No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

BILLY JACK CRUTSINGER,
Petitioner,

v.

Lorie Davis, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division, Respondent.

_____

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

PETITION FOR WRIT OF *CERTIORARI*

CAPITAL CASE

EXECUTION SCHEDULED: September 4, 2019

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QUESTION PRESENTED

I. Whether in ruling on a 60(b) motion for relief from judgment, a court can consider "a change in the law" as one of many wide-range of factors, in determining whether extraordinary circumstances are present, warranting relief from the judgment

II. Whether an allegation that an indigent, death-sentenced habeas applicant has been deprived of his statutory right to representation in a 28 U.S.C. § 2254 federal habeas corpus proceeding is an allegation that there existed a structural defect in the integrity of the proceeding, and whether an applicant can challenge that structural defect in a Motion for Relief From the Judgment under Fed. R. Civ. P. 60(b)

PARTIES TO THE PROCEEDING

BILLY JACK CRUTSINGER, Petitioner

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

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Petitioner, BILLY JACK CRUTSINGER, petitions for a writ of certiorari to review the Fifth Circuit's published opinion*: Crutsinger VI* – Crutsinger v. Davis, 2019 WL 4010718 (5th Cir. Aug. 26, 2019.

OPINION BELOW

Crutsinger v. Davis, 2019 WL 4010718 (5th Cir. Aug. 26, 2019) (Appendix 1 – Crutsinger VI).

JURISDICTION

The Fifth Circuit Court of Appeals opinion sought to be reviewed was entered on August 26, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the rights ... to have the assistance of counsel for his defence" U.S. CONST. amend. XVI.

18 USCA § 3599(f) – Counsel for financially unable defendants

> (f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefore under subsection (g). ....

STATEMENT OF THE CASE WITH FACTS RELEVANT TO THE ISSUE

State Trial Proceedings: In 2003, a Tarrant County jury convicted Crutsinger of capital murder and sentenced him to death. The conviction and death sentence was affirmed on direct appeal to the Texas Court of Criminal Appeals. *Crutsinger v. State*, 206 S.W.3d 607 (Tex. Crim. App. 2006).

Initial State Habeas Court Proceedings: In 2007, the Texas Court of Criminal Appeals denied state habeas relief. *Ex parte Crutsinger*, No. WR-63,481-01, 2007 WL 3277524 (Tex. Crim. App. Nov. 7, 2007) (not designated for publication). On November 19, 2007, Richard Alley, state capital habeas counsel, filed a Motion to Withdraw in federal district court.

Initial Federal Habeas Corpus Proceedings: On January 15, 2008, the federal district court granted the motion and appointed undersigned counsel, Brandt, pursuant to 21 U.S.C. § 848(q)(4)(B).

In 2008, the federal district court denied a funding request and reconsideration motion for investigative and expert assistance to investigate and develop a *Wiggins* claim. The district court denied funding for both investigative and expert assistance. [Doc 18, dated 05/21/2008; Doc 19, dated 8/5/2008; Doc 20, dated 8/19/2008]. *Crutsinger v. Stephens*, 576 Fed. Appx. 422, 428-29 (5th Cir. 2014). Thereafter, and without funding to develop his claims, Mr. Crutsinger filed a timely federal habeas petition pleading Early Stage Claims.

On February 6, 2012, the district court entered its Memorandum Opinion and Judgment. All the claims were denied. *Crutsinger v. Stephens*, 576 F. App'x 422, 425-425 (5th Cir. 2014).

"After the district court's initial ruling on Crutsinger's federal habeas petition, the Supreme Court issued *Martinez v. Ryan*, which held that "[i]nadequate assistance of counsel at initial-review

collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial. Crutsinger then filed a Federal Rule of Civil Procedure 59(e) motion to vacate the initial habeas judgment. The district court denied the request, concluding that "the claim of ineffective trial counsel raised by Crutsinger had no merit and was, therefore, not 'substantial' as required by *Martinez*." *Crutsinger v. Davis*, 929 F.3d 259, 262 (5th Cir. 2019). [3/5/2015 59(e) Motion; 4/13/2012 Order, Doc 56].

In 2012, Mr. Crutsinger filed a Certificate of Appealability (COA) in the Fifth Circuit, which the Fifth Circuit denied in 2014. The Fifth Circuit reviewed both the IATC claim and the related claim that the district court had abused its discretion in denying funding under § 3599. It denied COA and affirmed the district court's denial of the § 3599 claim. "In applying the statutory standard of whether an investigator's services were 'reasonably necessary for the representation of the defendant,' [the Fifth Circuit] construed '[r]easonably necessary in this context [to] mean[ ] 'that a petitioner must demonstrate 'a substantial need' for the requested assistance.'" *Crutsinger v. Davis*, 929 F.3d 259, 262–63 (5th Cir. 2019). Thereafter, Mr. Crutsinger filed a petition for writ of certiorari in this United States Supreme Court. The petition was denied. *Crutsinger v. Stephens*, 135 S. Ct. 1401 (2015).

Additional Federal Court Proceedings

On March 21, 2018, the Supreme Court decided *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). "In *Ayestas*, the Supreme Court expressly cited [the Fifth Circuit]'s decision in Crutsinger with disapproval, and [the Fifth Circuit] agree[d] that [its] decision in Crutsinger was accordingly abrogated regarding its analysis and application of § 3599." *Crutsinger*, 929 F.3d at 264.

On May 9, 2018, Crutsinger then returned to federal district court, asserting in a Rule 60(b)(6) motion that there was a structural defect in the integrity of his initial federal habeas proceedings because the district court had incorrectly applied the law in assessing his request for funds under § 3599. He requested that the federal district court vacate its judgment and allow him to file a new § 3599 motion. *Crutsinger*, 929 F.3d at 264. [Doc 90].

