CAPITAL CASE

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

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

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REPLY BRIEF FOR THE PETITIONER

Mr. Beatty's petition presents a circuit split about whether relief from judgment under Federal Rule of Civil Procedure 60(b)(6) is available when it is based on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Those decisions permit federal habeas courts to consider ineffective assistance of trial counsel (IATC) claims that are otherwise procedurally barred because of ineffective state habeas representation. Texas denies that the Fifth Circuit applies a categorical rule prohibiting the revival of claims based on *Martinez* and *Trevino* through Rule 60(b)(6). But other federal courts and authorities have acknowledged it, as Justice Sotomayor recently observed. *See Crutsinger v. Davis*, No. 19-5755, 2019 WL 4184098, at *1 (U.S. Sept. 4, 2019) (statement of Sotomayor, J., respecting the denial of certiorari) (noting that the Fifth Circuit "appear[s] to have announced a [] categorical rule" against Rule 60(b)(6) motions premised on a change in decisional law). It is an issue that warrants the Court's attention.

Beatty has also raised in his petition the Fifth Circuit's restrictive view of whether Rule 60(b)(6) motions are reasonably timely under Rule 60(c)(1) as well as the scope of the federal right to conflict-free counsel at all stages of representation under 18 U.S.C. § 3599. This case presents an ideal opportunity to address these questions.

I. Contrary to the State's Position, a Circuit Split Exists on How Courts Should Address Rule 60(b)(6) Motions Premised on *Martinez* and *Trevino*

The Third, Seventh, and Ninth Circuits have correctly held that a Rule 60(b)(6) motion premised on *Martinez* as an intervening decision of law can be granted (Pet. at 23-24). The Fourth, Fifth, Sixth, and Eleventh Circuits have incorrectly held that a 60(b)(6) motion premised on *Martinez* as an intervening decision of law cannot be granted (Pet. at 22-23).

Although Texas calls the split "illusory," several courts acknowledge it. The Third Circuit discussed the split at length in *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), noting the Fifth Circuit's "categorical rule that a change in decisional law is never an adequate basis for Rule 60(b)(6) relief." *Id.* at 121. It observed further that, in *Adams v. Thaler*, 679 F.3d 312 (5th Cir. 2012), the Fifth Circuit "ended its analysis after determining that *Martinez*'s change in the law was an insufficient basis for 60(b)(6) relief," "did not consider whether the capital nature of the petitioner's case or any other factor might counsel that *Martinez* be accorded heightened significance in his case or provide a reason or reasons for granting 60(b)(6) relief," and indeed "did not address in any meaningful way the petitioner's claim that he was not offering *Martinez* 'alone' as a basis for relief." *Cox*, 757 F.3d at 122. "The fact that the petitioner's 60(b)(6) motion was predicated chiefly on a post-judgment change in the law was the singular, dispositive issue for the *Adams* court." *Id.* By contrast, the Third Circuit applies a "flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law, that takes into account all the particulars of a movant's case." *Id.* The Third Circuit recently noted its continuing disagreement with the Fifth Circuit, rejecting *Tamayo v. Stephens*, 740 F.3d 986 (5th Cir. 2014), because it "relies on an earlier decision in *Adams v. Thaler* . . . which we explicitly declined to adopt in *Cox*." *Satterfield v. Dist. Attorney Philadelphia*, 872 F.3d 152, 161 n.9 (3d Cir. 2017).

The Third Circuit is not the only court to explicitly recognize the split. Federal district courts have done the same. *See, e.g.*, *Sallie v. Humphrey*, 2016 WL 6897790, at *2 (M.D. Ga.

