70026).

- January 30, 2015: Smith filed a motion to recall the mandate in the Fifth Circuit, in which he requested a remand so that he could investigate state habeas counsel's investigation. Motion to Recall the Mandate (No. 13-70026).

While it is true that Beatty began citing to *Trevino* twenty-two days after it issued, the district court ultimately granted the relief that he requested: He requested conflict-free counsel for the appeal, and three weeks later, he received conflict-free counsel for the appeal. ROA.245, 252. The purported defect was removed, and Beatty appeared satisfied. Smith did not then assert that his appointment for the appeal was inadequate, nor that he would need

to investigate state habeas counsel's investigation at the district court level. He certainly could have, though.

Smith could have asked the Fifth Circuit to stay proceedings so he could return to district court to file a Rule 60(b) motion. *E.g., Gamboa v. Davis*, No. 16-70023 (5th Cir. Feb 13, 2017), Order Granting Petitioner's Motion to Stay Proceedings Pending the Filing of a Rule 60(b) Motion. He could have asked the Fifth Circuit to remand his case pursuant to § 3599 to allow him to investigate state habeas counsel's performance. *See, e.g.*, *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015); *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015). He even could have requested remand when he filed his petition for COA. But he did not. Instead, he represented to the Court that "post-conviction counsel's investigation was adequate." Motion for Certificate of Appealability 24 (No. 13-70026). Then, nine months later, he asked the appellate court to return to the district court to investigate post-conviction counsel's investigation—presumably to prove it was inadequate. Petition for Rehearing 10–14. At that point, it was too late, as more than fourteen months had passed since *Trevino*. Later still, Beatty filed his Rule 60(b)(6) motion in October 2015—twenty-nine months after *Trevino*. ROA.285–323.

2. The Fifth Circuit considered and rejected Beatty's allegations of diligence.

Beatty's asserts that the Fifth Circuit ignored his diligence in seeking relief through other, more direct means. Pet. Cert. 28–35. But it did not. While the court did not accept his version of his pursuit for relief—which conflates his requests for relief, ignores his receipt of the relief he requested, and ignores his year-long silence regarding the adequacy of that relief—it did not overlook it. *See Beatty*, 755 F. App'x at 347–48. The lower court explained that Beatty received the relief he requested and appeared satisfied. *Id.* It then devoted a paragraph to listing the direct ways in which he could have sought remand. *Id.* But he did not pursue any avenue of relief until it was too late. That was the court's focus. *See id.*

Beatty disregards the Fifth Circuit's consideration of his delay in seeking remand and instead focuses on distinguishing his case from others. He highlights that, in *Pruett*,[11] conflict-free counsel did not seek relief in any court for sixteen months after his appointment. Pet. Cert. 29. Beatty's case is not so different, though. Smith did not seek the relevant relief in any court until nearly a year after his appointment. That he was seeking a COA on a different (and contradictory) legal theory should not, as he suggests, excuse his delay in

[11] *Pruett v. Stephens*, 608 F. App'x 182 (5th Cir. 2015).

seeking remand. *Compare* Mot. Cert. App. 24 ("Here post-conviction counsel did an adequate investigation."), *with* Pet. Rehearing 11–12 (requesting remand to investigate state habeas counsel's investigation).

Beatty further attempts to distinguish his case from *Pruett* and *Clark* based on their procedural postures. But his procedural position when *Trevino* issued does not explain why he waited so long thereafter to seek the relief that he now seeks.[12] Accordingly, it does not bear on Rule 60(b)'s timeliness analysis. The Fifth Circuit's approach is as case specific as it purports to be. It considered Beatty's allegations of his efforts for relief and found that they did not excuse his delay. And it was correct.

B. The Fifth Circuit's timeliness calculation is consistent with that of the other circuits.

Conjuring another circuit split, Beatty asserts that the Third, Sixth, Ninth, and Eleventh Circuits differ from the Fifth Circuit in their consideration of whether a Rule 60(b) motion is timely. Pet. Cert. 32–35. But a survey of the circuits and their district courts suggests that, in fact, the inquiry is the same. Courts begin by calculating the time elapsed between the

[12] Again, Beatty's argument assumes that Haas's initial request to withdraw was a request for new counsel to redo his federal habeas petition. *See* Pet. Cert. 31. But by that point, all briefing had been completed and pending before the district court for nearly two years, and the district court issued a lengthy decision just weeks later. Furthermore, Haas clarified in his next motion that he was seeking new counsel for the appeal. ROA.245.

triggering change in law and petitioner's filing of the Rule 60(b) motion, and then go on to consider the petitioner's excuses for the delay.

Beatty directs the Court to the Third Circuit's opinion in *Cox* and distinguishes its timeliness analysis as employing a "multifactor, equitable balancing test." Pet. Cert. 32. But Beatty misinterprets the court's consideration of extraordinary circumstances for its consideration of timeliness. In fact, the issue of the motion's timeliness was not even before the court:

> Still, though not an issue before us, it is important that we acknowledge—and, indeed, we warn—that, unless a petitioner's motion for 60(b) relief based on *Martinez* was brought within a reasonable time of that decision, the motion will fail.