On August 7, 2018, the district court determined that Rule 60(b) motion was a second-or-successive petition for habeas relief, which deprived the court of jurisdiction, and transferred the motion to the Fifth Circuit. *Crutsinger*, 929 F.3d at 264. Mr. Crutsinger took an appeal to the Fifth Circuit. [Doc 98].

On February 6, 2019, the state court judge signed an execution warrant setting the execution date of Mr. Crutsinger for September 4, 2019. [Doc 107].

In its July 3, 2019 panel opinion, the Fifth Circuit vacated the district court's order transferring Crutsinger's motion to the Fifth Circuit as a successive petition and remanded the case to the district court. *Crutsinger*, 929 F.3d at 266.

In his dissenting opinion, Judge Graves wrote: "I agree with the majority that the Supreme Court's decision in *Gonzalez* compels the conclusion that Crutsinger's Rule 60(b)(6) motion is proper and not a successive petition. However, I disagree with the majority's determination that *Gonzalez* appears to establish that a change in the law cannot constitute an extraordinary circumstance." *Crutsinger*, 929 F.3d at 269. Judge Graves stated that "Crutsinger has not abandoned this issue and has been extremely diligent," *Id.* at 271. He observed the district court required that "Crutsinger must prove his claim of ineffective assistance of counsel to be able to establish that "investigative, expert, or other services are reasonably necessary" to then be able to

prove his claim of ineffective assistance of counsel. Such a circular application is illogical. It heightens the standard required under 18 U.S.C. § 3599(f) and essentially makes it impossible for a defendant to ever obtain funding on such a claim. A defendant who has already proven his claim of ineffective assistance of counsel would have no need for additional investigative, expert, or other services." *Crutsinger*, 929 F.3d at 267. Judge Graves "conclude[d] that Billy Jack Crutsinger's motion under Federal Rule of Civil Procedure 60(b)(6) should be granted, I would vacate and remand for proper consideration of his funding motion." *Crutsinger*, 929 F.3d at 266.

In a published order, denying Mr. Crutsinger's Motion to Stay Execution, two of the panel members stated: "Though acknowledging that we were without jurisdiction to make a merits determination on his Rule 60(b)(6) motion, we underscored that Crutsinger was unlikely to establish that 'extraordinary circumstances' exist to justify the reopening of the final judgment because 'not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final.'" *Crutsinger v. Davis*, 930 F.3d 705, 707 (5th Cir. 2019). Judge Graves again dissented and "would grant the stay of execution." *Crutsinger*, 930 F.3d at 709.

On August 8, 2019, the district court entered a Memorandum Opinion and Order Denying Rule 60(b) motion and, in the Alternative, Denying Authorization of Funds. The district court denied a certificate of appealability. [Doc 120].

Mr. Crutsinger filed a notice of appeal in the Fifth Circuit seeking a Certificate of Appealabilty (COA) and also filed a Motion for Stay of Execution. On August 26, 2019, a two member panel opinion in a published opinion denied a COA "[b]ecause Crutsinger fails to show that reasonable jurists would debate whether the district court abused its discretion in denying his motion, ... [and] [b]ecause Crutsinger does not establish that the circumstances justify the exercise of our

equitable discretion, ... den[ied] the motion for stay." *Crutsinger v, Davis*, slip op. No, 19-70012 at 1-2 (5th Cir. Aug. 26, 2019). The two judges, relying on *Hayes*, an unpublished opinion with no precedential authority, wrote that "in *Haynes*, 733 F. App'x at 770, we maintained that 'finality is a particularly strong consideration in the habeas context," and affirmed the most recent district court denial of 60(b) relief. The Fifth Circuit's Crutsinger VI employed the district court's numbering system in Crutsinger V.

Crutsinger I	Crutsinger v. Thaler, No. 4:07-CV-703-Y, 2012 WL 369927, at *4 (N.D. Tex. Feb. 6, 2012(denying habeas relief. "Petitioner's failure to develop the factual basis of these claims in state court bars any factual development in this Court. Nevertheless, the record contains sufficient facts to make an informed decision on the merits....")
Crutsinger II	Crutsinger v. Stephens, 576 F. App'x 422 430 (5th Cir. 2014) (affirming habeas denial because among other things, "the court even implied that it was unnecessary to revisit its prior funding decision when it determined that "the record contain[ed] sufficient facts to make an informed decision on the merits.")
Crutsinger III	Crutsinger v. Davis, 929 F.3d 259, 261 (5th Cir. 2019) (reversing and remanding; 60(b) motion was not a successive habeas petition)
Crutsinger IV	Crutsinger v. Davis, 930 F.3d 705, 707 (5th Cir. 2019) (denial of motion to stay execution; prematurely ruling on 60(b) motion: "Though acknowledging that we were without jurisdiction to make a merits determination on his Rule 60(b)(6) motion, ... Crutsinger's motion, with its focus on mere changes in decisional law, provides us with no occasion to doubt that conclusion.").
Crutsinger V	Crutsinger v. Davis, No. 4:07-CV-00703-Y, 2019 WL 3749530 at *1 (N.D. Tex. Aug. 8, 2019) (negative answer by the district court to" whether the circumstances require reopening this case under Federal Rule of Civil Procedure 60(b) (6) and, if so, whether Crutsinger has made the necessary showing for funding under § 3599(f)").
Crutsinger VI	Crutsinger v. Davis, 2019 WL 4010718 (5th Cir. Aug. 26, 2019) (opinion sought to be reviewed)

Once again, Judge Graves dissented writing that he "would grant the COA and the motion for stay essentially for reasons I have previously stated. *See Crutsinger v. Davis*, 929 F.3d 259, 266 (5th Cir. 2019); *see also Crutsinger v. Davis*, 930 F.3d 705 (5th Cir. 2019)." Slip Op. at 13.

Mr. Crutsinger now appears before this Supreme Court in a petition for writ of certiorari and Motion to Stay Execution.

