NO. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

TRACY LANE BEATTY,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(Capital Case)

This case presents the following questions worthy of the Court's review:

1. **Whether the Court should grant certiorari to resolve a conflict among the federal courts of appeals as to whether petitioners may ever prevail on a Federal Rule of Civil Procedure 60(b)(6) motion premised, in part, on *Martinez v. Ryan*, 566 U.S. 1 (2012).**

2. **Whether the Court should grant certiorari to bring the Fifth Circuit's rigid approach to assessing timeliness under Rule 60(c)(1) into line with other courts of appeals.**

3. **Whether the Court should grant certiorari and provide guidance to the courts of appeals regarding the scope of the 18 U.S.C. § 3599 right to adequate representation post-*Martinez* and *Trevino*, and in particular whether federal habeas petitioners are entitled to conflict-free counsel to investigate all available claims and respond to the State's procedural arguments.**

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Tracy Lane Beatty, incarcerated on Texas' death row at the Polunsky Unit of the Texas Department of Criminal Justice, was represented below by undersigned counsel, Thomas Scott Smith.

The Respondent, Lorie Davis, Director of the Correctional Institutional Division of the Texas Department of Criminal Justice, was represented by Texas Assistant Attorney General Jennifer Wren Morris.

There were no other parties to the proceeding below.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Tracy Lane Beatty respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished November 12, 2018 order of the Fifth Circuit, denying Mr. Beatty's motion for a certificate of appealability (COA) to appeal the denial of his Rule 60(b) motion, __ Fed. App'x. __, 2018 WL 5920498 (5th Cir. 2018), is attached as Appendix A. The unpublished March 31, 2017 Memorandum Opinion and Order Denying Relief from Judgment, issued by the U.S. District Court for Eastern District of Texas, Sherman Division, is reported at 2017 WL 1197112 (5th Cir. 2017), and is attached as Appendix B. The district court's unpublished Memorandum Opinion and Order Denying Motion to Alter or Amend Judgment is not reported. It is attached as Appendix C.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Mr. Beatty's habeas cause under 28 U.S.C. §§ 2241 & 2254. The Fifth Circuit had jurisdiction over uncertified issues presented in a motion for COA under 28 U.S.C. § 2253. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction over all issues presented to the Fifth Circuit under 28 U.S.C. § 2253. On January 14, 2019 Justice Alito granted Mr. Beatty's Application to extend the time to file a petition for a writ of certiorari, making this petition due March 11, 2019. The petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. Constitution, Amendment VIII provides in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Constitution, Amendment XIV provides in relevant part: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

18 U.S.C. § 3599 provides in relevant part:

> (a)(2) In any postconviction proceeding under section 2254 . . . seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
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> * * * *
>
> (e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of judicial proceedings . . . .

28 .S.C. § 2253(c) provides in relevant part:

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

Federal Rule of Civil Procedure 60 provides in relevant part:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * * *
>
> (6) any other reason that justifies relief.
>
> (c) Timing and Effect of the Motion.
>
> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time . . . .

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Fifth Circuit has made a number of decisions in Federal Rule of Civil Procedure 60(b)(6) cases arising from the sea change in law effected by *Martinez v. Trevino*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), which conflict with the equitable principles behind those decisions and Rule 60(b), and with the practices of many other courts of appeals. Guidance from this Court is necessary to resolve (1) whether Rule 60(b)(6) relief is ever available under *Martinez* and *Trevino*, (2) how the lower courts should assess the timeliness of a Rule 60(b)(6) motion premised on *Martinez* and *Trevino*, and (3) whether federal habeas petitioners are entitled, upon timely motion in the federal district court, to conflict-free counsel to investigate and pursue defaulted Sixth Amendment claims under *Martinez* and *Trevino*.

STATEMENT OF THE CASE

A. *Mr. Beatty's Trial and Post-Conviction Proceedings Prior to* Trevino

Tracy Beatty was sentenced to death on August 10, 2004 for the capital murder of his mother. To elevate the offense to capital murder, the State alleged both a contemporaneous robbery and a contemporaneous burglary. Defense counsel presented no witnesses at the guilt phase of trial but pressed a theory that the murder occurred in the middle of a heated argument. The jury rejected the State's robbery allegation and convicted under a theory of burglary, even though Mr. Beatty and his mother both resided in the home where the offense took place.

After the State rested its case for a death sentence, the trial court held an *ex parte* hearing at which Mr. Beatty's defense counsel testified they were unsuccessful in locating any mitigation witnesses and their consulting experts had failed to identify any mitigating factors in Mr. Beatty's background. Under these circumstances, Mr. Beatty assented to defense counsel's decision not to present a case at the penalty phase of trial. The jury returned a death verdict.

Despite the absence of defense evidence at trial, Mr. Beatty's capital murder conviction was only narrowly upheld by a five-to-three vote of the Texas Court of Criminal Appeals ("TCCA"). *Beatty v. State*, No. AP-75010, 2009 WL 619191 (Tex. Crim. App. Mar. 11, 2009) (unpublished). Three dissenting Judges would have reformed the judgment to non-capital murder because the State's untested evidence failed to prove either lack of consent to enter the home or Mr. Beatty's intent to commit a theft, assault or other felony at the time of entry. *Id.* ("The evidence of entry

without consent is thin, and the evidence of intent to commit a felony, theft, or assault even thinner.").[1]

State habeas counsel filed an application for post-conviction relief alleging ten grounds for relief, eight of which had been raised on direct appeal and were therefore not cognizable on collateral review. The two remaining claims alleged Sixth Amendment violations arising from trial counsel's failure to investigate and present mitigation evidence (hereinafter the "penalty-phase IATC claim") and failure to discover and present evidence of the victim's medical condition.

After holding an evidentiary hearing at which numerous witnesses testified for the first time regarding the victim's violent and erratic behavior, her physical and psychological abuse of Mr. Beatty and her step-children, her controlling and degrading treatment of Mr. Beatty as an adult, and her significant mental illness, the trial court signed the prosecution's proposed findings of fact and conclusions of law and recommended the denial of relief. The TCCA rejected many of the trial court's findings and conclusions but ultimately adopted the recommendation to deny habeas relief.

As was relatively common in Texas prior to *Trevino v. Thaler*, 569 U.S. 413 (2013), state habeas counsel was appointed to continue his representation in federal habeas corpus proceedings. In June 2010, he filed a two-issue federal petition raising the penalty-phase IATC claim he had exhausted in state court and a new claim alleging trial counsel were ineffective for failing to develop evidence that Mr. Beatty

[1] The dissenting opinion is not available on Westlaw but is available on the TCCA's website: http://www.search.txcourts.gov/Case.aspx?cn=AP-75,010&coa=coscca.

did not commit a burglary and was innocent of capital murder under Texas law (hereinafter the "guilt-phase IATC claim"). Both claims were supported only by the penalty-phase IATC evidence produced at the state habeas hearing.

Respondent argued that the guilt-phase IATC claim was procedurally defaulted in federal habeas because the Texas courts would not consider the claim if presented for the first time in a second or successive state habeas application. Federal habeas counsel conceded in the reply brief that the viability of the guilt-phase IATC claim did not occur to him until after the state hearing, at which point it was too late to amend the state habeas application. He argued, nonetheless, that although "this exact claim was not contained in his original State Writ," it was fairly presented to the state court, was exhausted, and was not procedurally defaulted.

B. *On June 19, 2013, Tracy Beatty Made his First Request for Conflict-Free Representation in the Federal District Court in Light of* Trevino v. Thaler, *and Consistently Pursued his Request Through this Court's Denial of Certiorari on May 18, 2015.*

While Mr. Beatty's habeas petition was pending in the federal district court, this Court decided *Trevino v. Thaler*, 569 U.S. 413 (2013), reversing the Fifth Circuit's line of cases holding that *Martinez v. Ryan*, 566 U.S. 1 (2012), was inapplicable to Texas convictions. Because *Trevino* opened the first procedural pathway to merits review of Mr. Beatty's guilt-phase IATC claim, federal habeas counsel moved to withdraw and asked for the appointment of conflict-free counsel, arguing that "[i]f there would be any claims of ineffective assistance of counsel of state habeas, these claims should be addressed by successor counsel." *Beatty v. Thaler*, No. 4:09-cv-00225, Motion to Withdraw at 2 (E.D. Tex. Jun. 19, 2013). The motion was filed on June 19,

2013, only twenty-two days after *Trevino* was published. Based on undersigned counsel's review, Mr. Beatty was the first Texas capital prisoner to file a motion for appointment of conflict-free counsel post-*Trevino*.

On July 16, 2013, the district court issued a memorandum opinion and order denying habeas relief and denying without inquiry or discussion "all motions not previously ruled on," including the motion for conflict-free counsel. *Beatty v. Director, TDCJ-CID*, 2013 WL 3763104 at *61 (E.D. Tex. 2013). The opinion found that Mr. Beatty's guilt-phase IATC claim was procedurally defaulted and that cause and prejudice did not exist to excuse the default. Counsel had not argued cause and prejudice under *Martinez* and *Trevino* because his ethical conflict prevented him from doing so. Nevertheless, the district court considered and rejected the merits of a hypothetical *Martinez*/*Trevino* argument. *Id.* at *57-58.

Mr. Beatty 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 substitution motion because of the limitations counsel's status as Mr. Beatty's state habeas representative placed on the scope of his federal representation post-*Trevino*. *Beatty v. Thaler*, Case No. 4:09-cv-00225, DE 31 at 2 (E.D. Tex. Aug. 9, 2013). The court denied the motion to alter or amend because "[r]elief based on *Trevino* is unavailable," but held it would be "prudent" for a different attorney to represent Mr. Beatty on appeal. *Beatty v. Director, TDCJ-CID*, Case No. 4:09-cv-00225, DE 36 at 2 (E.D. Tex. Aug. 30, 2013). Undersigned was appointed on August 30, 2013.

The Fifth Circuit denied a certificate of appealability ("COA"). Regarding the guilt-phase IATC claim, the Fifth Circuit held both that relief was precluded under AEDPA review[2] and that Mr. Beatty had failed to demonstrate—on the basis of the record compiled by conflicted state/federal habeas counsel—that the defaulted claim was substantial or that state habeas counsel was ineffective for purposes of establishing cause and prejudice under *Martinez* and *Trevino*:

> Beatty argues simply that there was 'no reason not to argue the ineffectiveness of trial counsel on this issue, particularly in light of the vigorous and substantial dissent [on appeal].' [] Beatty makes no further attempt to explain why his state habeas counsel was ineffective. [] Because Beatty defaulted, he is not entitled to a COA on this claim.

Beatty v. Stephens, 759 F.3d 455, 466 (5th Cir. 2014). Noting that other panels had remanded cases like Mr. Beatty's for further proceedings in the district court with the assistance of conflict-free counsel, the Court held it was unnecessary to remand Mr. Beatty's case:

> Because the district court conducted a *Trevino/Martinez* review, *see Beatty,* 2013 WL 3763104 at *16 ("There is nothing else pending before this court that arguably supports relief based on *Trevino*."), this case stands in contrast to those in which this Court has remanded for further consideration of a petitioner's right to seek relief pursuant to *Trevino*.

Id. at 466 n.2. The opinion did not address the fact that *Martinez* cause and prejudice was not investigated or argued in the district court because predecessor counsel had a disabling conflict on that point.[3]

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[2] The Fifth Circuit erred by applying the AEDPA's relitigation bar to both prongs of an IATC claim that had never been presented to the state courts.

[3] Mr. Beatty's COA motion had argued that state habeas counsel's continued appointment in the federal district court was "problematic" after *Trevino*, and highlighted that predecessor counsel had recognized his conflict and asked to withdraw. Just a few months after *Trevino* and before parties had the benefit of this Court's opinion in *Christeson v. Roper*, 135 S. Ct. 891 (2015), Mr. Beatty argued

Mr. Beatty petitioned for rehearing from the Fifth Circuit, arguing that the provision of conflict-free counsel for proceedings in the Court of Appeals did not satisfy his right to adequate representation under 18 U.S.C. § 3599(a)(2), because appellate counsel was bounded by a record developed in the district court by a lawyer laboring under a conflict of interest: "No meaningful review is possible until a lawyer other than state habeas counsel has an opportunity to investigate whether state habeas counsel failed to develop a substantial claim of [IATC]." *Beatty v. Stephens*, Case No. 13-70026, Petition for Rehearing at 8-9 (5th Cir. Aug. 12, 2014). Mr. Beatty further requested that his petition be held pending the outcome of two cases the Fifth Circuit would imminently decide, and which involved the same request for conflict-free representation at the district court level that Mr. Beatty had made:

> This Court recently heard argument in two Texas capital habeas corpus cases in which it will decide under what circumstances a federal court must replace federal habeas counsel who served as state habeas counsel. *Mendoza v. Stephens*, No. 12-70035 (5th Cir.) (argued June 18, 2014); *Speer v. Stephens*, No. 13-70001 (5th Cir.) (argued June 18, 2014). Both cases are fully briefed, argued, and pending decision. . . . Should this panel harbor any doubt that Mr. Beatty is entitled to a remand for the appointment of conflict-free counsel in the district court, it should hold this proceeding for forthcoming guidance in *Mendoza* and *Speer*.

Id. at 14-15.