Nov. 22, 2016) (noting that "[t]he circuits are split" as to whether *Martinez* "can [ever] qualify as an extraordinary circumstance" under Rule 60(b)(6)); *Balentine v. Stephens*, 2016 WL 1322435, at *3 (N.D. Tex. Apr. 1, 2016) (noting that the issue is "the subject of differing opinions and reversals in the appellate courts"); *Moses v. Joyner*, 2015 WL 631989, at *5 (M.D.N.C. Feb. 13, 2015) (rejecting argument that the Fifth Circuit in *Haynes v. Stephens*, 576 F. App'x 364 (5th Cir. 2014), held that *Martinez* could be an equitable consideration supporting 60(b)(6) relief), *aff'd*, 815 F.3d 163 (4th Cir. 2016).[1]

Others have urged this Court to address the split. For example, in *Johnson v. Carpenter*, 137 S. Ct. 1201 (2017), the petitioner argued that three circuit courts have recognized that "intervening changes in decisional law (like *Martinez*) may form a basis for Rule 60(b)(6) relief in conjunction with critical, case-specific equities," but that four circuit courts have rejected that principle. Pet. for a Writ of Cert. at 13 (Mar. 22, 2016) (No. 15-1193); *see also* Pet. for a Writ of Cert. in *Raby v. Davis* (Feb. 28, 2019) (No. 18-8214); Pet. for a Writ of Cert. in *Crutsinger v. Davis* (Aug. 29, 2019) (No. 19-5755). A group of former federal district judges submitted an *amicus* brief in support of Petitioner Johnson also arguing that "the Sixth Circuit is joined by the Fourth, Fifth, and Eleventh Circuits in adopting a *per se* rule against granting 60(b)(6) relief for motions based on *Martinez*." Brief for Former Federal District Judges as *Amici Curiae* in Support of Petitioner at 4 (Apr. 22, 2016) (No. 15-1193). The University of Texas's Capital Punishment Center has also underscored the "persistent split." Brief for UTCPC as *Amicus Curiae* in Support of Petitioner in *Raby v. Davis* at 24 (Apr. 3, 2018) (No. 18-8214).

In Beatty's case, the Fifth Circuit made clear its position. Quoting *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002), the court explained: "We have repeatedly held that '[u]nder our precedents, changes in decisional law . . . do not constitute the 'extraordinary circumstances' required for granting Rule 60(b)(6) relief.'" *Beatty v. Davis*, 755 F. App'x 343, 348 (5th Cir. 2018). Then, driving the point home, the court wrote, "[a]pplying *this rule* to the very changes in

[1] *See also Diggs v. Mitchem*, 2014 WL 4202476, at *6 (S.D. Ala. Aug. 22, 2014) (noting that some other circuits apply a multifactor analysis).

decisional law that Beatty invokes, we have held that a district court does not 'abuse[ ] its discretion in finding that *Martinez*, even in light of *Trevino*, does not create extraordinary circumstances warranting relief from final judgment." *Id.* (emphasis added). The categorical language is not an accident, nor is it misleading; it is the very same language in *Hess* that the Fifth Circuit quoted in *Adams*, 679 F.3d at 320. The Brief in Opposition managed to overlook it.

No matter how one describes the court's approach, the Fifth Circuit is certainly not applying other circuit courts' holistic, multifactor test when it rejects *Martinez* and other factors seriatim as independently insufficient to support 60(b)(6) relief. The cases cited by the State demonstrate instead that Rule 60(b)(6) motions premised on *Martinez* categorically fail in the Fifth Circuit. Indeed, *Diaz v. Stephens*, 731 F.3d 370 (5th Cir. 2013), *cert. denied*, 570 U.S. 946 (2013), cited by the State as disproving the split (BIO at 13-14), confirms it. In *Diaz*, the Fifth Circuit expressly acknowledged that, in prior cases, it had not cited additional equitable factors "as bearing on the analysis of extraordinary circumstances under Rule 60(b)(6)." *Id.* at 376; *see also Cox*, 757 F.3d at 122. The Fifth Circuit considered whether equitable considerations beyond just *Martinez* supported Diaz's 60(b)(6) motion, concluding that they did not, but only in *dicta*. 731 F.3d at 375-78 & n.1 (assuming "arguendo" that such factors "may have some application in the Rule 60(b)(6) context," and including a footnote arguing that they do not).