Additional State Habeas Proceedings

On August 17, 2019, Mr. Crutsinger filed a Suggestion That The Court Reconsider, On Its Own Motion, The Initial Application For Post-Conviction Writ of Habeas Corpus (Suggestion) in the Texas Court of Criminal Appeals (TCCA). The basis was that, despite the statutory guarantee of the right to competent counsel, Richard Alley, appointed in 2003 to represent Mr. Crutsinger, was not competent at any stage of the proceeding. Mr. Crutsinger submitted evidence consisting of 1.6GB of data (the legal papers from the 2000 federal disciplinary hearing of Richard Alley, and the legal papers in all six initial state collateral cases (*Carpenter*, *Williams*, *Reese*, *Scheanette*, *Kerr*, and *Crutsinger*), who Alley had been appointed to represent between 1999 and 2007. In the alternative, Mr. Crutsinger alleged that even if Alley was competent at the time of appointment and for the duration of the representation, his actions as an agent of Crutsinger were so meaningless as to constitute abandonment.

Mr. Crustsinger, an indigent death row inmate, alleged he was deprived of his Art. 11.071 statutory right and federal constitutional due process rights to one full and fair opportunity to present all claims concerning violations of his fundamental constitutional rights in a single, comprehensive

post-conviction writ of habeas corpus, citing among other authority, U.S. CONST. amend. XIV, and *Burns v. Ohio*, 360 U.S. 252 (1959).

On August 23, 2019, in an email from General Counsel, the TCCA denied the Suggestion without order. On August 27, 2019, Mr. Crutsinger filed a petition for writ of certiorari and a Motion to Stay Execution. The pleadings are currently pending in this Supreme Court.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether in ruling on a 60(b) motion for relief from judgment, a court can consider "a change in the law" as one of many wide-range of factors, in determining whether extraordinary circumstances are present, warranting relief from the judgment

A. *Gonzalez* did *not* announce a *per se* rule that subsequent changes in law cannot be an extraordinary circumstance warranting reopening of a final judgment, and Fifth Circuit precedent is in conflict with *Gonzalez* and *Buck* in so holding

In Crutsinger VI, the two panel members rejected Crutsinger's arguments that "he is entitled to relief under Rule 60(b) because recent changes in decisional law, including Ayestas, Trevino, and Martinez, coupled with seven additional factors, constitute extraordinary circumstances," and denied COA. Crutsinger VI, 2019 WL 4010718, at *2 (citations omitted). Judge Graves dissented ("I would grant the Certificate of Appealability and the motion for stay essentially for reasons I have previously stated. See Crutsinger III, 929 F.3d at 266; Crutsinger IV, 930 F.3d 705 (5th Cir. 2019). Thus, I respectfully dissent.") (citations shortened) Crutsinger VI, 2019 WL 4010718, at *6.

Fifth Circuit precedent has interpreted *Gonzalez* to hold that "[a] change in decisional law after entry of judgment does not constitute extraordinary circumstances and is not alone grounds for relief from a final judgment." Crutsinger VI, 2019 WL 4010718, at *1, and n. 3 *citing Raby*, 907 F.3d at 884. *Gonzalez* did not announce a *per se* rule that subsequent changes in law cannot be an extraordinary circumstance warranting reopening of a final judgment. *Gonzalez* considered whether the change in law identified by the petitioner in that case was an extraordinary circumstance warranting relief from the judgment. Were there a *per se* rule that a change in decisional law does not, on its own, constitute an "extraordinary circumstance" warranting relief from judgment this

Supreme Court would have said so without determining whether it in fact was extraordinary in the *Gonzalez* case.

This Court explained why the change of law identified by the *Gonzalez* petitioner was not extraordinary in that case. The *Gonzalez* petitioner complained about an interpretation of 28 U.S.C. § 2244(d)(2) in his case that was later contradicted by the Supreme Court's *Artuz* decision. The Court wrote that "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final." *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005). That not every interpretation by a lower court that is revealed to be erroneous by a subsequent Supreme Court decision warrants reopening of a judgment does not mean that no erroneous interpretation does.

Specifically, the *Gonzalez* Court observed that an erroneous application of this particular statute was not extraordinary, because an "unduly parsimonious interpretation of § 2244(d)(2)" would just as easily justify reopening as an unduly generous one. *Gonzalez*, 545 U.S. at 537. Mr. Crutsinger has not alleged a defect in an interpretation of substantive or procedural law like a statute of limitations.

Rather, in his Rule 60(b) motion Mr. Crutsinger attacked an antecedent defect in the integrity of the proceeding: a denial of his § 3599 statutory representation rights[1] that precluded him from identifying and meaningfully pleading factual allegations related to the legality of his confinement because the court held his Sixth Amendment IATC claim was procedurally defaulted. He asserted

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[1] *See also Robertson v. Davis*, (SCT No. 19-70006 to be conferenced 10-1-2019)(same denial of §3599 statutory representation rights); *Jones v. Davis*, petition for writ of certiorari due 9/16/2019, same denial of § 3599 Statutory representation rights, *Jones v. Davis*, 927 F.3d 365, 373 (5th Cir. 2019).

he was denied a review of the "true merits" of his claims, which have never been considered or adjudicated by any federal court. *See Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. 1981) (recognizing with respect to Rule 60(b) motions that, "although the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause").

Because of deficient state habeas representation (to the point of abandonment),[2] Mr. Crutsinger arrived in federal court without ever having had an opportunity to investigate the effectiveness of his trial counsel's sentencing investigation. In federal court, Mr. Crutsinger never had a meaningful opportunity to investigate the facts of a possible Sixth Amendment claim his federal habeas counsel identified. In *McFarland v. Scott*, 512 U.S. 849 (1994), the Supreme Court recognized that the complexity of habeas corpus jurisprudence "makes it unlikely that capital defendants will be able to file successful petitions for collateral relief" without representation, including "[t]he services of investigators and other experts" which "may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *McFarland*, 512 U.S. at 855-56. *McFarland*'s essential holding is that the deprivation of meaningful representation prevents the "true merits" of a habeas applicant's claims from ever being heard. *See McFarland*, 512 U.S. at 856 ("Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel thus would expose him to the substantial risk that his habeas claims never would be heard on the merits.").

