NO. 18-8440

# In The Supreme Court of the United States

## TRAVIS TREVINO RUNNELS,

*Petitioner,*

v.

## LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

# REDACTED REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI


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## PETITIONER'S REPLY BRIEF

The State's Brief in Opposition misconstrues legal arguments and either downplays or outright ignores the extreme misconduct of prior federal habeas counsel Don Vernay. In doing so, the State has invited this Court to improperly apply a "rigid per se approach" to Mr. Runnels' equitable claim for relief. *See Holland v. Florida*, 560 U.S. 631, 653 (2010). [redacted]

First, the State attempts to excuse the extreme misconduct of Vernay, going so far as to claim that Vernay "continuously and ably" represented Mr. Runnels. Respondent's Brief in Opposition (hereinafter "BIO") at 27. [redacted]

Second, the State ignores the equitable demands of Rule 60(b), and instead envisions a bright-line test that Rule 60(b) movants must meet *before* the district court is permitted to consider "whether equity warranted relief." BIO at 17-18. This argument contradicts this Court's own Rule 60(b) jurisprudence, including *Gonzalez v. Crosby*, 545 U.S. 524 (2005), which did not reject the application of the equitable

rule to habeas cases but rather found implicit "harmonization" between the limits of Rule 60(b) and federal habeas law.

Third, the State misinterprets *Cullen v. Pinholster*, 563 U.S. 170 (2011), in order to wrongly conclude that the procedural default exception in *Martinez v. Ryan*, 566 U.S. 1 (2012), is inapplicable to Mr. Runnels' case.

Finally, contrary to the State's assertion, the Fifth Circuit conducted an overly demanding certificate of appealability analysis in this case, as it has done in several cases, notwithstanding the fact that it recited the corrected legal standard.

Mr. Runnels' petition presents a case of extreme counsel misconduct that undermined the integrity of his habeas proceedings and denied him basic constitutional protections of law. Certiorari should be granted.

## ARGUMENT

### I. PRIOR HABEAS COUNSEL VERNAY'S MISCONDUCT WAS EXTREME

The State avoids discussing the details of the facts surrounding Vernay's derelict representation of Mr. Runnels until the end of its brief. BIO at 26-29. This decision is perhaps understandable, given the extreme nature of Vernay's misconduct. The State's attempt to rehabilitate Vernay in the face of the evidence falls short. The State describes Vernay as an "abl[e]" attorney simply because he did not miss any filing deadlines, and dismisses any alleged misconduct as mere negligence. *See* BIO at 27. The State's position is contradicted by the record.

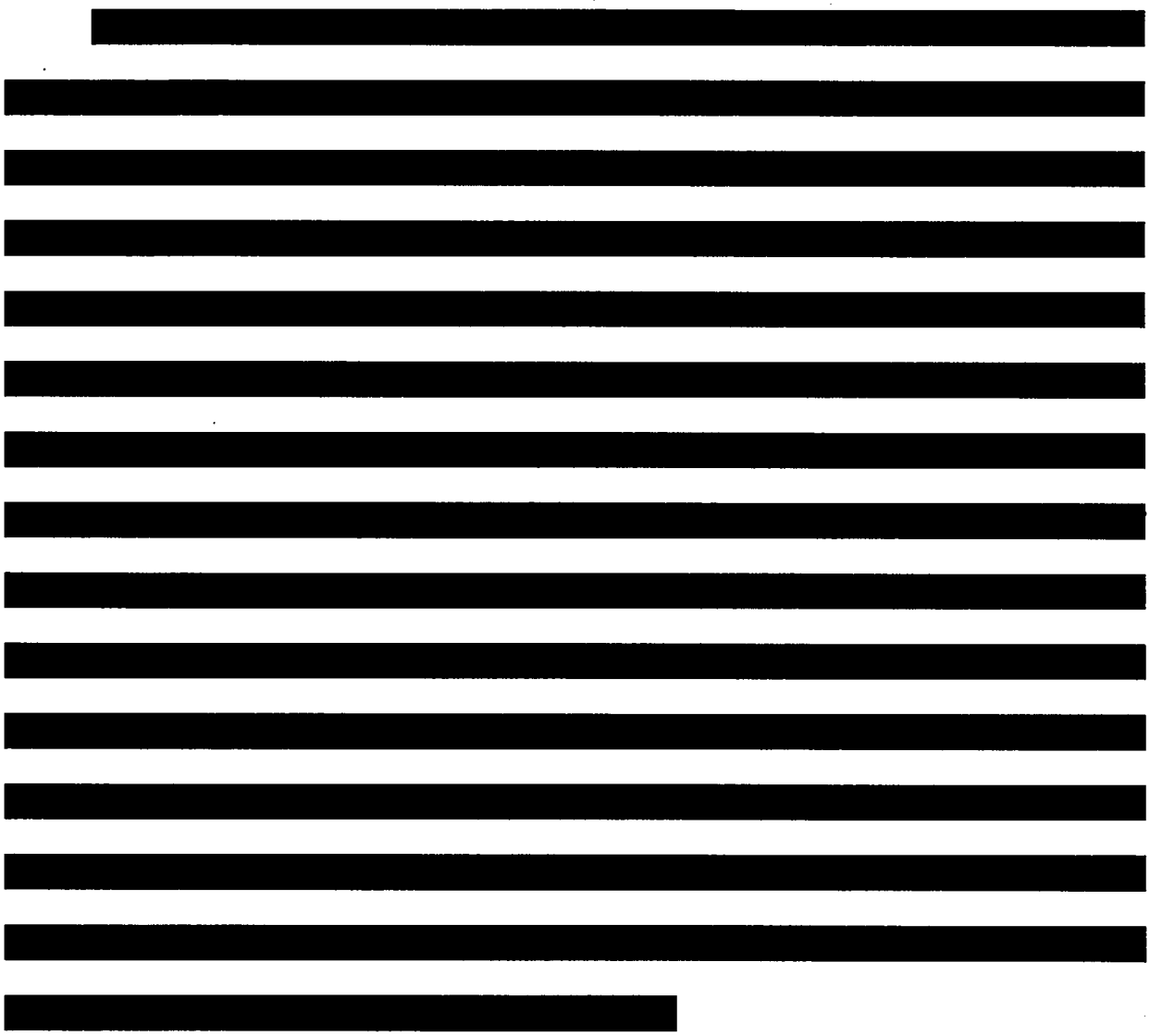
As discussed more thoroughly in Mr. Runnels' Petition, Vernay's performance was far worse than garden-variety negligence. The district court provided Vernay