In another case cited by the State (BIO at 15), *Haynes v. Davis*, 733 F. App'x 766, 767 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 917 (2019), the Fifth Circuit noted only that *Martinez* did not on its own demonstrate extraordinary circumstances and then rejected other equitable factors as independently insufficient. A dissenting opinion criticized the majority's failure to "actually engage with the specifics of Haynes's ineffective-assistance claim," even though *Martinez* and *Trevino* were a "significant change in habeas jurisprudence" important for "review of Haynes's particular circumstances." *Id.* at 772-73 (Dennis, J., dissenting). In *Raby*, the Fifth Circuit noted only that *Martinez* does not demonstrate extraordinary circumstances before summarily rejecting other equitable factors as independently insufficient. *Raby v. Davis*, 907 F.3d 880, 884-85 (5th Cir. 2018). In *Balentine v. Stephens*, 553 F. App'x 424 (5th Cir. 2014)—a matter in which the

State cited to other post-remand opinions (BIO at 14)—the Fifth Circuit merely remanded to the district court, which denied the Rule 60(b)(6) motion based on a magistrate judge's conclusion that *Martinez* did not apply. *Balentine v. Davis*, 2017 WL 9470540, at *5-16 (N.D. Tex. Sept. 29, 2017), *report and recommendation adopted*, 2018 WL 2298987 (N.D. Tex. May 21, 2018), *appeal docketed*, No. 18-70035) (5th Cir. Dec. 28, 2018)).

Texas's claim that the Fifth Circuit is no longer on the wrong side of the split is undercut by its heavy reliance on the evidentiary hearings in *Haynes* and *Balentine*. Of the many Fifth Circuit cases in which movants have invoked *Martinez* under Rule 60(b)(6), *Haynes* and *Balentine* appear to be the only two in which hearings have been granted.[2] Those hearings were granted only after the movants appealed to this Court (see *Haynes v. Thaler*, 569 U.S. 1015 (2013) (vacating and remanding for further consideration in light of *Trevino*), and *Balentine v. Thaler*, 569 U.S. 1014 (2013) (same)). And, both movants' motions were still denied.

The Fifth Circuit's actual approach is epitomized in *Buck v. Davis*, 137 S. Ct. 759 (2017). There, this Court reversed the Fifth Circuit's denial of a certificate of appealability to review the denial of Buck's Rule 60(b)(6) motion, which depended on the application of *Martinez* and *Trevino* to his defaulted IATC claim. *Id.* at 780. Buck's trial counsel hired an expert psychologist who opined that Buck was statistically more likely to pose a future danger because he is black. If that was not extraordinary in conjunction with a new constitutional claim, it is unclear what would be. But, the Fifth Circuit not only missed the mark in that case, it has also suggested in multiple post-*Buck* opinions that a claim of racial discrimination is necessary for a movant to establish extraordinary circumstances. *See Beatty*, 755 F. App'x at 350 (discounting allegations of extraordinary circumstances because "[n]o such concern" with racial discrimination "is present here"); *see also Raby*, 907 F.3d at 885 (noting that the movant did not allege "racial discrimination").

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[2] *See also* Appendix G to Pet. for a Writ of Certiorari in *Raby v. Davis*, *supra* (listing cases in which movants urged reopening the case under *Martinez*).

Beyond its labored accounting of the Fifth Circuit's approach, the State's analysis of other circuits' precedent mischaracterizes any mention of other factors as proof that those factors mattered. For example, in *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014), the Eleventh Circuit ruled that *Martinez* did not apply, and did not address other equitable factors except to deny any extraordinariness. *See id.* at 633. The Sixth Circuit, as shown in *Zagorski v. Mays*, 907 F.3d 901 (6th Cir. 2018), and *Miller v. Mays*, 879 F.3d 691 (6th Cir. 2018), continues to deny claims based on *Martinez* under *Abdur'Rahman v. Carpenter*. 805 F.3d 710, 714 (6th Cir. 2015) ("[E]ven if *Martinez* did apply, that case was a change in decisional law and does not constitute an extraordinary circumstance . . ."). Assessing the cases cited by the State, no petitioner won review of a claim in an evidentiary hearing except after appealing to this Court. Most of the cases have an analysis of *Martinez* and other equitable factors that amounts to no more than a few sentences. The cited cases establish the predetermined outcome of every Rule 60(b)(6) motion that invokes *Martinez*. This Court has stated that extraordinary circumstances will "rarely occur in the habeas context." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). But "rarely" does not mean "never." *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015); *Cox*, 757 F.3d at 122. This case presents the Court with a scenario in which the Fifth Circuit's categorical rule "cause[s] friction with *Gonzalez*." *Crutsinger*, 2019 WL 4184098, at *1.