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[2] *See Crtusinger v. Texas*, Sup Ct No. 19-5715, currently pending before this court

Thus, the deprivation of Crutsinger's representation right demands a remedy and places this case on an entirely different footing from *Gonzalez*. There is not any rote rule of law that can be distilled from *Gonzalez* to dispose of Mr. Crutsinger's 60(b) motion. A court must simply ascertain for itself, based on the totality of circumstances alleged, whether relief from the judgment is warranted. And in *Crutsinger*, based on the totality of circumstances alleged, relief from the judgment is warranted.

B. Crutsinger raised seven (7) factors, in addition to a change in a decisional law. Even so, *Martinez/Trevino* was not a *mere* change in decisional law. It provides a baseline for the 60(b) inquiry

It is it curious why Crutsinger VI recites:

- "Mere changes in decisional law, *without more*, do not constitute extraordinary circumstances." Crutsinger VI, 2019 WL 4010718, at *4; and

- "A change in decisional law after entry of judgment does not constitute extraordinary circumstances and *is not alone* grounds for relief from a final judgment." Crutsinger VI, 2019 WL 4010718, at *1.

And why Crutsinger IV recites:

- "Though acknowledging that we were without jurisdiction to make a merits determination on his Rule 60(b)(6) motion, ... Crutsinger's motion, with its focus on *mere* changes in decisional law, provides us with no occasion to doubt that conclusion.") (emphasis supplied). Crutsinger, 930 F.3d at 707.

And why Crutsinger VI asserts:

- "Circuit precedent also squarely forecloses Crustinger's claim," citing Fifth Circuit case law at footnote 8,[3] which hold a change in law "*alone*," or

[3] *See Adams v. Thaler*, 679 F.3d 312, 319 (5thCir. 2012) (emphasis supplied) ("Our precedents hold that "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is *not alone* grounds for relief from a final judgment" under Rule 60(b)(6).") (emphasis supplied); *Haynes v. Davis*, 733 Fed. Appx. 766, 768 (5th Cir. 2018) (emphasis supplied) ("Furthermore, a change in decisional law does not, *on its own*, constitute an

> "*without more*," or "*on its own*" does not constitute extraordinary circumstances. Crutsinger VI, 2019 WL 4010718, at *4, n.8.

In *Buck*, this Court announced that "[i]n determining whether extraordinary circumstances are present, a court may consider a *wide range of factors*." (Emphasis supplied) *Buck v. Davis*, 137 S.Ct. 759, 778 (2017). And that is exactly what Mr. Crutsinger did as acknowledged in the lower court opinions *See Crutsinger* VI ("Crutsinger maintains that he is entitled to relief under Rule 60(b) because recent changes in decisional law, including *Ayestas*, *Trevino* and *Martinez*, <u>coupled with seven additional factors</u>, constitute extraordinary circumstances." (Citations omitted, emphasis supplied) *Crutsinger*, 2019 WL 4010718, at *2. *See also* Crutsinger V, 2019 WL 3749530, at *2 ("Crutsinger asserts that the following additional factors together create extraordinary circumstances that justify reopening the judgment," and enumerates seven (7) factors).

It appears the answer is that Crutsinger VI seeks to deflect from its glaring omission. The opinion failed to address Crutsinger's argument that *Martinez/Trevino* is not a *mere* change in law. Mr. Crutsinger asserted that jurists of reason would debate the characterization in Crutsinger VI , and illustrated his point with the writings of Judge Graves, Judge Dennis, and Justice Scalia.

Judge Graves in his dissent (Crutsinger III) pointed out "*Martinez* provides an exception for claims such as Crutsinger's. *Martinez* was an equitable ruling." *Crutsinger v. Davis*, 929 F.3d 259, 267 (5th Cir. 2019).

"extraordinary circumstance" warranting relief from judgment."); *Diaz v. Stephens*, 731 F.3d 370, 375 (5th Cir. 2013), *citing Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir.1990) ("As Diaz acknowledges, this court has held that "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is *not alone* grounds for relief from a final judgment" under Rule 60(b)(6)."); *Hernandez v. Thaler*, 630 F.3d 420, 430 (5th Cir. 2011) (emphasis supplied) ("We have previously held that "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is *not alone* grounds for relief from a final judgment" under Rule 60(b)(6)."). (Emphasis supplied).

Judge Dennis in his dissent in *Haynes*, quotes Justice Scalia's dissent in *Martinez*. *Haynes v. Davis*, 733 Fed. Appx. 766, 772 (5th Cir. 2018) (Dennis, J., dissenting). This is the very same unpublished *Haynes* decision that the two-member opinion insisted foreclosed Crutsinger claim.

Justice Scalia wrote that *Martinez* was "a repudiation of the longstanding principle governing procedural default, which *Coleman* and other cases consistently applied," *Martinez*, 566 U.S. at 2. Justice Scalia described *Martinez* as "a radical alteration of our habeas jurisprudence." *Martinez*, 566 U.S. at 2. *See Haynes*, 733 Fed. Appx. at 771-772 (Dennis, J., dissenting) *quoting Martinez*, 566 U.S. at 2 , 15 (Scalia, J., dissent).

And Judge Dennis concluded in *Haynes*: "The change adopted in *Martinez* and expanded in *Trevino* was also important, crafted, as it was, to ensure that fundamental constitutional claims receive review by at least one court," and "***[t]hough not alone an 'extraordinary circumstance' warranting Rule 60(b) relief, this significant change in habeas jurisprudence provides an important baseline for our review...***" *Haynes*, 733 Fed. Appx. at 771-772 (Dennis, J., dissenting).