The Fifth Circuit refused to hold the petition and denied rehearing on November 3, 2014, reaffirming its opinion that the provision of conflict-free counsel

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to the Fifth Circuit that, "[j]ust as it is 'unrealistic to expect trial counsel, who is also appellate counsel, to call into question his own competence' it is unrealistic for federal post-conviction counsel to question his own competence in handling the state post-conviction proceedings." *Beatty v. Stephens*, Case No. 13-70026, Appellant's Brief Supporting Application for Certificate of Appealability at 24 (5th Cir. Nov. 22, 2013) (*quoting Rounsaville v. State*, 282 S.W.3d 759, 760 (Ark. 2008) (per curiam)). This argument remained unaddressed by the Court.

on appeal was sufficient to cure the deprivation of qualified counsel in the district court. The order faulted Mr. Beatty for failing to identify substantial IATC claims that state habeas counsel may have ineffectively defaulted, despite the dependence of those arguments on investigation and facts outside the record compiled by state habeas counsel, and despite appellate counsel's inability to conduct those investigations absent a remand. *Beatty v. Stephens*, Case No. 13-70026, Order on Petition for Rehearing (5th Cir. Nov. 3, 2014).

On January 20, 2015, this Court decided *Christeson v. Roper*, 135 S. Ct. 891 (2015), holding that a federal district court abused its discretion by denying a motion to appoint substitute counsel where the attorneys originally appointed were unable to make the petitioner's strongest argument because doing so would "denigrate their own performance," causing a "'significant conflict of interest.'" *Christeson*, 135 S. Ct. at 894 (*quoting Maples v. Thomas*, 565 U.S. 266, 285 n.8 (2012)). As in Mr. Beatty's case, conflicted counsel in *Christeson* had acknowledged the nature of their conflict in the district court. *Id*. And as in Mr. Beatty's case, the conflict was actual instead of potential. In *Christeson*, the originally appointed counsel's arguments to the court were "directly and concededly contrary to their client's interest, and manifestly served their own professional and reputational interests." 135 S. Ct. at 895. In Mr. Beatty's case, the originally appointed counsel raised a procedurally defaulted IATC claim and abstained from making the *Martinez* arguments that would allege his own ineffectiveness in state habeas and were essential to his client's interests in the development and merits review of the claim, instead arguing that the claim was

exhausted despite not being presented in the state habeas application. "*Clair* makes clear that a conflict of this sort is grounds for substitution." *Id.*

Less than one week after the Court announced its opinion in *Christeson*, the Fifth Circuit remanded a case materially indistinguishable from Mr. Beatty's with instructions to investigate and determine—with the assistance of newly appointed conflict-free counsel—whether the petitioner "can establish cause for the procedural default of any [IATC] claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief." *Tabler v. Stephens*, 591 Fed. App'x. 281, 281 (5th Cir. 2015) (unpublished).

On January 30, 2015, ten days after the *Christeson* opinion was announced, Mr. Beatty filed an opposed motion asking the Fifth Circuit to recall the mandate in his proceeding in light of *Christeson* and *Tabler*. *Beatty v. Stephens*, Case No. 13-70026, Motion to Recall the Mandate (5th Cir. Jan. 30, 2015). The Fifth Circuit denied the motion, reasoning once again that representation by conflict-free counsel on appeal is sufficient to satisfy an indigent capital state prisoner's rights to federal habeas representation such that a remand to the district court is unnecessary. *Beatty v. Stephens*, Case No. 13-70026, Order at 2 (5th Cir. Feb. 26, 2015).

Only one month later, the Fifth Circuit held in *Speer* and *Mendoza*[4] that the relief it had denied Mr. Beatty—conflict-free counsel at the district court level, where investigations and claim identification must necessarily take place—was exactly the

[4] *Speer* and *Mendoza* were the cases Mr. Beatty requested the Fifth Circuit panel decide before deciding his Petition for Rehearing, *see supra* p. 9.

relief to which petitioners similarly situated to Mr. Beatty are entitled.[5] *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015); *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015). Whereas Mr. Beatty's request was fatally crippled by his failure to identify, without provision for investigations, substantial IATC claims that had been defaulted by ineffective state habeas representation, Judge Owen (who was also a member of Mr. Beatty's Fifth Circuit panel) filed a concurring opinion in *Mendoza* making plain that petitioners could not reasonably be held to such an ambitious standard absent a remand and adequate investigations:

> The State of Texas does not contend that [conflicted counsel] does not have a conflict of interest. Instead, the State argues that Mendoza has not pointed to any ineffective-assistance-of-trial-counsel claim that [counsel] should have raised, but did not raise, in the state habeas corpus proceedings. This argument is entirely circular. The State says that Mendoza cannot have conflict-free counsel unless conflicted counsel does what no court has thus far expected an attorney to do, which is argue that she was ineffective in assisting her client. Mendoza would be place in the untenable position of being forced to rely on appointed counsel to identify that counsel's own failings, if any, and to contend in federal court that her failings constituted ineffective assistance of habeas counsel.

Mendoza, 783 F.3d at 207-08. *Cf. Beatty v. Stephens*, Case No. 13-70026, Order on Petition for Rehearing at 2 (5th Cir. Nov. 3, 2014) ("In both his petition for rehearing and his initial briefing before this panel, petitioner fails to state what his conflicted

[5] In fact, Mr. Beatty should have been more favorably positioned than the petitioners in *Speer* and *Mendoza*. Petitioner Speer's habeas petition had been denied by the district court when this Court decided *Trevino*, he had not raised a defaulted IATC claim, and he filed a motion for substitute counsel in the Fifth Circuit more than two months after Mr. Beatty did so in the district court. Petitioner Mendoza's case was also on appeal at the time *Trevino* was announced, and his counsel waited sixty-five days, or three times longer than Mr. Beatty's counsel, before filing a motion for conflict-free representation.

counsel in the district court habeas proceeding did improperly, or what his current, conflict-free counsel would have done differently.").

Mr. Beatty filed a petition for a writ of certiorari asking this Court to vacate the Fifth Circuit's order denying COA and remand for further proceedings in light of *Christeson*. The Court denied certiorari on May 18, 2015.

C. *With Less Than Three Months Remaining Before His Scheduled Execution, Mr. Beatty Sought Relief from the State Courts.*

By May 18, 2015, when this Court denied certiorari to review the lower courts' denial of conflict-free counsel at the district court level, the State of Texas had scheduled Mr. Beatty's execution for August 13, 2015. Mr. Beatty filed a second habeas application and motion to stay his execution in the state court, seeking to establish his innocence of the burglary charge and attendant innocence of capital murder. With less than three months before his execution date and no court funding, the investigation was limited to interviewing an elderly neighbor who had testified at trial. The neighbor confirmed that his mother told Mr. Beatty to leave her house on a near daily basis, but her threats were always forgotten by the time he returned home in the evenings. The neighbor and Mr. Beatty would regularly discuss that his mother threatened kicking him out of the home in an effort to control him, which was prompted by the fact that his parole required that he live with her. On the night of the offense, Mr. Beatty did not appear to give any attention to his mother's most recent threat to kick him out and he returned home as usual, after having dinner with the neighbor.

The allegations in Mr. Beatty's second state habeas application secured him a stay of execution pending further order of the court. *Ex parte Beatty*, 2015 WL 4760059 (Tex. Crim. App. Aug. 11, 2015) (unpublished). But on October 14, 2015, the TCCA dismissed the application as an abuse of the writ without full consideration of the merits of Mr. Beatty's allegations, finding Mr. Beatty failed to satisfy one of the narrow exceptions to the state-law ban on successive habeas applications. *Ex parte Beatty*, 2015 WL 6442730 (Tex. Crim. App. Oct. 14, 2015) (unpublished).

D. *Sixteen Days After the State Court Disallowed Mr. Beatty's Subsequent State Habeas Application, He Filed the Instant Motion for Relief from Judgment.*

On October 30, 2015, Mr. Beatty filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) (hereinafter the "Rule 60(b) motion") in the federal district court. Only sixteen days had elapsed between the TCCA's dismissal of his second habeas application and the filing of his Rule 60(b) motion.

The Rule 60(b) motion contended that the district court's denial of Mr. Beatty's motion for substitute counsel was a defect in the integrity of his federal habeas proceeding because *Martinez* and *Trevino* reflect this Court's equitable judgment that state prisoners must be afforded meaningful access to at least one court to challenge their convictions and sentences on the ground that their trial counsel were ineffective. Although the federal courts were designated as the appropriate—and only guaranteed—venue for initial review of substantial IATC claims that were waived by ineffective state habeas counsel, Mr. Beatty was denied access to the federal courts for that purpose. Mr. Beatty further alleged that the appointment of conflict-free

counsel to seek a COA based on the record created by a conflicted lawyer was insufficient to cure the violation of his right to adequate representation throughout "all available post-conviction process," 18 U.S.C. § 3599(e), because he could only conduct investigations and designate claims while represented by conflict-free counsel in the district court.

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 extenuating circumstances justified his unique and different treatment. Indeed, the motion highlighted that Mr. Beatty was the first Texas capital prisoner to request the appointment of conflict-free counsel to investigate defaulted IATC claims, and unlike his counterparts he made the motion while his initial habeas petition was still pending in the federal district court and subject to amendment. Moreover, at the time *Trevino* came down, Mr. Beatty's pending federal petition had already identified one defaulted IATC claim, which was not reviewed on the merits because conflicted counsel either failed or refused to make an argument that the default should be excused because of his own ineffectiveness in state habeas. And in the reply to the Director's answer to his federal petition, which was filed prior to *Trevino*, the same conflicted attorney conceded that he overlooked the guilt-phase IATC claim at the state habeas level because he was focused on the relevance of the new evidence to a penalty-phase IATC claim.

As further evidence that his case is extraordinary and warrants reopening, Mr. Beatty alleged that there is compelling evidence that he may be innocent of capital

murder, a claim that neither his state/federal habeas attorney nor his trial attorneys investigated. Even the guilt-phase IATC claim that conflicted counsel raised in the federal petition rested entirely on mitigation evidence counsel had uncovered while investigating a penalty-phase IATC claim. Finally, the district court's refusal to appoint conflict-free counsel to investigate and present potential IATC claims post-*Trevino* was particularly prejudicial in the Fifth Circuit, where well-established precedent—which has since been overturned—precluded the provision of court funds to investigate and develop unexhausted and putatively defaulted claims. *See Ayestas v. Stephens*, 817 F.3d 888, 895-96 (5th Cir. 2016), *overruled*, *Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

In rebuttal to Respondent's argument that Mr. Beatty's Rule 60(b) motion was not timely filed because more than two years had passed between this Court's decision in *Trevino* and the motion's filing, Mr. Beatty argued that the courts must consider the context and course of proceedings prior to the motion's filing. Mr. Beatty first requested the relief sought in his Rule 60(b) motion twenty-two days after *Trevino* was announced, on June 19, 2013. He litigated the district court's denial of that motion until this Court denied certiorari on May 18, 2015.

Mr. Beatty filed his Rule 60(b) motion five-and-a-half months after certiorari was denied, during which time he prepared and filed a second state habeas application and sought and secured a stay of his August 13, 2015 execution date. The state court proceedings were Mr. Beatty's good faith attempt, under significant time constraints, to litigate the innocence issues that his trial and state habeas counsel

had overlooked, and which he had been denied an opportunity to investigate or litigate in federal proceedings. Thus, by litigating his state habeas application, Mr. Beatty was actively working to cure the prejudice he suffered as a result of the federal district court's denial of his substitution motion two years prior. Had his good faith efforts succeeded, the Rule 60(b) motion would have been unnecessary.

Mr. Beatty asked the court to consider, when making its timeliness findings, his diligence in seeking to cure or mitigate—on direct review and in a state proceeding—the harm he suffered as a result of the defect in his federal proceedings, rather than adopt Respondent's argument that the only relevant consideration in a timeliness review is the petitioner's diligence in filing, specifically, a motion for relief from judgment pursuant to Rule 60(b)(6).

The district court denied the Rule 60(b) motion, adopting Respondent's timeliness arguments and also finding that Mr. Beatty had failed to establish extraordinary circumstances sufficient to warrant the reopening of his proceeding. App'x. B. Mr. Beatty filed a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), which was also denied. App'x. C. On November 12, 2018, the Fifth Circuit denied a COA, concluding that neither of the district court's findings was debatable among jurists of reason. App'x. A.

E. *The Fifth Circuit's Reasons for Denying a Certificate of Appealability.*

On November 12, 2018, the Fifth Circuit held that reasonable jurists could not debate that the district court did not abuse its discretion in finding Mr. Beatty's Rule 60(b) motion was untimely and lacking extraordinary circumstances. App'x. A at 1-2.

Regarding the district court's finding that Mr. Beatty's Rule 60(b) motion was not filed within a reasonable time, the Fifth Circuit relied on its precedent holding that the "timeliness clock" for motions premised on the petitioner having been represented by counsel laboring under a *Martinez*-created conflict of interest begins May 28, 2013, the date *Trevino* was announced. App'x. A at 8. In *Clark v. Davis*, the Fifth Circuit held that a sixteen-month delay between *Trevino* and the filing of a Rule 60(b) motion was untimely and alternatively that waiting twelve months from the date conflict-free counsel was appointed is also untimely, regardless of other equitable factors in the case. 850 F.3d 780, 782 (5th Cir. 2017). Reasonable jurists could, therefore, not debate that Mr. Beatty's Rule 60(b) motion, filed twenty-nine months after this Court decided *Trevino*, was untimely.