II. The Fifth Circuit's Timeliness Inquiry Undercuts the Purpose of Rule 60(b)

A. The State's Timeliness Arguments Turn on a Fundamental Mischaracterization of the Record Below

Texas's key contention about the Fifth Circuit's timeliness decision is that "the district court ultimately granted the relief that he requested [under *Trevino*]: He requested conflict-free counsel for the appeal, and three weeks later, he received conflict-free counsel for the appeal." BIO at 24. Unfortunately for the State, this argument suffers from a fatal flaw: the core request for relief was not for conflict-free counsel for the appeal. Moreover, that foundational request for relief—which sought the substitution of counsel in the district court and not simply a conflict-

free lawyer for appeal—was lodged by the attorney suffering from the conflict, and could only be understood to minimize the problems Petitioner faced at that juncture.

Before the district court issued its order denying habeas relief—and only twenty-two days after this Court decided *Trevino*—federal habeas counsel filed a motion to withdraw. Citing *Trevino*, counsel put the court on notice that the decision "squarely puts Counsel for Applicant in an ethical position due to the fact that Counsel represented Petitioner during the State Habeas proceedings. If there would be any claims of ineffective assistance of counsel of state habeas, these claims should be addressed by successor counsel." *Beatty v. Thaler*, Case No. 4:09-cv-00225, DE 27, at 2 (E.D. Tex. June 19, 2013). The district court **denied** this motion, and did so summarily and without any further inquiry into the matter. *Beatty v. Director, TDCJ-CID*, 2013 WL 3763104 at *17 (E.D. Tex. 2013).

Mr. Beatty then filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), which asked the court to reconsider its denial of the motion to withdraw because of the limitations that counsel's status as Mr. Beatty's state habeas counsel placed on the scope of his federal representation post-*Trevino*. No. 4:09-cv-00225, DE 31, at 2 (E.D. Tex. Aug. 9, 2013). On the same date, in a separately-filed notice of appeal and motion to appoint counsel for appeal, Mr. Beatty requested "that present Counsel be allowed to withdraw and other court appointed counsel continue with the prosecution of this appeal." No. 4:09-cv-00225, DE 32, at 1 (E.D. Tex. Aug. 9, 2013); *see also* DE 33. Texas glosses over a critical fact: the district court **denied** the motion to reconsider the previous request to withdraw—again without any meaningful inquiry—and **only granted** the motion for new counsel for purposes of the appeal. Presented with the opportunity to appoint counsel in district court proceedings who could pursue a *Martinez* review without a conflict of interest—once before denying the petition and once shortly after—the Eastern District court turned away. Texas is correct that a new lawyer was appointed for appeal, but misleads this Court on an important issue when it submits that Mr. Beatty received the relief he requested. The Fifth Circuit did the same. *Beatty*, 755 F. App'x at 347 (stating that Beatty sought "to receive conflict-free counsel for his appeal"). At no time did

Beatty obtain conflict-free counsel in the district court though that is what he twice timely requested.

B. The Fifth Circuit's Timeliness Approach, Like Its Categorical Approach to Rule 60(b)(6) Motions Premised on *Martinez*, Warrants Review

At bottom, Texas does not contest that the Fifth Circuit's approach to the issue of timeliness involves an inelastic calculation of the time that elapsed between the relevant change in the law and the ultimate filing date of the Rule 60(b) motion. Given Rule 60(b)'s equitable purpose, the timeliness inquiry should not fixate on the specific date a Rule 60(b) motion was filed but instead should assess both how diligently the petitioner attempted to correct the defect in the proceedings' integrity and the extent of prejudice the defect caused. The Fifth Circuit simply overlooks any other efforts movants make between the date of the triggering event and the filing date. This myopic and inflexible analysis renders the rule inapplicable in cases in which the equities strongly counsel in favor of a remedy, and encourages federal habeas petitioners to circumvent more direct and entrenched remedies for errors in their proceedings if they wish to have any hope the district court may exercise jurisdiction under Rule 60(b).

