No. 19-5755
No. 19A237

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

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* AND TO APPLICATION FOR STAY OF EXECUTION

CAPITAL CASE
EXECUTION SCHEDULED: September 4, 2019

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The Petitioner, BILLY JACK CRUTSINGER, files this Reply to the Briefs in Opposition (BIO) of Respondent Davis in No. 19-5755 and No. 19A237.

I. The rulings of the district court and the Fifth Circuit address *Martinez/Trevino* as the "change in law" that is not an extraordinary circumstance – contrary to Respondent's assertion that it is solely *Ayestas*

The Respondent sets up the mistaken premise that there is only one "change in law," and that is *Ayestas*, and not *Martinez/Trevino*. BIO at 9-10. From there she reasons that because the district court denied funding under *Ayestas*, the district court considered this change in law as a factor in denying the Rule 60(b)(6) motion; thus Mr. Crutsinger "seeks simple error correction" and there is no compelling reason to grant certiorari. BIO at 8.

The Respondent's premise is wrong. The rulings of the district court and the Fifth Circuit address *Martinez/Trevino* as the "change in law." *See infra*.

A. The district court held *Gonzalez* and Fifth Circuit precedent "appear to foreclose Crutsinger's reliance on the changes in law brought by *Martinez/Trevino*"

In Crutsinger V, the district court denied the Rule 60(b)(6) motion because circuit precedent and *Gonzalez* appears to foreclose Crutsinger's reliance on the change in law brought by *Martinez/Trevino*. Crutsinger V held:

> As the Court of Appeals has already acknowledged, circuit precedent appears to foreclose Crutsinger's reliance on the changes in law brought by *Martinez/Trevino*. *Crustinger v. Davis*, No. 18-70027, 2019 WL 3243399, at *2 n.1 (5th Cir. July 19, 2019) (order denying stay); *see Adams v. Thaler*, 679 F.3d 312, 319-20 (5th Cir. 2012) (rejecting argument that *Martinez* and the equitable imperative that the "true merit of the cause be heard" constitute extraordinary circumstances in death-penalty case); *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013) (holding that *Trevino* did

not undermine *Adams*).

> Crutsinger's reliance on the changes in law brought by *Martinez/Trevino* appears to be foreclosed by *Gonzalez* as well.

Crutsinger v. Davis, 2019 WL 3749530, at *1–2 (N.D. Tex. 2019).

B. Crutsinger VI left no doubt circuit precedent and *Gonzalez* foreclosed Crutsinger's reliance on changes in law brought by *Martinez/Trevino*. "Circuit precedent squarely forecloses Crustinger's claim"

The district court made an arguably equivocal statement: Circuit precedent "appears" to foreclose reliance on *Martinez/Trevino*. In contrast, the Fifth Circuit's Crutsinger VI left no doubt that it did. Crutsinger VI held:

> Circuit precedent also squarely forecloses Crutsinger's claim [changes in decisional law (specifically, *Trevino and Martinez*)] [ftnt 8 listing cases]. We noted as much in both of our recent decisions. Crutsinger IV, 930 F.3d at 707; Crutsinger III, 929 F.3d at 266. ***This overwhelming precedent is effectively dispositive of the matter***.

(Emphasis supplied) *Crutsinger v. Davis*, 2019 WL 4010718, at *3, 4 (5th Cir. 2019).

Discussing *Diaz* in particular, Crutsinger V 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*.' .... " *Crutsinger v. Davis*, 2019 WL 4010718, at *3.

Thus, the opinions of the district court and the Fifth Circuit make clear they are addressing *Martinez/Trevino* in determining if the "change in law" occasioned by these cases constituted extraordinary circumstances. The Circuit precedent that foreclosed Crutsinger's reliance on a change in law was not about *Ayestas* as Respondent mistakenly contends. BIO 8-10. To avoid redundancy, Mr. Crutsinger refers the Court back to his Petition for a discussion of *Gonzalez* in response to the

Respondent's contention that Crutsinger misapprehends *Gonzalez*. Pet. at 10-13, 17.