The Court dismissed Mr. Beatty's arguments that he could show good cause for the delay because he was actively seeking direct review of the district court's denial of his motion for conflict-free counsel until May 18, 2015, and litigated a subsequent habeas application and motion for stay of execution in the state court through October 14, 2015, only sixteen days before he filed his Rule 60(b) motion. In rejecting his arguments, the Fifth Circuit found that Mr. Beatty's original motion for conflict-free counsel, filed in the district court on June 19, 2013, was granted three weeks after it was filed, with which Mr. Beatty "appeared satisfied." App'x. A at 8. This finding is not supported by the record.

The Fifth Circuit also held that Mr. Beatty should have asked for a stay of the COA proceedings to immediately file a Rule 60(b) motion, or filed a separate motion

for remand under 18 U.S.C. § 3599 instead of filing a COA motion and seeking to correct the defect through direct review. App'x. at 8-9. Regarding the state habeas application filed after certiorari was denied, the Court held Mr. Beatty should have concurrently filed his Rule 60(b) motion. App'x. A at 9.[6]

The Fifth Circuit also found that reasonable jurists could not debate the district court's finding that the circumstances of Mr. Beatty's case are not extraordinary. The Court noted that Mr. Beatty sought, on direct review, essentially the same relief he now seeks, and "[e]ven in Beatty's past visits to this Court, we rejected his arguments based on the *Martinez*/*Trevino*/*Christeson* trilogy." App'x. A at 10. The Court focused primarily on its precedent holding that this Court's opinions in *Martinez* and *Trevino* do not establish extraordinary circumstances for purposes of reopening a federal proceeding. *Id.* Addressing Mr. Beatty's argument that his Rule 60(b) motion is not narrowly focused on *Martinez*, but also on this Court's holding in *Christeson* and the Fifth Circuit's decisions allowing conflict-free counsel in the district court in every case other than Mr. Beatty's, the Court stated "*Martinez* and

[6] With only three months remaining before his scheduled execution, Mr. Beatty was, for all practical purposes, forced to choose between state and federal litigation. The TCCA will not consider a subsequent state habeas application during the pendency of federal habeas proceedings challenging the same conviction unless the petitioner secures a stay of the federal proceedings. *Ex parte Soffar*, 143 S.W.3d 804, 806-07 (Tex. Crim. App. 2004). While filing a Rule 60(b) motion and seeking a federal stay to litigate a state habeas application is a strategic option available to many petitioners, it was not an option for Mr. Beatty because there was no guarantee the federal court would grant a motion to stay Rule 60(b) proceedings, and Mr. Beatty did not have sufficient time before his execution to go through the state and federal proceedings in reverse order. *See Hearn v. Dretke (In re Hearn)*, 389 F.3d 122, 123 (5th Cir. 2004) (applying equitable tolling to second federal habeas petition filed in the wake of *Atkins* because combination of two-forum rule and the withdrawal of counsel constituted rare and exceptional circumstances). It is unclear to Mr. Beatty why filing a placeholder Rule 60(b) motion and seeking an immediate stay to conduct state litigation, only to pursue the 60(b) motion after the conclusion of state litigation is perceived as any different from or better than filing the Rule 60(b) motion immediately after the conclusion of state litigation and pursuing it to its conclusion without interruption.

Trevino are not 'extraordinary circumstances,' and neither are our precedents that merely apply them." *Id*. at n.3.

The Court faulted Mr. Beatty for trying to "shoehorn his case into extraordinary circumstances by supplementing the changes in decisional law with 'other factors,'" *Id*. at 11, and rejected all of Mr. Beatty's evidence. Regarding his allegation that he is the lone petitioner whose timely request for conflict-free counsel in the district court has been denied, 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). In *Roberson*, the petitioner had moved *pro se* for the appointment of new counsel in the Fifth Circuit on numerous grounds, including the ground 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 at all times been represented by one attorney who had not represented him in state habeas. That attorney told that Court 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*.

Regarding Mr. Beatty's allegation that there are legitimate concerns about his innocence of capital murder, the Court held Mr. Beatty could not rely on this circumstance unless he can prove his innocence by clear and convincing evidence. App'x. A at 11. The Court rejected the circumstance that conflicted counsel had already conceded in a federal filing that he had overlooked at least one guilt-phase

IATC claim, because the Court held the defaulted IATC identified by conflicted counsel did not merit relief. App'x. A at 12. And the Court rejected Mr. Beatty's argument that he had been diligent in seeking to remedy the denial of his right to conflict-free representation, including by being the first capital petitioner to request conflict-free representation post-*Trevino*, based on its calculation that he unreasonably waited twenty-nine months to file his Rule 60(b) motion. *Id*. Finally, the Court held that this Court's opinion in *Buck v. Davis*, 137 S. Ct. 759, 778 (2017), provided no support for Mr. Beatty's argument that a Rule 60(b) motion was the appropriate vehicle to vindicate his right to adequate representation post-*Martinez* because Mr. Beatty's case does not involve race issues that would cause the public to question the integrity of the trial proceedings. App'x. A at 12.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. The Court Should Grant Certiorari to Resolve a Conflict Among the Federal Courts of Appeals as to Whether a Federal Habeas Petitioner May Ever Prevail on a Rule 60(b)(6) Motion Premised, at Least in Part, on *Martinez v. Ryan*.[7]

There exists an acknowledged conflict among the circuits regarding the availability of Rule 60(b)(6) relief to petitioners who have been denied their right to access the federal courts to litigate defaulted IATC claims in the wake of *Martinez*. Four circuits, led by the Fifth Circuit, have held that Rule 60(b)(6) relief is precluded for petitioners whose motions rely, to some extent, on the change in decisional law occasioned by *Martinez*. Three circuits have explicitly rejected this approach, holding

[7] Mr. Beatty notes that Charles Raby, another capitally sentenced Texas prisoner, filed a petition for a writ of certiorari raising this issue on February 28, 2019. *Raby v. Davis*, No. 18-8214 (Feb. 28, 2019).

that Rule 60(b)(6) relief is available to petitioners seeking to invoke the new rule announced in *Martinez* when case-specific equities justify reopening the proceeding to accomplish justice. The conflict is ripe for resolution by this Court.

A. *There is a Circuit Split Regarding Whether a Rule 60(b)(6) Motion Premised on* Martinez v. Ryan *May Ever be Granted.*

The Fifth Circuit fashioned the first categorical approach to Rule 60(b)(6) motions that rely, at least in part, on *Martinez*. In *Adams v. Thaler*, 679 F.3d 312 (5th Cir. 2012), a Texas capital petitioner sought to reopen his judgment shortly after the Court announced the new rule in *Martinez*, arguing that the severity of his sentence combined with the merits of his underlying IATC claims constituted extraordinary circumstances. The Court rejected the motion, applying its rule that "[a] change in decisional law after entry of judgment does not constitute extraordinary circumstances." *Id*. at 319. Having invoked this rule, the Fifth Circuit refused to balance the case-specific equities. *Id*. at 319-20.

Since *Adams*, the Fifth Circuit has repeatedly relied on this rule to avoid balancing the equities in Rule 60(b)(6) cases that invoke *Martinez* and *Trevino*, including Mr. Beatty's. While the Court paid lip service to the requirement that it consider the case-specific equities, it refused to do so, even going so far as to fault Mr. Beatty for **alleging** case-specific factors:

> 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." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002). Applying this rule to the very changes in 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 the

> judgment." *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013); *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012). Even in Beatty's past visits to this Court, we rejected his arguments based on the *Martinez*/*Trevino*/*Christeson* trilogy[].
>
> Knowing this all too well, Beatty tries to shoehorn his case into extraordinary circumstances by supplementing the changes in decisional law with "other factors."

App'x. A at 10-11. *See also* App'x. A at 10 n.3 ("*Martinez* and *Trevino* are not 'extraordinary circumstances,' and neither are our precedents that merely apply them.").

The Eleventh Circuit has adopted the Fifth Circuit's categorical approach. *See Arthur v. Thomas*, 739 F.3d 611, 633 (11th Cir. 2014) (citing the rule that a change in decisional law is not an extraordinary circumstance sufficient to invoke Rule 60(b)(6) and refusing to consider the other factors in the case, including the petitioner's death sentence and the fact that no court had considered his IATC claims on the merits). The Fourth and Sixth Circuits have also molded a rule under which *Martinez*-based Rule 60(b) motions are *per se* not extraordinary. *Abdur'Rahman v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015); *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016). In a dissenting opinion in *Abdur-Rahman*, Chief Judge Cole criticized the majority's categorical approach, explaining that "[t]he decision to grant Rule 60(b)(6) relief" should remain "a **case-by-case** inquiry that requires the **trial court** to intensively balance **numerous factors** []." 805 F.3d at 718 (Cole, C.J., dissenting) (quotations omitted) (emphasis in original).

The Third, Seventh and Ninth Circuits agree with Chief Judge Cole, and have held that Rule 60(b)(6) relief may be appropriate in some cases despite the movant's

reliance, in part, on *Martinez*. In *Cox v. Horn*, the Third Circuit explicitly parted ways with the Fifth Circuit, explaining that "we have not embraced any categorical rule that a change in decisional law is never an adequate basis for Rule 60(b)(6) relief. Rather, we have consistently articulated a more qualified position." 757 F.3d 113, 121 (3d Cir. 2014). The Court rejected the Fifth Circuit's refusal in *Adams* "to consider the full set of facts and circumstances attendant to the Rule 60(b)(6) motion under review," and emphasized the need for a "flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law." *Id*. at 122. The Court also rejected the Eleventh Circuit's precedent, concluding it had "extract[ed] too broad a principle from *Gonzalez* []." *Id*. at 123. Accordingly, the Third Circuit remanded *Cox* for a case-specific balancing of the equities, including the change in law occasioned by *Martinez*, the merits of the underlying IATC claim, the movant's diligence, and the special consideration of a capital sentence. *Id*. at 124-26.

The Seventh Circuit has adopted the Third Circuit's "*Cox* factors." *See Ramirez v. United States*, 799 F.3d 845, 850-51 (7th Cir. 2015) ("Rule 60(b)(6) is fundamentally equitable in nature" and "requires the court to examine all the circumstances."). The Ninth Circuit, too, balances all of the equities when examining a Rule 60(b)(6) motion premised on *Martinez*. *See Lopez v. Ryan*, 678 F.3d 1131, 1135-37 (9th Cir. 2012) (considering the nature of the intervening change in law, the petitioner's diligence in pursuing the issue in federal habeas, the delay in the filing, the degree of connection between the claim and the intervening change in law, and concerns about comity and finality).

B. *The Circuit Split Warrants this Court's Attention.*

The courts of appeals are aware of the circuit split. Indeed, many of their opinions on the issue reference the split. Yet, the circuits have taken no steps to resolve the conflict themselves, and resolution will likely require this Court's guidance because the split is grounded in a broader disagreement about the meaning of *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

The Court should, moreover, take up this conflict because it implicates issues of vital importance to capitally-sentenced prisoners. Many petitioners who have invoked *Martinez* have done so in the Rule 60(b)(6) posture because their initial habeas petitions had already been denied when *Martinez* issued. At least sixty-five of those petitioners are serving death sentences. Because initial federal habeas review has already expired for so many capital prisoners, *Martinez* and *Trevino* would be largely nullified in the capital context if they could not be invoked in Rule 60(b)(6) motions. *Martinez*'s pronouncement that every prisoner deserves an opportunity to present a substantial IATC claim will ring hollow in many cases where it should apply most forcefully.

Finally, the Court should resolve the conflict because it has already forecasted its opinion on the issue. In *Buck v. Davis*, the Court held that the Fifth Circuit erred in denying the petitioner a COA to review the denial of his Rule 60(b)(6) motion, which depended on the application of *Martinez* and *Trevino* to his defaulted IATC claim. 137 S. Ct. at 780. In so holding, the Court has already indicated that the Fourth, Fifth, Sixth and Eleventh Circuits' categorical denial of *Martinez*-based Rule

60(b)(6) motions is flawed. However, further guidance on the factors to be considered is needed.

C. *Mr. Beatty's Case is an Ideal Vehicle to Resolve the Circuit Split.*

Mr. Beatty's case presents a strong vehicle for the Court to address whether a Rule 60(b)(6) motion should be fatally condemned by its reliance, to any extent, on *Martinez* and *Trevino*. Although the defect in Mr. Beatty's proceeding was created by this Court's opinions in *Martinez* and *Trevino*, the offending equities in his case critically find their mooring in the denial of his timely motion for conflict-free representation, in violation of his rights under 18 U.S.C. § 3599. Thus, the extraordinary circumstances of his case go far beyond mere reliance on a change in decisional law.

As Mr. Beatty argued to the Fifth Circuit, there are several extraordinary circumstances in his case. First, he has been litigating his request for an opportunity to investigate and present defaulted IATC claims in the federal courts since June 19, 2013, only twenty-two days after this Court announced its opinion in *Trevino*. Had the district court properly granted his motion, he would have been at a stage in his litigation where petition amendment was still available with leave of court. He should be returned to that position.

Second, according to undersigned counsel's research, Mr. Beatty was the **first** Texas capital petitioner to request conflict-free counsel post-*Trevino* and he is the **only** Texas capital petitioner to have his timely request denied. In all likelihood, Mr. Beatty has become the lone Texas capital prisoner to have his request denied because

he was **too** diligent in asking the federal courts to recognize the *Trevino*-created conflict with his initially-appointed counsel.