Petitioner's case exemplifies the problem with the current practice. Throughout the Rule 60 litigation, Beatty urged the court to find the motion timely because the course of proceedings prior to the filing demonstrated that he acted in good-faith, repeatedly seeking a remedy. *See* Petition at 6-17. He first requested the relief sought in his Rule 60(b) motion twenty-two days after *Trevino* was decided. He then litigated the district court's denial of that motion until this Court denied certiorari on May 18, 2015. Just five-and-a-half months passed after that denial before Beatty filed his Rule 60(b) motion. In that period, he prepared and filed a second state habeas application and sought and secured a stay of his August 13, 2015 execution date. The claims developed and presented in that state application underscore that Beatty actively sought to cure the prejudice he suffered as a result of the federal district court's denial of his counsel's

motion to withdraw two years earlier. Only sixteen days after the state court dismissed his second application, Beatty filed the Rule 60(b) motion.

The Fifth Circuit's arithmetic disregarded Mr. Beatty's efforts; it found that twenty-nine months had passed between the decision in *Trevino* and the filing of the Rule 60(b) motion. It then analyzed timeliness using "Beatty's twenty-nine month delay" as the anchor. *Beatty*, 755 F. App'x at 348. It discounted all other litigation, ignoring the reasons the other litigation made a Rule 60(b) motion impracticable and ill-advised. *See id.*; *see also* Petition at 19 n.6 (exploring how the Fifth Circuit's finding is inaccurate). If a court's timeliness inquiry can shrug off the movant's timely effort to correct the defect (like the motion to withdraw filed immediately after this Court decided *Trevino*) and the subsequent efforts made to do the same (outlined in the Petition), its approach is not consonant with the Rule 60(b)'s equitable nature. The Fifth Circuit's count-the-days approach warrants scrutiny for the same reasons its categorical approach to Rule 60(b)(6) motions based on *Martinez* warrants scrutiny: it contravenes "the underlying objectives of the rule." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

III. The Extraordinary Circumstances Make Mr. Beatty's Case an Excellent Vehicle to Resolve the Rule 60(b) Questions and Underscore the Importance of Whether Federal Petitioners are Entitled to Conflict-Free Counsel at the Petition Stage

Though unfairly discounted in the Fifth Circuit's analysis, the extraordinary circumstances surrounding Mr. Beatty's request to reopen his federal habeas proceedings demonstrate why this case is an ideal vehicle for resolving the Rule 60(b) questions presented and underscore that the question regarding 18 U.S.C. § 3599 is an important question of federal law.

A. Mr. Beatty is the Only Capital Petitioner in Texas Denied in the District Court the Right to Counsel to Investigate and Present IATC Claims Under *Martinez* and *Trevino*

In his Rule 60(b) motion, Mr. Beatty alleged as an extraordinary circumstance that he was the only Texas capital prisoner to have his timely request for conflict-free counsel in the district

court denied. No. 4:09-cv-00225, DE 45, at 33-34 (E.D. Tex. Oct. 30, 2015). In fact, the motion noted that Mr. Beatty was the *first* to request the appointment of conflict-free counsel, and he made the motion while his initial habeas petition was pending and amendable. When *Trevino* came down, Mr. Beatty's pending federal petition had already identified one defaulted Sixth Amendment claim.

The Fifth Circuit erroneously held that it was "not even correct" for Beatty to assert that he was "the lone petitioner who has not been allowed to return to district court with conflict-free counsel." *Beatty*, 755 F. App'x at 349. The court cited its order denying a motion to appoint counsel in *Roberson v. Stephens*, No. 14-70033, Slip Op. (5th Cir. May 22, 2015) to back up this claim. In *Roberson*, the petitioner had moved for the appointment of new counsel in the Fifth Circuit on numerous grounds, including that one of his two court-appointed federal habeas counsel had represented him in state habeas. The court denied the motion, reasoning that Mr. Roberson had been represented in all levels of the federal proceedings by one attorney who had not represented him in state court. That attorney also assured the court that he had been "very cognizant of any potential *Martinez*/*Trevino* issues, and found none." *Id.* at 2. "As such, Roberson has already received the benefit of independent, conflict-free counsel to investigate potential *Martinez-Trevino* issues." *Id.* But, the court in *Beatty* mistakenly interpreted this order to support the proposition that it had found it "sufficient that conflict-free counsel at the appellate level reviewed *Martinez/Trevino* issues." *Beatty*, 755 F. App'x at 349. The attorney who had not represented Mr. Roberson in state habeas was appointed by an order of the federal district court on March 5, 2012. *See Roberson v. Thaler*, No. 2:09-cv-00327, Doc. 26 (E.D. Tex. Mar. 5, 2012). The district court did not even deny relief in the case until September 2014. *See* No. 2:09-cv-00327, Doc. 48 (E.D. Tex. Sept. 30, 2014). The conflict-free attorney was counsel for more than two years before the appeal.