with the opportunity to raise additional habeas claims relying on the procedural default exception in *Martinez v. Ryan*, 566 U.S. 1 (2012). Instead of investigating new, previously defaulted claims of trial ineffectiveness as *Martinez* plainly requires of counsel, Vernay half-heartedly repackaged an existing undefaulted claim with boilerplate language directly from the *Martinez* decision. His briefing made no attempt to explain how a claim he had previously presented as undefaulted was now being properly raised under *Martinez*. Moreover, Vernay did not take any actions that would be necessary to investigate potentially new trial ineffectiveness claims. There is no indication he conducted any actual factual investigation himself, and he did not file any motions to seek funding for investigators or experts. *See* PWC, App. F at 5-9; *see also Martinez*, 566 U.S. at 17.

The State's brief claims that Vernay *did* ask the district court to "provide funding and the opportunity to develop" a trial ineffectiveness claim relying on *Martinez*. BIO at 28. Yet the State's own brief belies this disingenuous argument. Vernay never made a request for specific funding for a specific expert that a district court could have considered. Instead, Vernay made a vague "request" in Mr. Runnels' habeas petition for "resources to develop his ineffectiveness assistance claim . . . ." *See id.* The nature of this funding request is indicative of Vernay's extreme misconduct in representing Mr. Runnels.

This Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), provides that indigent defendants have the right to the appointment of psychiatrists and other experts to assist in their defense, but this right is not automatic. The reviewing court

must determine whether the requested expert is "important enough to preparation of a defense" based on a three factor test. *Id.* at 77. No court could have evaluated Vernay's "request" for expert funding when no expert funding motion was filed, no expert identified, no dollar amount or hourly rate named, and no specific purpose described. It was incumbent upon Vernay to do so.



## II. VERNAY'S MISCONDUCT JUSTIFIES EQUITABLE RELIEF UNDER RULE 60(b)(6)

The State attempts to argue that Mr. Runnels' Rule 60(b)(6) motion was properly dismissed as a successive petition. BIO at 12. This argument not only relies on downplaying Vernay's derelict performance as mere ineffectiveness, but ignores the commands of Rule 60(b)(6) and misconstrues *Gonzalez* in the process.

Rule 60(b) is an equitable remedy that "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949). In *Gonzalez*, this Court held that Rule 60(b) relief is permissible in the habeas context and that Rule 60(b)'s own limitations exist in "harmon[y]" with 28 U.S.C. § 2254. *Gonzalez*, 545 U.S. at 535. As the Fifth Circuit correctly noted in its order denying certificate of appealability, *Gonzalez* requires the Rule 60(b) movant to demonstrate "extraordinary circumstances exist that justify the reopening of a final judgment" by identifying "a non-merits based defect" in the district court's prior habeas decision PWC, App. A at 10 (citing *Gonzalez,* 545 U.S. at 535). A non-merits based defect can be contrasted from one which "seeks to add a new ground for relief" or which "attacks the federal court's previous resolution of a claim *on the merits* . . . ." *Gonzalez,* 545 U.S. at 530, 532.