C. *Buck* stands for the proposition that finality is *not* the overriding concern when assessing Rule 60(b) motions in habeas cases

The district court complained that "Eleven years ago, this Court denied federal habeas petitioner Billy Jack Crutsinger's request under 18 U.S.C. § 3599(f) for funds to investigate an unexhausted and procedurally barred claim of ineffective trial counsel." *Crutsinger* V, 2019 WL

3749530, at *1. Tracking the Respondent's arguments, which rely on *Haynes*, an unpublished opinion that has no precedential authority,[4] Crutsinger VI wrote:

> In Diaz, 731 F.3d at 377), we emphasized that the petitioner's circumstances were 'no more unique or extraordinary than any other capital inmate who defaulted claims in state court prior to Trevino.' (Citation omitted.) So, too, with Crutsinger's funding request after Ayestas.
>
> Moreover, in *Haynes,* 733 F. App'x at 770, we maintained that "finality is a particularly strong consideration in the habeas context." The state emphasizes that here, as in *Haynes*, Crutsinger has been litigating his claims in federal court for more than a decade and has received multiple stages of review. In both cases, we found that Rule 60(b) relief was not warranted.

Crutsinger VI, 2019 WL 4010718, at *3. Crutsinger VI Is in conflict with *Buck.*

Mr. Crutsinger had demonstrated jurists of reason could disagree,. See Crutsinger's Reply at 13-14 (5th Cir. No. 19-70012). Judge Dennis wrote in his dissent in *Haynes*:

> The majority opinion cites *Diaz v. Stephens*, 731 F.3d 370 (5th Cir. 2013), for the proposition that "in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting." But, as is clear from that opinion, the quoted language is a statement by one judge only, not joined by the other panel members. *See id.* at 376 n.1 (statement of Jones, J.) ("Judge Jones notes that.... in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting."). In any case, whatever weight this statement might carry is strongly tempered by the Supreme Court's recent rejection of the notion that finality is the overriding concern when assessing Rule 60(b) motions in habeas cases. *Buck*, 137 S.Ct. at 779. As the Court explained, "the whole purpose of Rule 60(b) is to make an exception to finality." Id.

Haynes, 733 Fed. Appx. at, 775–76 (Dennis, J., dissenting).

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[4] "Pursuant to 5th Cir. R. 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 5th Cir. Loc. R. 47.5.4." *Haynes v. Davis,* 733 Fed. Appx. 766, 766 (5th Cir. 2018).

In sum, as Judge Graves in dissent in Crutsinger III recognized:

(1) Gonzalez itself "indicates the possibility that some changes [in law] provide cause for reopening cases," Crutsinger III, 929 F.3d at 269;

(2) Mr. Crutsinger "has not abandoned this issue and has been extremely diligently" trying to correct the flawed application of the representation statute," Crutsinger III, 929 F.3d at 271;

(3) the "risk of injustice to Crutsinger in not reopening the judgment and properly deciding his funding motion is great, while the risk of injustice to the government is nonexistent," Crutsinger III, 929 F.3d at 271;

(4) there exists "a risk of undermining the public's confidence in the judicial process" because the erroneous representation ruling in this case "dictate[s] the outcome of every decision that follows," Crutsinger, 929 F.3d at 271.

"Crutsinger has shown that extraordinary circumstances exist to justify reopening the final judgment on his habeas petition." Crutsinger III, 929 F.3d at 271 (Graves, J., dissenting).

For all of the aforementioned reasons, Mr. Crutsinger asks this Court to grant certiorari to answer the question: Whether in ruling on a 60(b) motion for relief from judgment, a court can consider "a change in the law" as one of many wide-range of factors, in determining whether extraordinary circumstances are present, warranting relief from the judgment.

II. This Court should grant certiorari to decide whether an allegation that an indigent, death-sentenced habeas applicant has been deprived of his statutory right to representation in a 28 U.S.C. § 2254 federal habeas corpus proceeding is an allegation that there existed a structural defect in the integrity of the proceeding, and whether an applicant can challenge that structural defect in a Motion for Relief From the Judgment under Fed. R. Civ. P. 60(b)

In rejecting the extraordinary factors raised by Crutsinger to reopen the judgment, the district court ruled, among other things, that "the changes in the law affecting funding [in Crutsinger] are, if anything less extraordinary than the changes discussed in *Gonzalez* because a lack of funding did not prevent Crutsinger from presenting a claim." Crutsinger V, 2019 WL 3749530, at *2. [Mem. Op. Doc 120 at 4, 7-15; 16-26]. It held that "Crutsinger wrongly characterizes the alleged defect in this proceeding as structural error in the form of the denial of representation. This Court's 2008 ruling on his motion for funding was not a "defect" in the proceedings." Crutsinger V, at *3.

The Fifth Circuit's Crutsinger VI opinion erroneously holds the district "court's analysis is both helpful and, more importantly, correct." Crutsinger VI, 2019 WL 4010718, at *4. It asserts "the movant failed to offer 'any authority that [§] 3599 has ever provided relief pursuant to Rule 60(b).'" Crutsinger VI, 2019 WL 4010718, at *3, *quoting In re Johnson*, _ F.3d __, 2019 WL 3814384, at *3 (5th Cir. Aug. 15, 2019).

Crutsinger VI further states:

> The district court engaged in an extensive review of the record to demonstrate that Crutsinger's representation at trial was not egregious and that he was not precluded from receiving a merits-based review of his federal habeas claims, including his claim of ineffective assistance of counsel ("IAC") .... As the court rightly emphasized, Crutsinger's 'assertions that the denial of funding precluded a true merits review and that trial counsel's representation was egregious, border on frivolous.' Crutsinger V, 2019 WL 3749530, at *3. Neither of these factors supports his claim that extraordinary circumstances justify reopening."