C. *Martinez/Trevino* supports that extraordinary circumstances exist

1. As described by Justice Scalia, *Martinez/Trevino* is "a radical alteration of our habeas jurisprudence"

Martinez/Trevino is a factor that supports that extraordinary circumstances exist. Justice Scalia wrote: *Martinez* was "a repudiation of the longstanding principle governing procedural default, which *Coleman* and other cases consistently applied." *Martinez v. Ryan*, 566 U.S. 1, 23 (2012). Justice Scalia described *Martinez* as "a radical alteration of our habeas jurisprudence." *Martinez*, 566 U.S. at 28. No Justice on the Supreme Court ever used such descriptors to characterize the change in law that was at issue in *Gonzalez*.

2. *Martinez/Trevino* is an "equitable" ruling (not a constitutional law ruling). Procedural bars such as *Teague* do not apply to equitable rulings. So *Martinez/Trevino* applies in habeas, in an equitable Rule 60(b)(6) proceeding, and to an *Ayestas* determination. The extraordinariness of this change in law is amplified in *Crutsinger* where all three coalesce at the same time

More importantly and as argued in his COA/Brief in the Fifth Circuit (but not addressed in Crutsinger VI), *Martinez/Trevino* is not a "constitutional" rule of criminal procedure. It is an equitable rule. *See Crutsinger v. Davis*, No. 19-70012, COA at 10-11, *quoting Martinez v. Ryan*, 566 U.S. 1, 16 (2012). *See also Trevino v. Thaler*, 569 U.S. 413, 429 (2013) ("our holding in Martinez applies").

Unlike a constitutional rule, procedural bars such as those in *Teague* do not apply to equitable rules. *See e.g.*, *Teague v. Lane*, 489 U.S. 288 (1989) ("holding that new constitutional rules of criminal procedure generally do not apply on habeas review"). As such, *Martinez/Trevino* applies

in Mr. Crutsinger's habeas proceeding. It applies in his equitable Rule 60(b)(6) proceeding. It applies in the *Ayestas* determination (prong 3 requirement "to clear any procedural hurdles standing in the way."). *Ayestas v. Davis*, 138 S.Ct. 1080, 1094 (2018). And it is particularly extraordinary in Crutsinger's case, where all three coalesce in the equitable Rule 60(b)(6) proceeding in habeas, where the court was required to make a proper *Ayestas* determination.

3. Fifth Circuit precedent that forecloses reliance on *Martinez/Trevino* conflicts with *Buck*. *Martinez/Trevino* provides an important baseline for lower court review

Because Fifth Circuit precedent forecloses Crutsinger from reliance on *Martinez/Trevino* to support extraordinary circumstances exit, a Movant, like Crutsinger, can never get to the *Ayestas* determination. This is because as the questions were posed by the district court in Crutsinger V, before the court can answer the second question (did Crutsinger make the necessary showing for funding under § 3599(f)), it necessarily required an affirmative answer to the first question (whether there were extraordinary circumstances that required reopening this case under Federal Rule of Civil Procedure 60(b) (6)).[1] Crutsinger V, 2019 WL 3749530, at *1 (N.D.Tex. 2019).

Disagreeing with circuit precedent, Judge Dennis wrote: "The change adopted in *Martinez* and expanded in *Trevino* was ... 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 v. Davis*, 733 Fed. Appx. 766, 771-772 (5th Cir. 2018) (Dennis, J., dissenting).

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[1] The district court answered the funding issue in the negative, but only as an alternative "if the Court were to reopen the case ...." Crutsinger V, 2019 WL 3749530 at *6.

Fifth Circuit precedent is in conflict with *Buck*. Judge Dennis noted "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*. (cleaned up)." *Haynes*, 733 Fed.Appx. at 776 (Dennis, J., dissenting), *citing Buck v. Davis*, 137 S.Ct. 759 (2017).