Third, Mr. Beatty's conflicted federal habeas attorney conceded, before *Martinez* or *Trevino* were decided and therefore before his concession was relevant to Mr. Beatty's case, that he had simply overlooked the potential merit of his guilt-phase IATC claim because he was focused on the penalty-phase claim during state habeas representation. Because he did not recognize the claim's potential merit until federal habeas, the claim was defaulted in federal court and Mr. Beatty was precluded under the law then in force in the Fifth Circuit from obtaining funding for an investigation. Accordingly, the guilt-phase IATC claim was raised, but remains uninvestigated. It was also denied on procedural grounds because conflicted counsel did not argue his own ineffectiveness in state habeas.

Fourth, the uninvestigated guilt-phase IATC claim that Mr. Beatty sought to litigate in his initial federal habeas proceeding concerns evidence of his likely innocence of capital murder. Given that Mr. Beatty is serving a death sentence and may receive an execution date any day, recognizing his right to one bite at the proverbial apple, to investigate and seek a merits ruling on a claim that could result in a reformation of his capital conviction to a non-capital crime, is critical.

Finally, the district court—by appointing new counsel to represent Mr. Beatty in COA proceedings in the Fifth Circuit—has already implicitly recognized that Mr. Beatty's initial federal habeas attorney operated under a conflict of interest post-*Trevino*. Having made that concession, it works a unique inequity for that same court

to have denied his repeated requests for conflict-free counsel before it, at the claim development stage.

II. The Fifth Circuit's Rigid Reliance on a "Timeliness Clock" to Determine Whether a Rule 60(b)(6) Motion has been Filed Within a Reasonable Time is Contrary to the Equitable Nature of the Rule and the Approach of Other Circuits.

The question of timeliness under Federal Rule of Civil Procedure 60(c)(1) should not focus narrowly on the petitioner's diligence in filing a Rule 60(b) motion and should rather address how diligently the petitioner has sought to remedy the defect in the integrity of the proceeding and the prejudice suffered as a result of the defect. Rule 60(b) is an "extraordinary remedy," and a rigid approach to Rule 60(c)(1) that focuses only on the amount of time that has passed between a triggering event and the filing of the motion itself, without considering the petitioner's other litigation efforts during that time, has the unintended consequence of incentivizing federal habeas petitioners to pass up more direct and entrenched remedies for errors in their proceedings in a desperate bid to invoke the district court's extraordinary jurisdiction under Rule 60(b).

With that in mind, the Fifth Circuit's practice of denying Rule 60(b)(6) motions premised on *Martinez* as untimely merely by counting the days elapsed since the issuance of *Trevino v. Thaler* conflicts with the Rule's equitable purpose. In contrast with that of other circuits, the Fifth Circuit's approach fails to account for the unique factors that contribute to the petitioner's delay in filing, and narrowly examines only a petitioner's timeliness in filing the Rule 60(b) motion itself. This approach fails to

account for petitioners' good faith efforts to seek a remedy for the defect through litigation other than the filing of a Rule 60(b) motion.

A. *The Fifth Circuit's Timeliness Practice Conflicts with the Equitable Principles Behind Federal Rule of Civil Procedure 60(b).*

The Fifth Circuit's analysis of Mr. Beatty's COA motion perfectly illustrates the flaws inherent in the Court's mechanical timeliness practice. The district court had conducted a side-by-side comparison of the number of days elapsed since *Trevino* in Mr. Beatty's case with the number of days passed in *Pruett v. Stephens*, 608 Fed. App'x. 182 (5th Cir. 2015) (unpublished), another capital habeas case involving a Rule 60(b) motion premised on federal counsel's conflict under *Martinez*. The court found, based on the side-by-side comparison, that "[t]he present motion was not filed until twenty-six months [after *Trevino*] on October 30, 2015. Petitioner waited seven months more than the length of time involved in *Pruett* to file the present motion. Once again, the Fifth Circuit held in *Pruett* that the Rule 60(b)(6) motion was untimely." App'x. B at 5. Accordingly, Mr. Beatty's motion was untimely.

The district court had previously found that the facts in *Pruett* and Mr. Beatty's cases were "comparable," thus offering support for its straightforward comparison of the two cases' timelines. However, there are distinguishing facts in the two cases that must be accounted for. The district court denied relief on the federal habeas petition in *Pruett* in 2010 and this Court denied certiorari on October 1, 2012. New federal counsel was appointed two months prior to this Court's opinion in *Trevino*, on March 28, 2013. Substitute counsel filed nothing on Pruett's behalf until July 30, 2014, when they filed a subsequent state habeas application that was dismissed as an abuse of

the writ on December 10, 2014. Pruett then filed his Rule 60(b) motion on January 6, 2015. Petitioner Pruett allowed sixteen months to elapse during which he was represented by conflict-free counsel and was not seeking relief in any court. Moreover, because his federal petition was finally denied before *Trevino*, his right to reopen his proceedings under *Martinez* and *Trevino* was questionable. The equities of the two cases are not at all similar.

The Fifth Circuit sponsored the lower court's timeliness analysis, changing only the case against which it compared Mr. Beatty's timeline:

> Reasonable jurists would not debate the conclusion that the district court did not abuse its discretion in concluding this motion is untimely. In *Clark* [*v. Davis*, 850 F.3d 277 (5th Cir. 2017)], we recognized that the sixteen months delay between *Trevino* and a Rule 60(b)(6) motion and, alternatively, the twelve months between appointment of conflict-free counsel and a Rule 60(b)(6) motion were both untimely. [] We also recognized that courts have denied motions as untimely when filed as few as five months after the starting date. [] Beatty's twenty-nine-month delay is not excused by the fact that his petition for certiorari was pending in the Supreme Court or that his subsequent writ was pending in state court. He could have made concurrent filings.

App'x. A at 9.

The equitable purpose served by Rule 60(b)(6) is lost by the Fifth Circuit's reliance on an overly rigid "timeliness clock," App'x. A at 8, under which sixteen months, and possibly even five months, between *Trevino* and the filing of the Rule 60(b) motion is unreasonable regardless of the unique circumstances of the case. Congress did create a "timeliness clock" for three of the six grounds for reopening a judgment under Rule 60(b)–but chose not to do so for Rule 60(b)(6), the ground Mr. Beatty relied on and the ground most firmly rooted in the courts' inherent powers to

effect an equitable and just outcome. *See* Fed. R. Civ. P. 60(b)(1)-(6) & (c)(1). *See also Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 233-34 (1995) (Rule 60(b) "reflects and confirms the courts' own inherent and discretionary power, firmly established in English practice long before the foundation of our Republic, to set aside a judgment whose enforcement would work inequity.") (internal quotation marks omitted). Had Congress wanted courts to conduct a simple calculation of the months elapsed between a triggering event and the filing of the Rule 60(b)(6) motion, they would have said so.

Moreover, the Fifth Circuit's mechanical approach forces courts to overlook the unique factors in each petitioner's case. By comparing Mr. Beatty's case to *Clark* and *Pruett*, the Court ignored that neither of the petitioners in those cases was similarly situated to Mr. Beatty except to the extent that all three petitioners were represented by *Martinez*-conflicted counsel in federal habeas proceedings. The petitioners in *Clark* and *Pruett* both had their initial federal petitions finally denied well before this Court issued the opinion in *Trevino*, and accordingly neither of them filed a motion for conflict-free counsel while their petitions remained pending and subject to amendment, as Mr. Beatty did. Any delay in the filing of their Rule 60(b) motions is not comparable, under any fact-bound inquiry, to the timeline in Mr. Beatty's case for the simple reason that Mr. Beatty sought direct review of the denial of his motion for conflict-free counsel to investigate his defaulted IATC claims for twenty-four of the twenty-nine months that the Fifth Circuit cursorily deemed a "delay."

The fallacy of the Fifth Circuit's timeliness "clock," which ignores the petitioner's efforts to secure relief via direct review of the offending order or by other means, is that it overstates the importance of the filing of, specifically, the Rule 60(b) motion. The question of diligence should not be narrowly focused on how diligent the petitioner was in filing the Rule 60(b) motion itself, but rather how diligent the petitioner was in seeking to cure the defect in the integrity of his federal proceeding and the resulting prejudice. In Mr. Beatty's case, he sought to cure the defect both on direct review and by filing a second habeas application in the state court. The Fifth Circuit's "timeliness clock" ignored those facts.

B. *The Fifth Circuit's Timeliness Practice is Inconsistent with that of Other Courts of Appeals, Which Consider a Petitioner's Overall Diligence as a Factor Weighing in Favor of Relief.*

Unlike the Fifth Circuit, other circuits remain true to Rule 60(b)'s equitable principles by evaluating whether a petitioner's delay in filing a Rule 60(b)(6) motion is "reasonable" based on the specific facts and circumstances of each case.

The Third Circuit treats the "timeliness clock" as only one part of a multi-factor, equitable balancing test pursuant to which a petitioner's delay in filing a Rule 60(b)(6) motion may be outweighed by other factors warranting relief, such as the strength of the underlying claim or the petitioner's diligence in pursuing relief. *See Cox v. Horn*, 757 F.3d at 116. A recent Third Circuit decision summarizes that Court's five equitable "*Cox* factors":

> (1) the timeliness of [the] Rule 60(b)(6) motion; (2) the merits underlying [petitioner's] ineffective assistance of counsel claim; (3) the amount of time that elapsed between [petitioner's] conviction and the commencement of habeas proceedings; (4) [petitioner's] diligence in

> pursuing review of his claims; and (5) the gravity of [petitioner's] sentence.

Greene v. Superintendent Smithfield SCI, 882 F.3d 443, 448 n.5 (3d Cir. 2018).

The Sixth Circuit takes a similar approach, holding that whether the timing of a Rule 60(b)(6) motion is reasonable necessarily depends on the unique facts of the case, "including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief." *Olle v. Henry & Wright Corp*., 910 F.2d 357, 365 (6th Cir. 1990).

In *Thompson v. Bell*, the Sixth Circuit reversed the District Court's denial of the petitioner's Rule 60(b)(6) motion. 580 F.3d 423, 443 (6th Cir. 2009). Addressing the question of timeliness, the Court held that the although the petitioner did not file his Rule 60(b)(6) motion until four years after his grounds for relief became available, his delay was reasonable given other equitable considerations:

> Although Thompson theoretically could have filed his Rule 60(b) motion immediately after *Abdur'Rahman I* was published, the appeal of his habeas petition was still pending on that date. This Court did not issue its mandate to the district court to dismiss Thompson's habeas petition until December 1, 2005; prior to that date, the district court would not have had jurisdiction to hear his Rule 60(b) motion. . . . Because Thompson filed his Rule 60(b) motion less than two months after we issued the mandate in his case, which he had been actively appealing until that time, we cannot find a lack of diligence that would detract from the extraordinary circumstance reflected in the promulgation of [the new Tennessee Supreme Court rule].

Thompson v. Bell, 580 F.3d at 443–44. According to the Sixth Circuit, Mr. Beatty's motion, too, would undoubtedly be timely filed.

The Ninth Circuit also analyzes timeliness not by counting days but by evaluating whether the petitioner's diligence in pursuing relief justifies the delay in

filing. For example, in *Foley v. Biter*, 793 F.3d 998 (9th Cir. 2015), the Ninth Circuit reversed the district court's denial of the petitioner's motion based on the petitioner's overall diligence. The Court credited the petitioner for his many efforts to determine whether relief was available and how to seek such relief, ultimately holding that the delay was reasonable "given Foley's lack of resources and legal training, and his attempt to find new counsel during that time." *Id. See also Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009) (reversing the district court's denial of the Rule 60(b)(6) motion, citing petitioner's diligence in seeking review of his original claim).

And in *Bucklon v. Secretary, Florida Department of Corrections*, the Eleventh Circuit held that the petitioner's eighteen-month delay in filing a Rule 60(b) motion was reasonable for numerous case-specific reasons, including the petitioner's "overall diligence in advancing his claim since the start of his federal habeas petition," and the reasonable strategy of waiting to see how the relevant new case law would be interpreted and applied by the courts in the petitioner's jurisdiction. 606 F. App'x. 490, 494-495 (11th Cir. 2015).

C. *The Court Should Grant Certiorari to Provide Guidance to the Courts of Appeals on Which Factors to Consider in a Rule 60(c)(1) Timeliness Inquiry.*

The Fifth Circuit's mechanical approach to Rule 60(c)(1) in federal habeas cases fails to examine the unique facts and equities of the particular case. The mere calculation of months cannot adequately serve the equitable purpose of Rule 60(b).

This Court should grant certiorari to provide guidance to the Fifth Circuit and other courts of appeals regarding the factors that should be considered in a Rule 60(c)(1) timeliness inquiry. The courts should make reasonable accommodation for

petitioners based on, *inter alia*: their overall diligence in seeking to cure the defect in the integrity of the proceeding, including by means other than the filing of a Rule 60(b) motion; time spent seeking direct review of the denial of federal habeas relief; time spent litigating claims for relief in the state courts—where petitioners are instructed they should, whenever possible, get a first ruling on any constitutional claims for relief; the gravity of the petitioner's sentence; and the likely merit of any claims for relief.

Under any such fact-intensive inquiry, Mr. Beatty's motion was timely filed. Because Mr. Beatty has been litigating his right to enjoy the relief that so many similarly-situated petitioners have enjoyed, in Texas and elsewhere, since June 19, 2013, his case presents a compelling vehicle through which to offer much needed guidance.

III. The Court Should Grant Certiorari to Provide Guidance to the Courts of Appeals Regarding the Scope of the 18 U.S.C. § 3599 Right to Quality Representation Post-*Martinez* and *Trevino*, in Particular Whether Federal Petitioners are Entitled to Conflict-Free Counsel to Investigate all Available Claims and Respond to the State's Procedural Arguments.