Crutsinger VI, 2019 WL 4010718, at *4, citing Crutsinger I, 2012 WL 369927, at *3-6, *4–13 (N.D. Tex. Feb. 6, 2012).

Crutsinger VI, and all the preceding Crutsinger rulings (I-V) are in conflict with *Ayestas v. Davis*, 138 S.Ct. 1080 (2018), *McFarland v. Scott*, 512 U.S. 849, 856 (1994), and *Gideon v. Wainwright*, 372 U.S. 335 (1963).

A. In determining if Crutsinger's § 3599 funding request was reasonably necessary, the district court's analysis was limited to a record-bound review, with the goal of proving trial counsel did some investigation contrary to *Ayestas*

In its Memorandum Opinion (Mem. Op.), the district court answered in the negative, the two questions it posited:

> The questions now before the Court are whether the circumstances require reopening this case under Federal Rule of Civil Procedure 60(b) (6) and, if so, whether Crutsinger has made the necessary showing for funding under § 3599(f). The Court answers both of these questions in the negative.

Crutsinger V, 2019 WL 3749530, at *1.

Ayestas sets the standard for the funding determination: "Proper application of the "reasonably necessary" standard thus requires courts to consider [1] the potential merit of the claims that the applicant wants to pursue, [2] the likelihood that the services will generate useful and admissible evidence, and [3] the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Ayestas v. Davis*, 138 S.Ct. 1080, 1094 (2018). The district court's analysis in Crutsinger V is in conflict with *Ayestas*, and its affirmance by the Fifth Circuit, places Crutsinger VI in conflict with *Ayestas* also.

To support its negative answer to the second question, the district court "engaged in an extensive" record-bound review. Crutsinger VI, 2019 WL 4010718, at *4. The district court scoured the clerk's record, reporter's record, and state habeas record for evidence of what trial counsel *did*.[5] Crutsinger V, 2019 WL 3749530, at *4-5:

- ("In addition, the trial court clerk's record includes [the Goodness report, the trial counsel affidavit given in state habeas after the convicting court granted the prosecutor's motion])" at *4;
- ("The clerk's record also [includes orders, rigorous pretrial motions practice] which speaks to the quality of counsel's overall representation") at *4;
- ("the clerk's record contains .... [refers to Tarrant County District Attorney Office's open-file policy and that these records *would* have been available for trial counsel's review, but not that trial counsel did review them]) at *4; and
- ("Next, this Court assessed trial counsel's investigative efforts from the contents of the reporter's record." at *5).

At the end, the district court concludes "If Crutsinger's failure to obtain funding prevented him from presenting a claim, he has not stated what exactly that claim is." Crutsinger V, 2019 WL 3749530, at *6. This is simply not true.

In his 04/29/2008 initial funding request, [Doc 13 at 2, 3], Mr. Crutsinger asked for funding "to investigate and develop the factual basis ... of a Wiggins/Rompilla claim." In his initial 04/29/2008 motion and 05/08/2008 Motion to Reconsider [Doc 17], Mr. Crutsinger explained to the

[5] Based on the district court's record-bound review, the court wrote that "trial counsel had procured a fact investigator, a psychiatrist (Barry Mills), a DNA expert (Identagene, Inc.), a forensic psychologist and mitigation investigator (Kelly Goodness), and a prison classification expert (Walter Quijano),... [engaged in] a rigorous pretrial motions practice," and speculates that because "Tarrant County ... also practices an open-file policy in capital murder cases.... thus, all records obtained by the prosecution would have been available to the defense...." Crutsinger V, 2019 WL 3749530, at *4. Thereafter, the Mem. Op. writes about the physical evidence and witness testimony in both phases of the trial. Crutsinger V at *4-5, [Mem. Op. Doc 120 at 11-13].

court that "the trial attorneys and state habeas counsel left significant issues unexplored and unexplained – both for purposes of mitigation, and 'also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.'" [Doc 17 at 11]. "These issues included: alcoholism and a personality change – lay witnesses had testified that after a single drink that Mr. Crutsinger was described by relatives as 'Dr. Jekyll and Mr. Hyde,' a history of domestic violence and abuse, and repeated losses of significant friends and relatives during his childhood and early adult years." The jury heard nothing from the defense that provided an explanation about the disease of alcoholism in relation to the offense conduct. ROA.6; [Doc 13 at 2]. As a result, the prosecutor argued to the jury there was nothing to explain the propensity for violence, and it was "the result of evil." Funding Motion Doc 13 at 2.

Further, the Fifth Circuit in Crutsinger II, 576 Fed. Appx. at 426 recognized that "[t]he critical issue in both of Crutsinger's arguments is whether the investigation was reasonable, ..." Crutsinger, 576 Fed. Appx. at 427.

Having quoted Mr. Crutsinger's requests out of context in its 2019 assessment, and vehemently disagreeing with Mr. Crutsinger, Crutsinger V erroneously characterizes Crustsinger's pleadings as "border[ing] on frivolous," "completely false;" and "leaving a false impression." Crutsinger V, 2019 WL 3749530, at *3, *7, *9, [Mem. Op. Doc 120 at 8, 20]. Thereafter, the district court castigates Crutsinger because he did not acknowledge the work done at trial:

- Crutsinger's proposed mitigation investigator "did not acknowledge the investigative work that was done at trial;" ROA.1388, [Mem. Op. Doc 120 at 17];

- "The application does not acknowledge the investigation and mental-health evaluations that were performed for his trial," ROA.1388, [Mem. Op. Doc 120 at 20];

- "Crutsinger gives short shrift to the defense evidence at punishment and suggests that reasonable counsel would have presented a mental-health defense." ROA.1388, [Mem. Op. Doc 120 at 21].