Cox, 757 F.3d at 116.

So even though the issue was not before the Third Circuit, it warned petitioners: Its timeliness calculation starts at the same place as the Fifth Circuit's—from the triggering change in law. And while case law on this issue is less developed in other circuits, district courts appear to be conducting the same analysis. *E.g., Lambrix v. Sec'y Fla. Dep't Corrections*, 851 F.3d 1158 (11th Cir. 2017) (noting district court's timeliness determination based on its calculation of the time between *Martinez* and petitioner's motion); *Wood v. Ryan*, 2014 WL 3573622, at *5 (D. Ariz. 2014) (calculating timeliness from date

Martinez issued); *Dubose v. Hetzel*, 2013 WL 4482413, at *4 (N.D. Ala. 2013) (same); *Hennes v. Bagley*, 2013 WL 4017643, at *10 (S.D. Ohio 2013) (same).

Beatty cites several cases as support for his assertion that the other circuits are taking a more liberal approach to the timeliness calculation. But really, his list shows only that, on rare occasion, courts accept a petitioner's excuse for delay. In *Foley v. Biter*, 793 F.3d 998, 1004 (9th Cir. 2015) and *Bucklon v. Secretary of Florida*, 606 F. App'x 490 (11th Cir. 2015), the Ninth and the Eleventh Circuits excused petitioners' delays because they were both pro se and diligent. Beatty was neither.[13]

In *Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir. 2009), the Sixth Circuit excused the petitioner's delay while his petition was pending. But in that case, the petitioner had timely asserted the legal theory that would support his later motion for Rule 60(b) relief while his petition was pending. Beatty did not. In seeking COA, he never alerted the court of the legal theory that would support his later request for remand. Instead, he undercut it by admitting that state habeas counsel's investigation was adequate. When the court denied COA, Beatty changed his theory. That is not diligence; it is opportunism. Rule 60(b)'s timeliness requirements do not yield to a petitioner's opportunism.

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[13] Beatty also cites *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), as support for his contention that other circuits are not considering the time between the relevant change in law and the petitioner's motion. Pet. Cert. 33. But the court's analysis in *Phelps* was about whether the petitioner had demonstrated extraordinary circumstances. The court did not address whether the petitioner's Rule 60(b) motion had been timely filed.

The Fifth Circuit's approach to calculating timeliness is consistent with that of the other circuits. They all begin with the triggering change in law, and end with the petitioner's excuses for his delay. This Court should deny certiorari because there is no issue to resolve.

III. Beatty Fails to Demonstrate that the District Court Abused Its Discretion When It "GRANTED" the Relief He Requested.

Beatty synthesizes the Fifth Circuit's denial of his requests for remand to assert that it "[f]undamentally" held that § 3599 does not entitle him to conflict-free counsel during the pre-petition phase of federal habeas proceedings. Pet. Cert. 35–40. But his synthesis is inaccurate. In each of its reviews, the lower court applied the governing legal standard: First, it denied his petition for rehearing. Order, Denying Pet. Rehearing, *Beatty v. Stephens* (No. 13-70026) (Nov. 3, 2014). Second, it denied his motion to recall the mandate. Order Denying Mot. Recall Mandate, *Beatty v. Stephens* (No. 13-70026) (Feb. 26, 2015). And finally, it denied his motion for COA because it found undebatable the district court's findings regarding extraordinary circumstances and timeliness. *Beatty*, 755 Fed. App'x at 348–50. Beatty's "fundamental" complaint seems to be that the lower court applied the law. He asks this Court to entertain his question about curing conflicts instead.

Beatty's petition for certiorari comes off the Fifth Circuit's denial of COA from his motion for Rule 60(b) relief. Whether he is entitled to relief at this

point hinges on extraordinary circumstances and the timeliness of his motion. *See Gonzalez*, 545 U.S. at 535–36. Absent either, his legal issue—even if considered novel in its seventh rendition[14]—cannot be reached.

Furthermore, Beatty's federal habeas proceedings are governed by AEDPA.[15] Generally speaking, AEDPA limits a petitioner's claims to those raised in his first federal petition. 28 U.S.C. § 2244(b)(2). And even then, it limits a petitioner to one round of litigation for those claims. § 2244(b)(1). Thus, barring exception,[16] petitioners are prohibited from raising in second or successive petitions claims omitted from or included in their first petition. If remanded, Beatty will almost certainly do both of the things AEDPA prohibits.