Fundamentally, the Fifth Circuit has held in all of Mr. Beatty's proceedings before it that the right to adequate representation guaranteed by 18 U.S.C. § 3599 does not include a right to conflict-free counsel to identify all available claims of constitutional error or respond to the State's arguments that the federal courts are procedurally barred from considering them. Under this reasoning, the Court has repeatedly defended its initial position in this case that the appointment of conflict-free counsel on appeal satisfied 18 U.S.C. § 3599, even though the Court thereafter

intercepted all of Mr. Beatty's efforts to return to the district court for necessary fact investigation and record development by qualified counsel. *Cf. Price v. Johnston*, 334 U.S. 266, 291 (1948) ("Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed.").

The Fifth Circuit's position is inconsistent with, at least, the Fourth Circuit, which has held that the courts in its jurisdiction are ethically required to appoint new counsel for petitioners situated similarly to Mr. Beatty in order to investigate and pursue claims arising under *Martinez*. *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2014). Moreover, the Court's position breaks with this Court's opinion in *McFarland v. Scott*, which held that capital habeas petitioners are entitled to quality preapplication representation. 512 U.S. 849, 855-56 (1994).

A. *Capital Prisoners Seeking Federal Habeas Corpus Relief Cannot Adequately Pursue their Available Remedies Absent Representation by Qualified Counsel in the District Court.*

In *Price v. Johnston*, this Court recognized the significant role that district court proceedings play in federal habeas corpus matters. Having found that, through no fault of the petitioner, the determinative issue in the case was not adequately developed below, the *Johnston* Court remanded the habeas petitioner's cause to the federal district court to make a record of facts necessary for the proper adjudication of his claims, reasoning:

> The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And if for some reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

334 U.S. at 291. And in *McFarland v. Scott*, decided a half-century later, the Court further elaborated on the need for quality legal representation to investigate, identify and pursue available claims for relief in the pre-petition stage of district court proceedings:

> The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified. Section 848(q)(9) [now codified as 18 U.S.C. § 3599] clearly anticipates that capital defense counsel will have been appointed [] **before the need for such technical assistance arises**[]. In adopting [18 U.S.C. § 3599], Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.
>
> This interpretation is the only one that gives meaning to the statute as a practical matter. . . . **An attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial**[]. . . .

512 U.S. 849, 855 (1994) (emphasis added). "Where this right is not afforded, 'approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.'" *Id*. at 858 (*quoting Barefoot v. Estelle*, 463 U.S. 880, 889 (1993)).

Critical to petitioners in Mr. Beatty's position post-*Martinez* and *Trevino*, an attorney cannot argue for the first time in appellate proceedings that his client has substantial IATC claims that were forfeited in the state court because of ineffective assistance of state habeas counsel. Making that argument requires investigation and presentation of evidence outside the record. Section 3599 guarantees federal representation for these functions, as the Fifth Circuit has recognized in every case **except Mr. Beatty's** in which conflict-free counsel was timely requested. *See Mendoza v. Stephens*, 783 F.3d at 203 (remanding proceedings to the district court

for appointment of conflict-free counsel to investigate and present arguments that petitioner has substantial, defaulted IATC claims that state habeas counsel ineffectively waived); *Speer v. Stephens*, 781 F.3d at 784 (same); *Tabler v. Stephens*, 591 Fed. App'x. at 281 (same); *Gardner v. Davis*, No. 1:10-cv-00610, DE 74 at 1 (E.D. Tex. Aug. 13, 2015) (appointing conflict-free counsel in accordance with *Speer* and *Mendoza*); *Neathery v. Stephens*, 746 F.3d 227, 229 (5th Cir. 2014) (remanding because "we are unable to determine from the record which, if any, of [the petitioner's] ineffective assistance of counsel claims may be preserved for review under *Trevino*"); *Lizcano v. Stephens*, No. 3:16-cv-01008, Memorandum Opinion and Order at 3-4 (N.D. Tex. Apr. 15, 2016) (*sua sponte* appointing supplemental counsel in light of *Martinez*, *Trevino*, *Christeson*, *Speer* and *Mendoza*).

The Fourth Circuit and at least one district court have also recognized that conflict-free counsel cannot perform his or her duties in a meaningful way unless their representation begins in the district court. *See Juniper v. Davis*, 737 F.3d at 290 ("if a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under Martinez . . . qualified and independent counsel is **ethically required**") (emphasis in original); *Rhines v. Young*, 2015 WL 4651090 at * (D.S.D. 2015) (sponsoring Fifth and Fourth Circuit opinions recognizing conflict of interest when federal habeas counsel represented petitioner in state habeas, and agreeing that solution can be the appointment of supplemental counsel for investigations into defaulted IATC claims and state habeas counsel ineffectiveness).

When an attorney's conflict of interest has been identified in the district court, and the conflict has impeded or foreclosed the attorney from investigating and raising claims and arguments in his or her capitally-sentenced client's best interests, then appointing substitute counsel to represent the client on the record created by the conflicted attorney, without affording the habeas petitioner an opportunity to return to the district court for necessary fact development and litigation, does not cure the conflict. This Court should grant certiorari to establish the extent of the federal habeas petitioner's rights in such situations.

B. *Mr. Beatty's Case Presents an Ideal Vehicle for this Court to Consider a Federal Habeas Petitioner's 18 U.S.C. § 3599 Right to Counsel on* Martinez *and* Trevino *Issues.*

No court has ever held that Mr. Beatty's state/federal habeas counsel did not have a conflict of interest that restricted the scope of his representation in the federal district court post-*Trevino*. Rather, both of the lower courts have consistently held that the restricted scope of Mr. Beatty's district court representation by a conflicted attorney is not error worthy of some type of relief, beginning with the district court's unexamined denial of Mr. Beatty's motion for conflict-free counsel on July 16, 2013 and ending with the Fifth Circuit's denial of Mr. Beatty's motion for a COA to appeal the denial of his Rule 60(b) motion on November 12, 2018. As the Fifth Circuit has said in three orders addressing this issue,

> *Christeson* held that "a petitioner was entitled to new counsel to pursue his federal habeas relief because his original counsel would have had to argue his own ineffectiveness." *Beatty v. Stephens*, No. 13-70026, slip op. at 1 (5th Cir. Feb. 26, 2015). **But unlike the petitioner in *Christeson*, Beatty "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." *Id.* at 1-2.

App'x. A at 6 (emphasis added). *See Beatty v. Stephens*, No. 13-70026, Order on Petition for Rehearing at 2 (5th Cir. Nov. 3, 2014) ("On appeal, and now on petition for rehearing, petitioner was, and is, represented by indisputably conflict-free counsel.").

Mr. Beatty's case presents an ideal vehicle for this Court's review for several reasons. First, by appointing substitute counsel to represent Mr. Beatty in appellate proceedings post-*Trevino*, the lower courts have implicitly found that his initial federal habeas attorney did have a conflict of interest. Second, the lower courts' repeated denials of Mr. Beatty's requests to pursue federal habeas relief with the assistance of qualified counsel **in the district court** demonstrate the courts' mistaken belief that appointment of conflict-free counsel on appeal cures the violation of a capital habeas petitioner's right to conflict-free counsel in the district court to investigate and pursue all available habeas claims, in violation of the holdings of this Court and in conflict with the Fourth Circuit. And third, Mr. Beatty has been diligent in seeking the relief he now requests, waiting only twenty-two days from the issuance of *Trevino*, and making his first request while his petition remained pending in the district court, and therefore while his petition was subject to amendment.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Beatty prays that this Court grant a writ of certiorari to resolve the Questions Presented.

Respectfully Submitted,

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Counsel for Petitioner

NO. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

TRACY LANE BEATTY,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

CERTICATE OF SERVICE

I, Thomas Scott Smith, hereby certify that true and correct versions of this Petition for a Writ of Certiorari, together with attached appendices, were served on opposing counsel on March 11, 2019 via email to:

Jennifer Wren Morris
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Austin, Texas 78711
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/s/ Thomas Scott Smith
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 12, 2018
Lyle W. Cayce
Clerk

No. 17-70024

TRACY LANE BEATTY,

Petitioner – Appellant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent – Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:09-CV-225

Before OWEN, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:*

Tracy Lane Beatty requests a certificate of appealability (COA) following the district court's denial of his Rule 60(b)(6) motion to re-open the district court's previous judgment denying habeas relief. We deny the COA because reasonable jurists would not debate the conclusion that the district court did

* Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

not abuse its discretion in deciding that the motion was untimely and lacked the "extraordinary circumstances" that Rule 60(b)(6) relief requires.

I.

A.

This case comes to us, after a long history of habeas litigation, as an appeal of a district court's denial of a Rule 60(b) motion[1] and certificate of appealability (COA). Tracy Lane Beatty was convicted and sentenced to death for the capital murder of his mother, Carolyn Click. On direct appeal, the Texas Court of Criminal Appeals affirmed his conviction. *Beatty v. State*, No. AP-75010, 2009 WL 619191 (Tex. Crim. App. Mar. 11, 2009). While that direct appeal was pending, Beatty, represented by attorney Jeff Haas, filed a state application for writ of habeas corpus. The state trial court held an evidentiary hearing, entered findings of fact and conclusions of law, and recommended that relief be denied. The Texas Court of Criminal Appeals adopted the trial court's findings, with some exceptions, and denied Beatty's application. *Ex parte Beatty*, No. WR-59,939-02, 2009 WL 1272550, at *1 (Tex. Crim. App. May 6, 2009) (per curiam).

Haas continued to represent Beatty in his federal habeas proceedings. In June of 2010, Beatty filed a federal habeas petition raising two issues: (1) an exhausted claim that his trial counsel failed to investigate and present mitigating evidence at the punishment phase[2] (the "punishment-phase claim"); and (2) an unexhausted claim that his trial counsel failed to investigate and present evidence to show that Beatty did not commit a burglary, which was a necessary element of his capital murder conviction (the "guilt-phase claim"). In July of 2013, the district court denied the petition. In assessing the

[1] *See* Fed. R. Civ. P. 60(b).

[2] Beatty brought this claim under *Wiggins v. Smith*, 539 U.S. 510 (2003).

unexhausted guilt-phase claim, the district court held that it was procedurally defaulted, even in light of the Supreme Court's newly released decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Those cases provide an exception to the procedural-default rule in cases in which the petitioner makes "a substantial claim of ineffective assistance at trial." *Trevino*, 569 U.S. at 429. But because the district court held that Beatty made no substantial showing that his trial counsel was ineffective, the exception did not apply. *Trevino*, 569 U.S. at 429. Beatty responded to this ruling with a motion for reconsideration, reiterating his claims based on *Trevino*. He also asked for a new attorney on appeal. The district court denied the motion for reconsideration but granted the request for a new attorney on the appeal.

B.

Thus, on August 30, 2013, Beatty proceeded with Scott Smith as his new attorney. Three months later, Smith sought a COA from this court on both the punishment-phase and guilt-phase claims. *Beatty v. Stephens*, 759 F.3d 455, 461 (5th Cir. 2014). It is helpful to summarize our reasons for rejecting a COA on those issues. We held that the guilt-phase claim was procedurally barred because *Martinez* and *Trevino* did not excuse Beatty's failure to raise it in state court. *Id.* at 465. *Martinez* and *Trevino* excuse these failures only if a petitioner shows: "(1) that his claim of ineffective assistance of counsel at trial is 'substantial' (i.e., 'has some merit'); and (2) that his habeas counsel was ineffective for failing to present those claims in his first state habeas application." *Id.* at 465–66 (quoting *Martinez*, 566 U.S. at 14).

The guilt-phase claim failed to meet either requirement. First, it did not have "some merit." *Martinez*, 566 U.S. at 14. To have merit, an ineffective-assistance-of-trial-counsel (IATC) claim must prove: (1) that counsel's performance was deficient; and (2) that such deficient performance prejudiced

the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We held that the district court's conclusion on the first *Strickland* prong was not debatable. Beatty's IATC argument was this: Trial counsel failed to present available witness testimony establishing how abusive his mother was to him (and to others) and how dysfunctional their relationship had become. *Beatty*, 759 F.3d at 466. Without this evidence, it appeared that Beatty's motive in murdering his mother was to steal her belongings, not because the two had a strained relationship. *Id.* This helped the prosecution establish that Beatty committed burglary in the course of the murder, which in turn established that Beatty had committed *capital* murder. In sum, Beatty claimed that his trial counsel's failure to present the evidence about Beatty's relationship with his mother elevated his conviction from non-capital to capital murder. *Id.* at 466–67.

We held that the trial counsel's failure to introduce this evidence was not deficient under *Strickland* because counsel reasonably decided "to attack the evidence supporting the burglary element"—rather than introducing separate evidence about Beatty's dysfunctional relationship with his mother—because none of the evidence about his mother's personality would be "more mitigating than aggravating." *Id.* at 465, 467. Beatty's trial counsel explained, "from a strategic standpoint, the danger you have in trying to make the victim of a homicide, who is the mother of a defendant, into the reason for her own death, has got to be clear, nearly to the point of a smoking gun." *Id.* at 465. We reached the same conclusion on the district court's analysis of the second *Strickland* prong. It was "unclear how the failure to investigate and present evidence of [his mother]'s personality, behavioral problems, or past abuse of other children prejudiced Beatty at the guilt stage." *Id.* at 468. Because of this *Strickland* analysis, we also held in the alternative that, even assuming *arguendo* that Beatty had not procedurally defaulted the guilt-phase claim, that claim did not warrant a COA. *Id.*

The guilt-phase claim also failed to establish that Beatty's "habeas counsel was ineffective for failing to present those claims in his first state habeas application," which is required to come within *Martinez*/*Trevino*'s exception to the procedural-default rule. *Id.* at 465–66. We held that the connection between the habeas evidence and the guilt phase of the trial was "neither clear nor strong enough to establish that Beatty's habeas counsel was ineffective for failing to raise this issue." *Id.* at 466.