If the district court's analytical approach were the standard to determine § 3599 funding requests – and it is not – then only capital habeas petitioners with "potted plants" for lawyers *might* qualify for funding under the district court's unworkable standard. *See Ex parte McFarland*, 163 S.W.3d 743, 752, n.19 (Tex. Crim. App. 2005) ("This prong of *Cronic* is epitomized by the "inert" or "potted plant" lawyer who, although physically and mentally present in the courtroom, fails to provide (or is prevented from providing) any meaningful assistance.").

The district court's analytical approach conflicts with *Ayestas v. Davis*, 138 S.Ct. 1080 (2018). The *Ayestas* "reasonable attorney" would (and Crutsinger did, *see infra*) conduct a pre-petition, Due Diligence Inquiry (defined, *infra*), to evaluate the quantum of known evidence – akin to the *Wiggins* inquiry looking at what the quantum of evidence was already known by former counsel, and whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003). The *Ayestas* reasonable attorney would (and Crutsinger did*, see infra*) seek funding if there is a likelihood the § 3599 representation services could generate useful and admissible evidence. *Ayestas*, 138 S.Ct. at 1094.

A "Due Diligence Inquiry" consists of engaging in such tasks as reviewing the official record and former-counsel files, conducting an analysis and assessment of content in various documents, and seeking preliminary information about a particular topic (either through literature searches and/or preliminary communications with an expert). This type of review frequently reveals deficiencies in the prior litigation efforts (the Red Flags), thereby putting counsel on notice that more needs to be done.

The Due Diligence Inquiry is the spring board from which a Petitioner seeks mitigation and expert services, using the Red Flags derived from it to support his funding requests and demonstrate there is a likelihood the § 3599 representation services could generate useful and admissible evidence – which Crutsinger did, *see infra*. When a court denies a Petitioner his § 3599 Sixth Amendment right to meaningful representation, a Petitioner is reduced to pleading Early Stage Claims, which are claims limited to reciting the Red Flags from the Due Diligence Inquiry, and speculating about what he would have developed and presented had he been provided the necessary funding.

Denied funding and without an expert to explain the significance of Crutsinger's alcoholism, Crutsinger could plead only Early-Stage claims and attached the scientific articles he discovered in the course of his Due Diligence Inquiry as exhibits in support – which the court mistakenly refers to as "materials apparently from trial counsel's files. (Petition, p. 67 (Exhibit List).)" Crutsinger V, 2019 WL 3749530, at *4.

In contrast, an "Investigation" is the actual extra-record efforts of experts and investigators that reveal facts not adequately investigated, developed, and presented by former counsel and their investigators at the trial. The Investigation, in turn, allows the Petitioner to plead a "Factually-Developed" Claim in the habeas petition, and support it with the evidence arising from extra-record efforts of experts and investigators, such as an affidavit or testimony about the results of the expert's evaluation.

B. Crutsinger demonstrated the denial of funding precluded a true merits review. It supports that extraordinary circumstances exist

Crutsinger satisfied the Ayestas prongs 1. 2 & 3. After Crutsinger conducted a Due Diligence Inquiry that raised red flags signaling further investigation should be conducted, Crutsinger on 04/29/2008 requested funding "to investigate and develop the factual basis ... of a *Wiggins/Rompilla* claim," [Motion for Funding, Doc 13 at 2, 3]. Without intending to be redundant, but to show he met the *Ayestas* prongs, Mr. Crutsinger's initial 04/29/2008 motion and 05/08/2008 Motion to Reconsider [Doc 17] explained to the court that "the trial attorneys and state habeas counsel left significant issues unexplored and unexplained – both for purposes of mitigation, and 'also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.'" [Doc 17 at 11]. "These issues included: alcoholism and a personality change – lay witnesses had testified that after a single drink that Mr. Crutsinger was described by relatives as 'Dr. Jekyll and Mr. Hyde,' a history of domestic violence and abuse, and repeated losses of significant friends and relatives during his childhood and early adult years."

The 2008 funding requests observed "the lay witness testimony did not address the current scientific knowledge about addiction." Crutsinger, 2019 WL 3749530, at *4; *6-8, ROA.6; [Doc 13 at 2]. Nor could they. They were lay witnesses. So despite the fact that Crutsinger was genetically predisposed to alcoholism and experienced various traumatic events, the jury heard nothing from the defense that provided an explanation about the disease of alcoholism in relation to the offense conduct.[6] ROA.6; [Doc 13 at 2].

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[6] The Mem. Op. relies heavily on the Goodness report and that "Dr. Goodness is a forensic psychologist whose qualifications to advise counsel on this subject have not been

Crutsinger further pled that as a result of trial counsel's omission, the door was thrown wide-open. The prosecutor stepped through and argued to the jury:

> "There is nothing that would explain or justify this propensity for violence, nothing that mitigates this; nothing but the concept of alcoholism. The offense has nothing to do with alcohol. It is a result of evil."

ROA.192; [Fed. Hab. Pet Doc 31 at 47; RR 33:5]. See also ROA.61 [Funding Application Doc 13 at 2].

Thus, a decade before the 2018 *Ayestas* opinion, Crutsinger satisfied the *Ayestas* prongs 1 & 2 ("the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence").

Mr. Crutsinger satisfied prong 3 also ("the prospect that the applicant will be able to clear any procedural hurdles standing in the way."). *Martinez/Trevino* had not yet been decided by this Court. So in his 05/08/2008 Motion for Reconsideration, Mr. Crutsinger raised a good-faith argument that circumstances existed that rendered the state corrective process ineffective, 28 U.S.C. § 2254(b)(1)(B)(ii) in an effort to clear the procedural bar hurdle. The 2008 Order, [Doc #18], which denied pre-petition funding for expert and investigative assistance, did so on the basis that Ground Two was unexhausted and procedurally defaulted relying on *Coleman v. Thompson* and Fifth Circuit precedent.