If this Court were to bypass Rule 60(b) and AEDPA to entertain Beatty's extrapolations about the Fifth Circuit's "[f]undamental[]" holdings, the § 3599

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[14] Smith did not assert that his appointment for the appeal did not "cure" the conflict until nearly a year after he was appointed. Since then, he has raised the issue in seven briefs. *See* Petition for Rehearing, *Beatty v. Stephens* (No. 13-70026); Motion to Recall Mandate, *Beatty v. Stephens* (No. 13-70026); Petition for Certiorari, *Beatty v. Stephens* (No. 14-8291); Motion for Relief from Judgment, *Beatty v. Davis* (No. 4:09-cv-00225); Motion to Alter or Amend Judgment, *Beatty v. Davis* (No. 4:09-cv-00225); Motion for Certificate of Appealability, *Beatty v. Davis* (17-70024); Petition for Certiorari, *Beatty v. Davis* (18-8429).

[15] Beatty directs this Court to two pre-AEDPA cases. Pet. Cert. 36–37 (citing *Price v. Johnston*, 68 U.S. 266 (1948), and *McFarland v. Scott*, 512 U.S. 849 (1994)). Notably, *Price* was abrogated even before AEDPA because it ignored the Court's disfavor for repetitive (i.e., successive) petitions. *McClesky v. Zant*, 499 U.S. 467, 483 (1991).

[16] A petitioner may bring a new claim omitted from his previous application: when the claim was unripe during the initial filing, *Panetti v. Quarterman*, 551 U.S. 930, 944–45 (2007); when he is challenging a different judgment or conviction than the original filing, *Magwood v. Patterson*, 561 U.S. 320, 330–334 (2010); or when the initial petition is dismissed on exhaustion grounds, *Slack v. McDaniel*, 529 U.S. 473, 485–86 (2000).

question would be next in line. The specific question is whether the district court abused its discretion in denying a petitioner's request for new counsel. *Martel v. Clair*, 565 U.S. 648, 663 (2012). Beatty cannot show that the district court abused its discretion because it gave him exactly what he asked for: He asked for new counsel for the appeal, and he received new counsel for the appeal. ROA.245, 252. Further, this Court's opinion in *Clair* suggests that even if Beatty had asked for new counsel to amend his federal petition, the district court would have been within its discretion in denying his request.

In *Clair*, the petitioner filed a motion for new counsel after all substantive briefing had been completed. 565 U.S. at 665. The district court denied the motion and issued its opinion shortly thereafter. *Id.* This Court found that the timing of petitioner's motion precluded a finding that the district court abused its discretion. *Id.* It explained that when the petitioner filed his motion, "[t]he case was all over but the deciding." *Id.* Beatty's case was also "all over but the deciding." The parties' substantive briefing had been completed and sitting for nearly two years when Haas filed his motion to withdraw. ROA.47–92, 103–54, 166–204, 209–10. Within a month of Haas's motion, the district court issued its opinion denying relief. ROA.239. Thus, even if Beatty had requested new counsel to redo his federal habeas petition (he did not), the timing of it would have precluded a finding that the district

court abused its discretion. Even if allowed to bypass Rule 60(b) and AEDPA, Beatty loses.

Assuming arguendo that Beatty need not demonstrate that the district court abused its discretion to be entitled to start over in district court, the next question is whether a true conflict of interest existed. Beatty asserts that it did because Haas continued to represent him in federal habeas proceedings and because no court has conclusively found that Haas was not conflicted. But a conflict of interest is not presumed in every case in which one might potentially arise. In fact, *Christeson* specifically refutes the idea that a legal framework requiring counsel to assert his own misconduct is itself sufficient to establish a conflict of interest. 135 S. Ct. at 895 (recognizing that "not every case in which a counseled habeas petitioner . . . misse[s] AEDPA's statute of limitations . . . necessarily involve[s] a conflict of interest"). The conflict must be substantiated.

Beatty failed to substantiate Haas's conflict of interest in his previous petition for certiorari, and he fails to do so again today. *See* Brief in Opposition, *Beatty v. Stephens* (No. 14-8291). Unlike the attorneys in *Christeson*, Haas did not ever call any of Beatty's arguments for relief "ludicrous." *See* 135 S. Ct. at 895. Nor did he place his own professional and reputational interest above Beatty's interest in obtaining relief. *See id.* He met every filing deadline. He raised Beatty's guilt-phase claim in federal habeas proceedings even though he

had failed to properly exhaust it in state court. He stayed apprised of cutting-edge law and asserted it promptly.[17]

Having failed six times to demonstrate that Haas was anything but loyal and competent in federal habeas proceedings, Beatty reverts to *Juniper*[18] to say same-counsel situations always create a conflict of interest and, thus, always require remand. *See* Pet. Cert. 38–39. While remand may be appropriate in cases where a true conflict deprived a petitioner of federal habeas review, presuming such a conflict in a case such as this one would greatly undermine AEDPA and the finality it was meant to protect. In absence of a real, substantiated conflict of interest, this Court should deny certiorari (again) and leave Rule 60(b) and § 2244(b) to govern.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[17] For an in depth discussion of Haas' representation of Beatty, see Respondent's Brief Opp., *Beatty v. Stephens* (No. 14-8291).

[18] *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013).

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