We also denied a COA on the punishment-phase claim because, while it was not procedurally barred, Beatty did not make "a substantial showing of the denial of a constitutional right," as required for a COA to issue. 28 U.S.C. § 2253(c)(2). On the first *Strickland* prong, we explained that the lead counsel's investigations "did not turn up any witnesses who would have had anything good to say about Beatty or any evidence that was more mitigating than aggravating." *Beatty*, 759 F.3d at 467 (citing *Harrington v. Richter*, 562 U.S. 86, 106–07 (2011)). Hence, the failure to pursue further evidence of his mother's personality did not fall below "an objective standard of reasonableness." *Id.* (quoting *Strickland*, 466 U.S. at 688). On the second *Strickland* prong, we noted that Beatty made "no discrete argument as to why the defense team's alleged failure to investigate mitigating evidence prejudiced Beatty at the punishment phase." *Id.* (citing *Strickland*, 466 U.S. at 695). In light of the "two-edged" nature of the evidence he wanted his trial counsel to introduce, we concluded that there was "no debate over the district court's conclusion that the evidence was not enough to satisfy the prejudice prong for the punishment-phase claim." *Id.*

C.

In August of 2014, Smith filed a petition for panel rehearing and requested a remand to the district court so that he could investigate state habeas counsel's investigation. He argued that the district court's

Martinez/*Trevino* review had been tainted because the record was developed by a lawyer laboring under a conflict of interest: Jeff Haas was arguing in the federal proceedings that Jeff Haas was ineffective in the state proceedings. We rejected that argument because Beatty had conflict-free counsel on appeal—Scott Smith—and he failed to explain what his conflict-free counsel would have done differently in the district court. *See* On Petition for Rehearing at 2, *Beatty v. Stephens* (No. 13-70026) (5th Cir. Nov. 3, 2014).

The Supreme Court then decided *Christeson v. Roper*, 135 S. Ct. 891 (2015), and Beatty asked us to recall our mandate in light of that decision. We denied his motion because *Christeson* did not provide him relief. *Christeson* held that "a petitioner was entitled to new counsel to pursue his federal habeas relief because his original counsel would have had to argue his own ineffectiveness." *Beatty v. Stephens*, No. 13-70026, slip op. at 1 (5th Cir. Feb. 26, 2015). But unlike the petitioner in *Christeson*, Beatty "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." *Id.* at 1–2. Beatty then petitioned the Supreme Court for certiorari, but that was also denied. *Beatty v. Stephens*, 135 S. Ct. 2312 (2015).

The State set Beatty's execution for August 13, 2015. Seven days before that, Beatty filed another state habeas application with three claims for relief. The Texas Court of Criminal Appeals stayed the 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. Oct. 14, 2015).

In October of 2015, twenty-nine months after the Supreme Court issued *Trevino*, Beatty went back to the federal district court to try to get Rule 60(b) relief from its original judgment denying habeas relief. The court denied that

motion because it was untimely and Beatty did not show the "extraordinary circumstances" that a Rule 60(b)(6) motion requires. The court also denied a COA. Beatty then filed a motion in the district court to alter or amend the judgment under Rule 59(e). The court denied that motion, too. Beatty now seeks a COA on the district court's denial of Rule 60(b) relief.

II.

We review COA requests by determining whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and [whether] jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Beatty seeks a COA in order to obtain relief under Rule 60(b). "[T]he decision to grant or deny relief under Rule 60(b) lies within the sound discretion of the district court and will be reversed only for an abuse of that discretion." *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011) (quoting *Rocha v. Thaler*, 619 F.3d 387, 400 (5th Cir. 2010)). Thus, we "must determine whether a jurist of reason could conclude that the district court's denial of [his] motion was an abuse of discretion." *Id.*

III.

The district court denied Beatty's Rule 60(b) motion and COA application for two reasons. First, it held that Beatty's motion was untimely. Second, it held that, even if it were timely, Beatty failed to establish the "extraordinary circumstances" that Rule 60(b) relief requires. We hold that reasonable jurists would not debate the conclusion that the district court did not abuse its discretion in reaching either holding.

A.

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 RepublicBank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 120 (5th Cir. 1992)).

In *Clark v. Davis*, we held that the "contention that a conflict of interest may arise when state habeas counsel in Texas is also federal habeas counsel flows from *Trevino*." 850 F.3d 780, 781 (5th Cir. 2017). Hence, the timeliness clock started on May 28, 2013, the date of the *Trevino* decision. Beatty began citing *Trevino* twenty-two days after it issued, but he did so to receive conflict-free counsel for his appeal. Three weeks after he requested conflict-free counsel, he received it and appeared satisfied. *See* Motion for Certificate of Appealability and Brief in Support at 24, *Beatty v. Stephens* (No. 13-70026) (5th Cir. Nov. 22, 2013) (representing that post-conviction counsel's investigation was adequate). The defect that he alleged was removed.

At that time, he could have asked this Court to stay proceedings so that he could return to the district court to file a Rule 60(b) motion. *See, e.g.*, Order Granting Petitioner's Motion to Stay Proceedings Pending the Filing of a Rule 60(b) Motion, *Gamboa v. Davis* (No. 16-70023) (5th Cir. Feb. 13, 2017). He could have asked this court to remand under 18 U.S.C. § 3599 to allow him to challenge 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 could have requested remand when he filed his petition for a COA. But he did none of those things. Instead, he represented to this Court that "post-conviction counsel's investigation was adequate." *See* Motion for Certificate of Appealability and Brief in Support at 24, *Beatty v. Stephens* (No. 13-70026)

(5th Cir. Nov. 22, 2013). Then, fourteen months after the *Trevino* decision, he asked this Court for a remand so that he could investigate his state habeas counsel's performance, presumably to show that it was inadequate. He finally filed his Rule 60(b)(6) motion, the subject of this appeal, in October of 2015—twenty-nine months after *Trevino* had been issued.

Reasonable jurists would not debate the conclusion that the district court did not abuse its discretion in concluding that this motion is untimely. In *Clark*, we recognized that the sixteen months between *Trevino* and a Rule 60(b)(6) motion and, alternatively, the twelve months between appointment of conflict-free counsel and a Rule 60(b)(6) motion were both untimely. *Clark*, 850 F.3d at 782. We also recognized that courts have denied motions as untimely when filed as few as five months after the starting date. *See id.* at 782 n. 63 (citing *Treadway v. Parke*, 79 F.3d 1150, 1996 WL 117182, *1 (7th Cir.) (five months); *Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (less than eight months); *Pruett v. Stephens*, 608 F. App'x 182, 185–86 (5th Cir. 2015) (petitioner waited fourteen months after *Trevino* to raise ineffective-assistance claim in state court); *Paredes v. Stephens*, 587 F. App'x 436, 438 (5th Cir. 2014) (three years); *Lewis v. Lewis*, 326 F. App'x 420, 420 (9th Cir. 2009) (mem.) (six months)). Beatty's twenty-nine month delay is not excused by the fact that his petition for certiorari was pending in the Supreme Court or that his subsequent writ was pending in state court. He could have made concurrent filings. *See Clark*, 850 F.3d at 783 (declining to excuse the time during which Clark had pending litigation in state court). Accordingly, reasonable jurists would not debate the conclusion that the district court did not abuse its discretion in determining that Beatty's twenty-nine month delay was untimely.

B.

Even if Beatty's motion were timely, reasonable jurists would not debate the conclusion that the district court did not abuse its discretion by holding that Beatty lacked the "extraordinary circumstances" that a Rule 60(b)(6) motion requires. *See In re Edwards*, 865 F.3d at 203; *Preyor*, 704 F. App'x at 342. 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." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002). Applying this rule to the very changes in 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." *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013); *Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012). Even in Beatty's past visits to this court, we rejected his arguments based on the *Martinez*/*Trevino*/*Christeson* trilogy: In his initial request for a COA, we rejected his reliance on *Martinez* and *Trevino*. *Beatty*, 759 F.3d at 465–66. When he asked us to recall our mandate on *Christeson* grounds, we rejected that argument, too.[3] *Beatty*, No. 13-70026, slip op. at 1–2.

Knowing this all too well, Beatty tries to shoehorn his case into extraordinary circumstances by supplementing the changes in decisional law

[3] Beatty tries to sidestep this problem by claiming that the district court failed to address the relevant change in decisional law: our decisions in *Speer* and *Mendoza*, not the Supreme Court's decisions in *Martinez* and *Trevino*. Beatty claims that *Speer* and *Mendoza* "broke new ground" by establishing the right, upon request, to conflict-free counsel to investigate state habeas counsel's performance. But changes in decisional law, by themselves, do not create "extraordinary circumstances." This argument also misreads those cases. We have explicitly held that "we do not interpret *Martinez* or *Trevino* as creating the right to new or additional counsel." *Speer*, 781 F.3d at 784; *see also Speer*, 781 F.3d at 787 n. 5 ("We also do not interpret . . . *Christeson* . . . as supporting appointment of new or additional counsel."). *Martinez* and *Trevino* are not "extraordinary circumstances," and neither are our precedents that merely apply them.

with "other factors." Specifically, he alleges that: (1) he is the lone petitioner who has not been allowed to return to district court with conflict-free counsel; (2) there are legitimate concerns that he may be innocent; (3) his state habeas counsel admitted error in failing to raise the guilt-phase claim in the state habeas proceedings; and (4) he has been prompt and diligent in asserting his argument for conflict-free counsel.

We reject Beatty's reliance on these "other factors." As a starting matter, just as in *Diaz*, these circumstances "are no more unique or extraordinary than any other capital inmate who defaulted claims in state court prior to *Trevino*." 731 F.3d at 371. And even if they were unique, they would not support Rule 60(b)(6) relief. The first falls short because it is not even correct. *See, e.g.,* Court Order Denying Motion to Appoint Counsel, *Roberson v. Stephens* (No. 14-70033) (5th Cir. May 22, 2015) (finding it sufficient that conflict-free counsel at the appellate level reviewed *Martinez*/*Trevino* issues). Moreover, *Martinez* and *Trevino* did not create a new right to conflict-free counsel on collateral review; they provide only remedial relief to procedural bars standing in the way of presenting defaulted claims in federal courts. *See Speer*, 781 F.3d at 785.

Beatty's claim of "legitimate concerns" about his innocence is also not enough. To get past the successive-petition bar, Beatty must do more than raise "legitimate concerns": he must establish by clear and convincing evidence that "no reasonable factfinder would have found him guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). His conclusory argument directs us to no new information other than a Texas Court of Criminal Appeals dissent that would have found that Beatty did not "lack consent" to enter his mother's home on the night of the murder, as required to conclude that he committed a burglary in the course of that murder. This argument fails to satisfy the standard of 28 U.S.C. § 2244.

The third of Beatty's factors fails because we already held, in Beatty's first appeal to this Court, that his guilt-phase claim is without merit,[4] so any failure to raise it in state habeas proceedings, confessed or not, was harmless anyway. *Beatty*, 759 F.3d at 465–66. The fourth claim, asserting that he was diligent, is undermined by our timeliness analysis.

Moreover, none of these "other factors" rise to the level of the circumstances in *Buck v. Davis*, such that they would "risk injustice to the parties" or raise "the risk of undermining the public's confidence in the judicial process." 137 S. Ct. 759, 778 (2017). In *Buck*, there was a legitimate concern that "Buck may have been sentenced to death because of his race" due to expert testimony, and the state proactively consented to resentencing in all five other cases that same expert testified in. *Id.* at 778–79. No such concern calling into account the integrity of the initial judicial proceedings in the public's mind is present here. Accordingly, the 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.

* * *

For these reasons, we DENY Beatty's request for a COA.

[4] *See supra* pp. 3–5.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

TRACY LANE BEATTY, #999484	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 4:09cv225
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER
DENYING RELIEF FROM JUDGMENT

Petitioner Tracy Lane Beatty is a death row inmate confined in the Texas Department of Criminal Justice, Correctional Institutions Division. On July 16, 2013, the court denied his petition for a writ of habeas corpus challenging his capital murder conviction. Before the court at this time is Petitioner's motion for relief from the judgment pursuant to Rule 60(b)(6). He argues that he has been denied his right to conflict-free representation in federal habeas corpus proceedings, in violation of 18 U.S.C. § 3599. His argument is based on an evolving area of decisional law in light of the Supreme Court's recent decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013); and *Christeson v. Roper*, 135 S. Ct. 891 (2015). For reasons set forth below, the court finds that the motion should be denied.

Background

On August 10, 2004, Petitioner was convicted and sentenced to death in the 241st Judicial District Court of Smith County, Texas, for the murder of his mother, Carolyn Click, in the course of burglarizing her home. The Texas Court of Criminal Appeals affirmed the conviction. *Beatty v. State,*

No. AP-75010, 2009 WL 619191 (Tex. Crim. App. March 11, 2009). He did not file a petition for a writ of certiorari. The Texas Court of Criminal Appeals subsequently denied his application for a writ of habeas corpus. *Ex parte Beatty*, No. WR-59939-02, 2009 WL 1272550 (Tex. Crim. App. May 6, 2009).