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challenged. But Crutsinger did challenge her role. She was hired as "a mitigation expert," and not as an expert on addiction or alcoholism. She did not testify at trial. The Fifth Circuit's Crutsinger II confirms that her role on the defense team was as a mitigation specialist. Crutsinger II recites: "During the underlying criminal proceedings, the trial court appointed, on counsel's motion, a forensic psychologist, Dr. Kelly Goodness, as a mitigation specialist to investigate Crutsinger's social history." Crutsinger II, 576 Fed. Appx. at 426.

On 02/06/2012, the district court denied Crutsinger's federal habeas petition. Mr. Crutsinger tried again to overcome the procedural hurdle by way of *Martinez*. Mr. Crutsinger filed a Federal Rule of Civil Procedure 59(e) motion to vacate the initial habeas judgment. The district court denied the request, concluding that "the claim of ineffective trial counsel raised by Crutsinger had no merit and was, therefore, not 'substantial' as required by *Martinez*." Crutsinger v. Davis, 929 F.3d 259, 262 (5th Cir. 2019). [3/5/2015 59(e) Motion; 4/13/2012 Order, Doc 56].

Turning to the current 2019 funding re-determination, the district court in Crutsinger V again denied funding: "Alternatively. If the Court were to reopen the case and reconsider the funding request under Ayestas, it would be denied." Crutsinger V, 2019 WL 3749530, at *6. It wrote:

> ... this Court addressed at length the merits of Crutsinger's ineffective-trial-counsel claim (IATC) based on the timing of counsel's investigation[7]. .... Although Crutsinger did not develop or present this particular IATC claim in state court (he presented different ones), the record *in this Court* was sufficient to make an informed merits review, as discussed in the pages that follow.

(Emphasis in original) Crutsinger V, 2019 WL 3749530, at *2.

The Fifth Circuit in Crutsinger VI, affirmed the district court's rulings. It holds: "As the court rightly emphasized, Crutsinger's 'assertions that the denial of funding precluded a true merits review and that trial counsel's representation was egregious, border on frivolous.' Neither of these factors supports his claim that extraordinary circumstances justify reopening." Crutsinger VI, 2019 WL 4010718, at *4, citing Crutsinger V, 2019 WL 3749530, at *3.

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[7] Crutsinger stresses yet again his claim was not about timing. Navigating the "timing" dispute between the district court and Crutsinger, the Fifth Circuit held: "The critical issue in both of Crutsinger's arguments is whether the investigation was reasonable, ..." Crutsinger, 576 Fed. Appx. at 427.

The upshot is that all of the Crutsinger opinions (I-VI) assure that Crustinger's claims will "never ... be heard"—and Congress presumably "did not intend for the express requirement" of investigative services "to be defeated in this manner." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). Section 3599(f) does not require litigants to prove their claims before investigating them.

The facts reflect the stark distinction between Crutsinger and Gonzalez. Gonzalez held a Rule 60(b) motion predicated on a post-judgment Supreme Court case interpreting a statute of limitations differently than was applied in his case was not an extraordinary circumstance. *Gonzalez*, 545 U.S. at 536. It also held the Gonzalez applicant's failure to pursue that issue on certiorari "confirm[ed]" the issue was not extraordinary. Id. at 537.

In contrast, the "statute" in question in the case at bar is fundamentally different in nature from that in *Gonzalez*. ROA.1388; [Mem. Op. Doc 120 at 6]. Here, it goes to the very structural integrity of the proceeding. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to representation is "fundamental and essential to a fair trial"). Moreover, unlike in *Gonzalez*, Mr. Crutsinger did pursue this issue on certiorari, but was denied. *Crutsinger v. Stephens*, 135 S. Ct. 1401 (2015).

C. The district court's requirement that the applicant "explicitly allege what potential evidence remains to be found" before he is given evidence to investigate and discover what remains to be found, conflicts with Ayestas. Ayestas held that a "funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks"

Finally, the district's court assessment conflicts with *Ayestas* because at bottom, Crutsinger V denied funding, because Crutsinger failed to prove a meritorious claim, in order to obtain funding to investigate, develop, and prove a meritorious claim.

Crutsinger V, affirmed by the Fifth Circuit in Crutsinger VI, held:

- "Crutsinger has not alleged that potential evidence exists that could show counsel unreasonably relied on the opinions of the experts'" Crutsinger V, 2019 WL 3749530, at *8 [Mem. Op. Doc 120 at 21]; and

- "It is incumbent on Crutsinger to explicitly allege what potential evidence remains to be found;" Crutsinger V, 2019 WL 3749530, at *9; [Mem. Op. Doc 120 at 25].

Ayestas stressed: "To be clear, a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks." (Emphasis in original) *Ayestas*, 138 S.Ct. at 1094. And as Judge Graves wrote in Crutsinger III: "Such a circular application [by the district court] is illogical. It heightens the standard required under 18 U.S.C. § 3599(f) and essentially makes it impossible for a defendant to ever obtain funding on such a claim. A defendant who has already proven his claim of ineffective assistance of counsel would have no need for additional investigative, expert, or other services." Crutsinger III, 929 F.3d at 267 (Graves, J. dissenting).

For all of the aforementioned reasons, Mr. Crutsinger asks this Court to grant certiorari to answer the questions: Whether an allegation that an indigent, death-sentenced habeas applicant has been deprived of his statutory right to representation in a 28 U.S.C. § 2254 federal habeas corpus proceeding is an allegation that there existed a structural defect in the integrity of the proceeding, and whether an applicant can challenge that structural defect in a Motion for Relief From the Judgment under Fed. R. Civ. P. 60(b).

CONCLUSION

For all of the aforementioned reasons, Mr. Crutsinger respectfully requests that this Court grant his petition for writ of certiorari, and also stay the execution of Mr. Crutsinger.

Respectfully submitted,

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APPENDIX

Appendix 1 (Crutsinger VI) Crutsinger v. Davis, 2019 WL 4010718 (5th Cir. Aug. 26, 2019)