In its BIO, Texas argues that other capital petitioners have not been permitted to return to district court for a conflict-free *Martinez* review. *See* BIO at 21. This contention ever-so-subtly alters the contention that Beatty made—that he was the only one to have his timely request for

conflict-free counsel **in the district court** denied. To support its adulterated proposition, Texas, like the Fifth Circuit, cites to *Roberson*, even though Roberson had an unconflicted lawyer who represented him for over two years in the district court. Texas also added a citation to *Freeney v. Davis*, No. 16-70007, slip op. (5th Cir. Aug. 3, 2017). This opinion came nearly two years after Beatty's Rule 60(b) motion was filed. Moreover, it involved a case, like *Roberson*, in which the request for conflict-free counsel came in the court of appeals, **not the district court**. *See id.* at 6 (explaining that Freeney had been on notice about the *Trevino* issues but never sought to remedy concerns with counsel in the district court). Neither the lower court nor the State has shown any other petitioner to be similarly-situated to Mr. Beatty. The circumstances are definitively extraordinary.

B. The Defaulted IATC Claim Underlying Beatty's Rule 60(b) Motion Raises Substantial Doubts About His Conviction

When he filed his second subsequent application after the denial of certiorari in 2015, Mr. Beatty presented the state court with compelling new claims that raise serious doubts about his guilt of capital murder. This case has been plagued by doubt related to the underlying burglary charge from its earliest stages. *See State v. Beatty*, No. AP-75,010, slip op. at 5 (Tex. Crim. App. Mar. 11, 2009) (unpublished) (Johnson, Price, Holcomb, JJ., dissenting).[3] Against the backdrop of the State's weak case for capital murder, the Petition elucidates the evidence counsel found—with no funding and little opportunity to investigate—to further call an element of the offense into question. *See* Petition at 13. The guilt-phase IATC claim concerns evidence of Beatty's likely innocence of capital murder. It is an extraordinary circumstance that he has not been permitted a real bite at the IATC apple, particularly because that bite could undermine his capital conviction.

[3] These justices agreed that they "do not think that [the State] proved, beyond a reasonable doubt, lack of consent to enter or entry with the intent to commit a felony, theft, or assault" and called for "a conviction for murder" and "a new sentencing hearing." The dissenting opinion is accessible on the CCA's website: http://www.search.txcourts.gov/Case.aspx?cn=AP-75,010&coa=coscca.

C. The Fifth Circuit Permitted Several Other Capital Petitioners the Opportunity to Have Conflict-Free Counsel Investigate and Present IATC Claims Under *Martinez* and *Trevino*

Mr. Beatty has been denied the benefit of *Martinez* and *Trevino*. There is no legitimate reason that he has been deprived of his right to conflict-free federal representation in the district court. Even several petitioners who were already in the Fifth Circuit when this Court decided *Trevino* had their cases remanded for further development of new and existing Sixth Amendment allegations. *See* No. 4:09-cv-00225, DE 45, at 33; Pet. at 37-38. The only plausible basis for the outcome here is the notion that the post-*Trevino* right to federal habeas counsel can be satisfied by the appointment of conflict-free counsel on appeal. But that purported basis is belied by the Fifth Circuit's decisions in *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015) and *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015), among others. Beatty's differential and extraordinary treatment is even more mystifying when one looks at the whole picture. Given the equities, his case presents an excellent vehicle for this Court to address the important questions presented.

Respectfully submitted,
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