The present petition was filed on June 9, 2010. Petitioner presented the following grounds for relief:

1. Petitioner received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution by trial counsel's failure to properly investigate, discover and present mitigating evidence; and

2. Petitioner received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution by trial counsel's failure to properly investigate facts which would have shown that this "killing" was a murder rather than capital murder.

The petition was denied. *Beatty v. Director, TDCJ-CID*, No. 4:09cv225, 2013 WL 3763104 (E.D. Tex. July 16, 2013). In denying relief, the court discussed the ramifications of *Martinez* and *Trevino* on his claims. *Id.* at *16. Petitioner filed a motion for rehearing reurging his claims based on *Trevino*. He also asked for a different attorney on appeal. On August 30, 2013, the court issued an order denying his motion for rehearing, but he was appointed a new attorney.

The Fifth Circuit denied his application for a certificate of appealability. *Beatty v. Stephens*, 759 F.3d 455 (5th Cir. 2014). Petitioner filed a motion for rehearing. He argued that while he was appointed conflict-free counsel for appellate proceedings, the record was developed in the district court by a lawyer laboring under a conflict of interest; thus, any *Martinez*/*Trevino* review conducted by the district court was necessarily tainted by counsel's conflict of interest. The argument was rejected as follows:

> Petitioner argues that because he may seek relief pursuant to *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), he is entitled to different counsel at his federal habeas proceeding, than he had at his

> state habeas proceeding. Petitioner further argues that rehearing is appropriate because the panel did not adequately consider petitioner's lack of conflict-free counsel in his initial federal habeas petition.
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> 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.

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After *Christeson* was decided, Petitioner asked the Fifth Circuit to recall the mandate. The motion was denied as follows:

> *Christeson* held that a petitioner was entitled to new counsel to pursue his federal habeas corpus relief because his original counsel would have had 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 v. Ryan*, 132 S. Ct. 1309 (2012), which we held did not warrant a COA, assuming *arguendo* that there was no procedural bar. *Beatty v. Stephens*, 759 F.3d 455, 465-466 (5th Cir. 2014).

Beatty v. Stephens, No. 13-70026, slip. op. at 1-2 (5th Cir. Feb. 26, 2015). In a footnote, the Court observed that "[t]o the extent Petitioner now argues this is a case about his statutory right to conflict-free counsel under 18 U.S.C. § 3599, this was not, and is not, the issue before us." *Id.* at 2 n.1. On May 18, 2015, the Supreme Court denied his petition for a writ of certiorari. *Beatty v. Stephens*, 135 S. Ct. 2312 (2015).

More recently, the Texas Court of Criminal Appeals dismissed a subsequent application for a writ of habeas corpus as an abuse of the writ without reviewing the merits of Petitioner's claims. *Ex parte Beatty*, No. WR-59,939-03 (Tex. Crim. App. Oct. 14, 2015).

The present motion was filed on October 30, 2015. The Director filed a response (docket entry #47) on November 16, 2015. Petitioner filed a reply (docket entry #50) on December 8, 2015.

Discussion and Analysis

A. Propriety of a Rule 60(b)(6) Motion

The Court must first determine whether Petitioner's motion is properly brought under Rule 60 or if it is a successive petition for habeas relief under 28 U.S.C. § 2244. If a petition is a "second or successive petition," a district court cannot consider it without authorization from the Fifth Circuit under 28 U.S.C. § 2244(b)(2). *Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2014). A Rule 60(b) motion is considered "successive" if it raises a new claim or attacks the merits of the disposition of the case. *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012). A Rule 60(b) is not successive if it attacks "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A Rule 60(b) motion based on "habeas counsel's omissions ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Id.* at 532 n.5.

The Fifth Circuit considered the identical issue in *In re Paredes*, 587 F. App'x 805 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 433 (2014). The Court decided that the motion was properly brought as a Rule 60(b) motion:

> The assertion that [petitioner's] federal habeas counsel had a conflict of interest and that [petitioner] is entitled to reopen the final judgment and proceed in the federal habeas proceedings with conflict-free counsel is a claim that there was a defect in the integrity of the federal habeas proceedings. Such a claim does not assert or reassert claims of error in the state conviction. Allowing [petitioner's] motion to proceed as a Rule 60(b)(6) motion is not inconsistent with 28 U.S.C. § 2244(d).

Id. at 823. For the reasons articulated by the Fifth Circuit, the court finds that Petitioner's motion is properly brought under Rule 60(b) and does not constitute a successive petition subject to the requirements of § 2244(b).

B. Timeliness

The next issue for the court's consideration is whether the present motion was timely filed. A motion made pursuant to Rule 60(b)(6), such as the present motion, must be filed "within a reasonable time." Fed. R. Civ. P. 60(c)(1). To demonstrate "any other reason that justifies relief" under Rule 60(b)(6), a petitioner must show "extraordinary circumstances." *Gonzalez*, 545 U.S. at 536. "Such circumstances will rarely occur in the habeas context." *Id.* at 535. The Fifth Circuit held that a Rule 60(b)(6) motion was not filed within a reasonable time when a death row inmate waited eight months after a relevant change in decisional law to file the motion. *Tamayo*, 740 F.3d at 991.

The Fifth Circuit considered whether a Rule 60(b)(6) motion was filed within a reasonable time in light of *Martinez*, *Trevino* and *Christeson* in *Pruett v. Stephens*, 608 F. App'x 182 (5th Cir.), *cert. denied*, 135 S. Ct. 1919 (2015). The facts of that case are comparable to the facts of this case. The federal district court denied Pruett's petition for a writ of habeas corpus on August 10, 2010. Pruett was appointed conflict-free counsel on March 28, 2013. *Trevino* was decided two months later on May 28, 2013. New counsel conducted an investigation for purposes of filing an ineffective assistance of counsel claim. Nonetheless, nothing was filed in the district court until January 6, 2015 - more than nineteen months after *Trevino* was decided. The district court found that the Rule 60(b)(6) motion was not filed within a reasonable time; thus, it was denied as untimely. On appeal, Pruett complained that the district court failed to give proper consideration to pleadings that he had filed in state court. The Fifth Circuit rejected the argument and found that Pruett had not offered any satisfactory explanation for the delay; thus, the decision dismissing the Rule 60(b)(6) motion was affirmed. *Id.* at 187.

In the present case, the court appointed new conflict-free counsel to represent Petitioner on August 30, 2013. The present motion was not filed until twenty-six months later on October 30, 2015. Petitioner waited seven months more than the length of time involved in *Pruett* to file the present

motion. Once again, the Fifth Circuit held in *Pruett* that the Rule 60(b)(6) motion was untimely. Just like the situation in *Pruett*, Petitioner cites *Martinez*, *Trevino* and *Christeson* in an effort to demonstrate "extraordinary circumstances." The Fifth Circuit, nonetheless, found that he had not "demonstrated the 'extraordinary circumstances' required to reopen the judgment." *Pruett*, 608 F. App'x at 185. Just like the situation in *Pruett*, Petitioner cites his efforts to obtain relief in state court during the interim period of time, but the Fifth Circuit rejected his explanation with the observation that he had not offered any satisfactory explanation for the delay in filing the Rule 60(b)(6) motion. *Id.* at 186-87.

Petitioner complains he is the only federal petitioner represented by a conflicted state habeas counsel to have been denied substitute or supplemental counsel in the district court after *Trevino*. He cites two recent decisions by the Fifth Circuit remanding cases on direct appeal with instructions to appoint supplemental conflict-free counsel for the purpose of investigating possible ineffective assistance of counsel claims based on *Martinez*/*Trevino*. The Fifth Circuit rejected such arguments in *Pruett* as follows:

> This Court's recent decisions in *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015), and *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015), do not lend any support to [petitioner's] argument that his Rule 60(b) motion was timely filed. In both of those cases, the petitioners were represented in federal habeas proceedings by the same counsel who had represented them in state habeas proceedings. Our Court, in the interest of justice, appointed supplemental counsel for the petitioners under 18 U.S.C. § 3599. As we have noted, [petitioner] was appointed conflict-free counsel on March 28, 2013, more than two years ago.

Pruett, 608 F. App'x at at 185 n.1. The Fifth Circuit's analysis in *Pruett* is equally applicable to the present case. The Rule 60(b)(6) motion in *Pruett* was untimely filed, and the present motion was filed even later than the motion filed in *Pruett*. Petitioner's Rule 60(b)(6) motion was not filed within a reasonable time and should be denied as untimely.

C. Extraordinary Circumstances

Timeliness notwithstanding, Petitioner's motion should also be rejected because it lacks merit. His motion is based on an evolving area of decisional law in light of the Supreme Court's recent decisions in *Martinez*, *Trevino* and *Christeson*. He argues that the post-*Trevino* denial of his request for the appointment of conflict-free counsel created a defect in the integrity of his initial habeas corpus proceedings. He cites 18 U.S.C. § 3599, which was extensively discussed in *Christeson*.

Petitioner acknowledges that he is seeking relief based on mere changes in decisional law. The Fifth Circuit has 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." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002). *See also Pruett*, 608 F. App'x at 185; *Paredes*, 587 F. App'x at 825. Most recently, the Fifth Circuit reiterated that a "Rule 60(b) motion is not a proper mechanism to re-litigate the merits of [previously litigated claims] and surely not a proper vehicle for doing so when the judgment from which [a petitioner] seeks relief has been confirmed on appeal." *Trottie*, 581 F. App'x 436, 439 (5th Cir.), *cert. denied*, 135 S. Ct. 41 (2014). *See also Hall v. Stephens*, 579 F. App'x 282, 283 (5th Cir. 2014) (same); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (recognizing that a Rule 60(b) motion is proper only to challenge a procedural, not a substantive error). In *Pruett*, the Fifth Circuit held that "nothing in *Christeson* . . . has demonstrated the 'extraordinary circumstances' required to reopen the judgment." *Pruett*, 608 F. App'x at 185. The changes in decisional law based on *Martinez*, *Trevino* and *Christeson* do not constitute the kind of "extraordinary circumstances" that would warrant relief under Rule 60(b)(6). The present motion lacks merit in light of clearly established law as decided by the Fifth Circuit.

The Rule 60(b)(6) motion should also be denied because the Fifth Circuit has already considered and rejected Petitioner's arguments based on these three cases. His *Martinez*/*Trevino*

arguments were initially rejected when the Fifth Circuit denied his request for a certificate of appealabity. *Beatty*, 759 F.3d at 465-66. He raised the arguments again in his motion for rehearing, which was denied. After *Christeson* was decided, Petitioner asked the Fifth Circuit to recall the mandate. The motion was denied as follows:

> *Christeson* held that a petitioner was entitled to new counsel to pursue his federal habeas corpus relief because his original counsel would have had 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 v. Ryan*, 132 S. Ct. 1309 (2012), which we held did not warrant a COA, assuming *arguendo* that there was no procedural bar. *Beatty v. Stephens*, 759 F.3d 455, 465-466 (5th Cir. 2014).

Beatty v. Stephens, No. 13-70026, slip. op. at 1-2 (5th Cir. Feb. 26, 2015). Petitioner in effect argues that the Fifth Circuit's previous decisions were erroneous and should be overruled, but this court is bound to follow the decisions of the Fifth Circuit.

The present Rule 60(b)(6) motion should be rejected because it is untimely and lacks merit.

D. Certificate of Appealability

Under 28 U.S.C. § 2253(c), a certificate of appealability should issue only when "the applicant has made a substantial showing of the denial of a constitutional right." When a petition is denied on the merits, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," and when a petition is denied on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable when the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In light of *Pruett*, *Paredes*, *Trottie*, the court is of the opinion that reasonable jurists could neither debate the denial of Petitioner's Rule 60(b)(6) motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve

encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). A certificate of appealability should be denied. It is accordingly

ORDERED that Petitioner's motion for relief from the judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) (docket entry #45) is **DENIED**. A certificate of appealability should be denied. All motions not previously ruled on are **DENIED**.

SIGNED this the 31st day of March, 2017.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

TRACY LANE BEATTY, #999484,	§	
	§	
Petitioner,	§	
	§	CIVIL ACTION NO. 4:09-CV-225
v.	§	
	§	JUDGE RON CLARK
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER
DENYING MOTION TO ALTER OR AMEND JUDGMENT

Before the court is Petitioner Tracy Lane Beatty's motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e). (Dkt. # 56). He is asking the court to alter or amend an order denying relief from the final judgment pursuant to Rule 60(b)(6). (Dkt. # 52). The motion for relief from the final judgment was based on the United States Supreme Court's decisions issued in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012); *Trevino v. Thaler*, 569 U.S. ___, 133 S. Ct. 1911 (2013); and *Christeson v. Roper*, ___ U.S. ___, 135 S. Ct. 891 (2015). The court found that the motion was untimely filed and that he had not shown extraordinary circumstances in order to warrant relief under Rule 60(b)(6). Petitioner is challenging those conclusions in the present motion. The Director has filed a response in opposition to the motion. (Dkt. # 59). For reasons set forth below, the motion is **DENIED**.