*Gonzalez* thus does not reject the case-by-case examination that an equitable Rule 60(b) inquiry demands, but rather adapts it to a habeas context. The Fifth Circuit abandoned the demands of this inquiry when it held that "we need not concern ourselves with Runnels's claim of abandonment by his previous habeas counsel

[Vernay] because we conclude that it is beyond debate that Runnels's Rule 60(b) motion is, in fact, a second-or-successive habeas petition." PWC, App. 1 at 10. The State now asks this Court to ignore the facts surrounding Vernay's misconduct. In fact, the section of the State's brief dedicated to arguing that Mr. Runnels did not meet the requirements of *Gonzalez* barely touches on any facts at all. *See* BIO, at 12-20.

A court considering an equitable claim in a habeas context must take a flexible approach that takes into account all of the relevant facts and which "enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices." *Holland v. Florida*, 560 U.S. 647, 650 (2010) (internal marks omitted). When examined in light of the facts, Mr. Runnels presented a clear non-merits-based defect in the district court proceedings. He was not denied relief because the district court ignored relevant facts before it, or because it misapplied controlling law. He was denied relief because the misconduct of his appointed counsel Vernay was so extreme that the district court was unable to review the case. [redacted]

## III. *MARTINEZ* IS APPLICABLE TO MR. RUNNELS' CASE

In arguing that the *Martinez* procedural default exception does not apply to Mr. Runnels' case, the State interprets *Cullen v. Pinholster*, 563 U.S. 170 (2011), so broadly that it would render *Martinez* itself meaningless. The State asks this Court

to read *Pinholster* without the benefit of *Martinez* at all, and goes so far as to claim Mr. Runnels' Petition argues that *Pinholster* "create[d] an avenue through which petitioners could avoid the limitations of 28 U.S.C. § 2254(d) by presenting new evidence in federal court to obtain de novo review of exhausted claims." BIO at 21. This characterization is false. Rather, as first argued in Mr. Runnels' Petition, *Pinholster* establishes the standard for determining whether a claim was exhausted in state court, which is critically important to determining whether the *Martinez* exception applies.

*Pinholster*, a pre-*Martinez* decision, provides that because habeas petitioners "must ordinarily *exhaust* state remedies before filing for federal habeas relief[,] [i]t *would be contrary to that purpose* to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo." 563 U.S. 170, 182 (emphasis added). Because *exhaustion* or *procedural default* is the principle on which *Pinholster* stands, any claim raised in federal habeas proceedings that relies on substantial new evidence that was not presented in state court must be deemed *unexhausted* or *defaulted*. The Fifth Circuit itself has held similarly. *See, e.g., Brown v. Estelle*, 701 F.2d 494, 495 (5th Cir. 1983) (holding that "where a federal habeas petitioner presents newly discovered evidence or other evidence not before the state courts such as to place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it," the claim is considered defaulted).

The State was perhaps happy with the limitations *Pinholster* placed on habeas petitioners in the pre-*Martinez* context, but *Pinholster*'s application to claims relying on the *Martinez* exception is inescapable. The *Martinez* exception provides that, "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a *procedural default* will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 566 U.S. at 17. A claim cannot simultaneously be defaulted for *Pinholster* purposes and undefaulted for *Martinez* purposes. The State cannot have it both ways.

Here, Mr. Runnels' claim relies on substantial new evidence in the form Dr. Fabian's comprehensive neuropsychological evaluation and report. *See* PWC, App. O. None of this evidence was before the state post-conviction court. This significant new evidence was more than enough to ensure that the claim of trial ineffectiveness was defaulted for the purposes of *Pinholster* and *Martinez.*

## IV. THE FIFTH CIRCUIT MISAPPLIED THE COA STANDARD

The State also contends that the Fifth Circuit did not incorrectly apply the certificate of appealability standard (COA) in this case. BIO at 24-26. In doing so, the State attempts to paint this Court's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), as an anomaly. In reality, *Buck* is one of three cases in which this Court has had to admonish the Fifth Circuit for its misapplication of the COA standard. *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004).

The only relevant question in considering COA is whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right . . . ." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This Court has repeatedly characterized this as a "limited" inquiry that does not delve deeply into the nuances of a claim. *See, e.g., Buck*, 137 S. Ct. at 774.

As described in Mr. Runnels' Petition, the Fifth Circuit's COA denial went beyond the limits of the COA inquiry. The State admits as much in its brief, stating that the Court "determine[d] whether Runnels's Rule 60(b)(6) motion was a successive petition." BIO at 25. This was not a proper consideration for the court at the COA stage because, as the State tacitly admits, the analysis was not couched in the threshold "debatability" analysis that is central to the COA inquiry.

The Fifth Circuit's defiance of the well-established COA standard so soon after *Buck* was decided is yet another reason why this case is exception. This Court should grant certiorari.

## CONCLUSION

For all of the foregoing reasons, as well as the reasons stated in Mr. Runnels' Petition, this case is an extraordinary one deserving of review by this Court. Certiorari should be granted so that the extreme misconduct of prior habeas counsel Don Vernay does not go uncorrected.

Respectfully submitted, this the 31st day of May 2019.

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