Background

On August 10, 2004, Petitioner was convicted and sentenced to death in the 241st Judicial District Court of Smith County, Texas, for the murder of his mother, Carolyn Click, in the course of burglarizing her home. The Texas Court of Criminal Appeals affirmed the conviction. *Beatty*

v. State, No. AP-75010, 2009 WL 619191 (Tex. Crim. App. March 11, 2009). He did not file a petition for a writ of certiorari. The Texas Court of Criminal Appeals subsequently denied his application for a writ of habeas corpus. *Ex parte Beatty*, No. WR-59939-02, 2009 WL 1272550 (Tex. Crim. App. May 6, 2009).

The present petition was filed on June 9, 2010. Petitioner presented the following grounds for relief:

1. Petitioner received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution by trial counsel's failure to properly investigate, discover and present mitigating evidence; and

2. Petitioner received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution by trial counsel's failure to properly investigate facts which would have shown that this "killing" was a murder rather than capital murder.

The petition was denied. *Beatty v. Director, TDCJ-CID*, No. 4:09cv225, 2013 WL 3763104 (E.D. Tex. July 16, 2013). In denying relief, the court discussed the ramifications of *Martinez* and *Trevino* on his claims. Petitioner filed a motion for rehearing reurging his claims based on *Trevino*. He also asked for a different attorney on appeal. On August 30, 2013, the court issued an order denying his motion for rehearing, but he was appointed a new attorney.

The Fifth Circuit subsequently denied Petitioner's application for a certificate of appealability. *Beatty v. Stephens*, 759 F.3d 455 (5th Cir. 2014). Petitioner filed a motion for rehearing. He argued that while he was appointed conflict-free counsel for appellate proceedings, the record was developed in the district court by a lawyer laboring under a conflict of interest; thus, any *Martinez*/*Trevino* review conducted by the district court was necessarily tainted by counsel's conflict of interest. The argument was rejected as follows:

> Petitioner argues that because he may seek relief pursuant to *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), he is entitled to different counsel at his federal habeas proceeding, than he had at his state habeas proceeding. Petitioner further argues that rehearing is appropriate because the panel did not adequately consider petitioner's lack of conflict-free counsel in his initial federal habeas petition.
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> 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.

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After *Christeson* was decided, Petitioner asked the Fifth Circuit to recall the mandate. The motion was denied as follows:

> *Christeson* held that a petitioner was entitled to new counsel to pursue his federal habeas corpus relief because his original counsel would have had 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 v. Ryan*, 132 S. Ct. 1309 (2012), which we held did not warrant a COA, assuming *arguendo* that there was no procedural bar. *Beatty v. Stephens*, 759 F.3d 455, 465-466 (5th Cir. 2014).

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More recently, the Texas Court of Criminal Appeals dismissed a subsequent application for a writ of habeas corpus as an abuse of the writ without reviewing the merits of Petitioner's claims. *Ex parte Beatty*, No. WR-59,939-03 (Tex. Crim. App. Oct. 14, 2015).

Petitioner's motion for relief from the final judgment was filed on October 30, 2015. The motion was denied on March 31, 2017.

Standard of Review

The United States Supreme Court discussed the purpose of Rule 59(e) as follows:

> Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following the entry of judgment. . . . Consistently with this original understanding, the federal courts have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits.

White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 450-51, 102 S. Ct. 1162, 1165-66 (1982) (citations omitted). "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5, 128 S. Ct. 2605, 2617 n.5 (2008) (citation omitted).

The Fifth Circuit has observed that a Rule 59(e) motion "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co*., 875 F.2d 468, 473 (5th Cir. 1989) (citation and internal quotations omitted). It "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem, Inc*., 367 F.3d 473, 479 (5th Cir. 2004) (citation omitted), *cert. denied*, 543 U.S. 976, 125 S. Ct. 411 (2005). The Fifth Circuit has repeatedly specified that the purpose of a Rule 59(e) motion is not to rehash arguments that have already been raised before a court. *See, e.g., Naquin v. Elevating Boats, L.L.C.*, 817 F.3d 235, 240 n.4 (5th Cir. 2016); *Winding v. Grimes*, 405 F. App'x 935, 937

(5th Cir. 2010). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet*, 367 F.3d at 479 (citations omitted). The decision to alter or amend a judgment is committed to the sound discretion of the district judge and will not be overturned absent an abuse of discretion. *Southern Contractors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 & n.18 (5th Cir. 1993).

Discussion and Analysis

Petitioner is improperly using a Rule 59(e) motion as a means to rehash matters that have repeatedly been presented to both this court and the Fifth Circuit. He has regularly complained that he has been denied the opportunity to develop his ineffective assistance of trial counsel claims using conflict-free counsel based on the *Martinez*/*Trevino* line of cases. However, he was appointed conflict-free counsel on August 30, 2013. In the present motion, he complains that he has never been afforded conflict-free counsel to investigate whether state habeas counsel was deficient in investigating his trial representation. The Director appropriately observed that he could have filed a Rule 60(b) motion at the time new counsel was appointed based on the *Martinez*/*Trevino* line of cases; instead, he chose to pursue an appeal.

After the Fifth Circuit denied his application for a certificate of appealability, he filed a motion for rehearing. As in the present motion, he argued that while he was appointed conflict-free counsel for appellate proceedings, the record was developed in the district court by a lawyer laboring under a conflict of interest; thus, any *Martinez*/*Trevino* review conducted by the district court was necessarily tainted by counsel's conflict of interest. The argument was rejected as follows:

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Beatty v. Stephens, No. 13-70026, slip. op. at 1-2 (5th Cir. Feb. 26, 2015). This issue has been repeatedly raised and rejected. The present motion is an abuse of the opportunity to bring a Rule 59(e) motion.

With respect to the issue of timeliness, the Fifth Circuit considered whether a Rule 60(b)(6) motion was filed within a reasonable time in light of *Martinez*, *Trevino* and *Christeson* in *Pruett v. Stephens*, 608 F. App'x 182 (5th Cir.), *cert. denied*, ___ U.S. ___, 135 S. Ct. 1919 (2015). The facts of that case are comparable to the facts of this case. The federal district court denied Pruett's petition for a writ of habeas corpus on August 10, 2010. Pruett was appointed conflict-free counsel on March 28, 2013. *Trevino* was decided two months later on May 28, 2013. New

counsel conducted an investigation for purposes of filing an ineffective assistance of counsel claim. Nonetheless, nothing was filed in the district court until January 6, 2015 - more than nineteen months after *Trevino* was decided. The district court found that the Rule 60(b)(6) motion was not filed within a reasonable time; thus, it was denied as untimely. On appeal, Pruett complained that the district court failed to give proper consideration to pleadings that he had filed in state court. The Fifth Circuit rejected the argument and found that Pruett had not offered any satisfactory explanation for the delay; thus, the decision dismissing the Rule 60(b)(6) motion was affirmed. *Id.* at 187.

In the present case, the court appointed new conflict-free counsel to represent Petitioner on August 30, 2013. Petitioner did not file his Rule 60(b)(6) motion until twenty-six months later on October 30, 2015. Petitioner waited seven months more than the length of time involved in *Pruett* to file the motion. Once again, the Fifth Circuit held in *Pruett* that the Rule 60(b)(6) motion was untimely. Just like the situation in *Pruett*, Petitioner cites *Martinez, Trevino* and *Christeson* in an effort to demonstrate "extraordinary circumstances." The Fifth Circuit, nonetheless, found that he had not "demonstrated the 'extraordinary circumstances' required to reopen the judgment." *Pruett*, 608 F. App'x at 185. Just like the situation in *Pruett*, Petitioner cites his efforts to obtain relief in state court during the interim period of time, but the Fifth Circuit rejected his explanation with the observation that he had not offered any satisfactory explanation for the delay in filing the Rule 60(b)(6) motion. *Id.* at 186-87.

Just recently, the Fifth Circuit rejected another appeal from the denial of a Rule 60(b)(6) motion based on the *Martinez*/*Trevino* line of cases in *Clark v. Davis*, 850 F.3d 770 (5th Cir. 2017). In that case, the Rule 60(b) motion was filed sixteen months after *Trevino* was decided. The Court

found that it was untimely. *Id.* at 782. In the alternative, using the date conflict-free counsel was appointed as the triggering date, as opposed to the date *Trevino* was decided, the Rule 60(b) motion was still filed too late since it was filed twelve months after new counsel was appointed. *Id.* In the present case, the Rule 60(b)(6) motion was filed twenty-nine months after *Trevino* was decided and twenty-six months after new counsel was appointed. The motion was untimely filed.

This issue before the court at this juncture, however, is whether Petitioner is entitled to relief under Rule 59(e). The present motion is an improper attempt to relitigate and rehash an issue already decided by the courts. Relief under Rule 59(e) is unavailable.

Petitioner is also endeavoring to relitigate the conclusion that the facts of this case do not support a showing of extraordinary circumstances. He is seeking relief based on mere changes in decisional law. The Fifth Circuit has 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." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002). *See also Pruett*, 608 F. App'x at 185. Most recently, the Fifth Circuit reiterated that a "Rule 60(b) motion is not a proper mechanism to re-litigate the merits of [previously litigated claims] and surely not a proper vehicle for doing so when the judgment from which [a petitioner] seeks relief has been confirmed on appeal." *Trottie v. Stephens*, 581 F. App'x 436, 439 (5th Cir.), *cert. denied*, ___ U.S. ___, 135 S. Ct. 41 (2014). *See also Hall v. Stephens*, 579 F. App'x 282, 283 (5th Cir. 2014) (same); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (recognizing that a Rule 60(b) motion is proper only to challenge a procedural, not a substantive error). In *Pruett*, the Fifth Circuit held that "nothing in *Christeson* . . . has demonstrated the 'extraordinary circumstances' required to reopen the judgment." *Pruett*, 608 F. App'x at 185. The changes in decisional law based on *Martinez*,

Trevino and *Christeson* do not constitute the kind of "extraordinary circumstances" that would warrant relief under Rule 60(b)(6).

The lack of extraordinary circumstances is equally true with respect to Petitioner's reference to *Speer v. Stephens*, 781 F.3d 784 (5th Cir. 2015), and *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015). The Fifth Circuit remanded both of these cases while they were on appeal from the denial of habeas relief for the purpose of appointing supplemental counsel in order to give new counsel the opportunity to conduct investigations into claims of ineffective assistance of counsel based on *Martinez*/*Trevino.* Petitioner's case is clearly distinguishable. He was appointed a new attorney before he appealed this court's denial of habeas corpus relief. He has already been given the opportunity afforded to the petitioners in *Speer* and *Mendoza*. Moreover, in his motion for rehearing before the Fifth Circuit, Petitioner cited *Speer* and *Mendoza* in an effort to obtain relief. *See* Motion for Rehearing, pages 14-15. In rejecting the argument, the Fifth Circuit observed that "[o]n appeal, and now on petition for rehearing, petitioner was, and is, represented by indisputably conflict-free counsel." *Beatty v. Stephens*, No. 13-70026, slip. op. at 2. Petitioner's arguments have already been raised and rejected. "A Rule 60(b) motion is not a proper mechanism to re-litigate the merits of [previously litigated claims] and surely not a proper vehicle for doing so when the judgment from which [a petitioner] seeks relief has been confirmed on appeal." *Trottie*, 581 F. App'x at 439. Petitioner has not shown extraordinary circumstances that would warrant relief under Rule 60(b)(6).

This issue before the court at this juncture, however, is whether Petitioner is entitled to relief under Rule 59(e). The present motion is an improper attempt to relitigate and rehash an issue already decided by the court. Relief under Rule 59(e) is unavailable.

Petitioner also raises two new arguments. He observes that the Supreme Court recently reversed the Fifth Circuit for failing to authorize Rule 60(b)(6) relief in a death penalty case in *Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759, 780 (2017). The petitioner in that case cited *Martinez* and *Trevino* in seeking relief. In addition to *Martinez* and *Trevino*, petitioner "identified ten other factors that, he said, constituted the 'extraordinary circumstances' required to justify reopening the 2006 judgment under the Rule." *Id.* at 767. The Director appropriately pointed out that the facts of *Buck* are unique. The issue of race was the overriding extraordinary circumstance. The petitioner raised an ineffective-assistance of counsel claim based on trial counsel's introduction of expert testimony that petitioner was statistically more likely to act violently because he was black. *Id.* The extraordinary circumstances in that case included "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Id.* at 778 (citation omitted). The infusion of race constituted an extraordinary circumstance that "contravenes" principles of justice and "poisons public confidence." *Id.* By comparison, the facts of this case do not involve any of the unique extraordinary circumstances that existed in *Buck*.

Petitioner also notes that the Supreme Court is scheduled to review a case involving similar facts in *Ayestas v. Davis*, No. 16-6795. He argues that the present case should be stayed during the pendency of *Ayestas*. The Fifth Circuit has made it clear that notwithstanding the fact that the Supreme Court has granted a writ of certiorari in a related case, "we must follow our circuit's precedents and deny both a certificate of probable cause and a stay . . ." *Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986). *See also Ladd v. Livingston*, 777 F.3d 286, 290 n.34 (5th Cir. 2015) (same). Courts should "apply the settled law of our circuit until it is changed by our court or the Supreme Court has plainly signaled a change." *Selvage v. Lynaugh*, 842 F.2d 89, 95 (5th

Cir. 1988). No such change or signal is present here. The case law in this circuit is clear, and this court is obligated to follow it.

In conclusion, Petitioner's Rule 59(e) motion lacks merit and should be denied. It is therefore

ORDERED that Petitioner's motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e) (Dkt. # 56) is **DENIED**. All motions not previously ruled on are **DENIED**.

So Ordered and Signed
Sep 18, 2017

Ron Clark, United States District Judge