II. The District court failed to conduct a proper *Ayestas* analysis. Mr. Crutsinger demonstrated the potential merit of his *Wiggins* claim. Yet the district court denied him his § 3599 statutory right to representation, a structural defect in the integrity of the proceeding. Because of that denial, Mr. Crutsinger has never had meaningful habeas review and suffered actual harm. The equities favor Mr. Crutsinger

The Respondent raises several arguments that have been addressed in detail in the Petition. They are identical to arguments she raised in the Fifth Circuit below. Mr. Crutsinger's Reply will be brief. The Respondent argues that in Crutsinger V, the district court denied funding "based on a fresh review under *Ayestas*" that was "extensive." (No. 19-5755 BIO at 17). There is no question the Fifth Circuit characterized the review as "extensive." Crutsinger VI – *Crutsinger v. Davis*, 2019 WL 4010718, at *4 ("The district court engaged in an extensive review of the record to demonstrate that Crutsinger's representation at trial was not egregious"). However, the 2019 review of what trial counsel *did*, is not a proper *Ayestas* inquiry. *See* Pet. at 19-23, 27-28.

The 2019 "fresh review" is the same-old, same-old iteration of the original erroneous 2012 denial of funding.[2] In both, the district court demands that Crutsinger "prove that he will be able to

[2] *See* Crutsinger II – *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....")

win relief if given the § 3599 services" which *Ayestas* rejected. *Ayestas v. Davis*, 138 S.Ct. 1080, 1084 (2018). *See* Pet. at 18-28. *See also Crutsinger*, 929 F.3d at 267 (Graves, J., dissenting) ("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.").

The 2012 erroneous decision (the denial of funding based on procedural bar) dictated the outcome of every decision that followed in "the decades worth of federal habeas litigation punctuated by five opinions by the Fifth Circuit over that span." (No. 19A237 BIO at 16). *See* Crutsinger III – *Crutsinger v. Davis*, 929 F.3d 259, 271 (5th Cir. 2019) (Graves, J., dissenting) ("There also exists a risk of undermining the public's confidence in the judicial process by allowing an erroneous decision, the denial of funding based on procedural bar, to dictate the outcome of every decision that follows rather than just requiring the proper consideration of the motion for funding.").

Additionally, and contrary to the BIOs (No. 19-5755 BIO at 18; No. 19A237 at 12), not only did Crutsinger identify a *Wiggins* claim, he also demonstrated the claim's potential merit. Mr. Crutsinger walked through the steps he took (the Due Diligence Inquiry that supported the § 3599 services request), with citations to the record. He identified each of the three *Ayestas* prongs he had satisfied, including his reliance in 2008 on title 28 U.S.C. § 2254(b)(1)(B)(ii) (circumstances existed that rendered the state corrective process ineffective) and in 2012, on *Martinez/Trevino*, in an effort to clear procedural hurdles standing in the way. Mr. Crutsinger took these steps years before *Ayestas* had been decided. Pet. at 24-27.

As she did in her Fifth Circuit briefing, the Director again makes the false statement that "the district court docket indicates counsel for Crutsinger was given at least $32,000 to *investigate* and present a federal petition." (emphasis supplied). (19-5755 BIO at 19). Mr. Crutsinger again replies: The court did not give counsel money to investigate, and undersigned counsel did not investigate. Undersigned counsel is licensed as an attorney in the State of Texas. She lacks the qualifications of a "mitigation expert," sometimes referred to as a "mitigation specialist," as set out in the Texas and ABA Guidelines. *See* GUIDELINES FOR STANDARDS FOR TEXAS CAPITAL COUNSEL, Guideline 10.1 – The Defense Team (State Bar of Texas, adopted April 21, 2006) ("A qualified 'mitigation expert' should be enlisted...."); ABA GUIDELINE 5.1 – Qualifications of the Defense Team Vol 36:677 HOFSTRA L. REV. 682 (2008) ("C. Mitigation specialists must be able to identify, locate and interview .....[enumerating the qualifications and obligations of a mitigation expert/specialist]").

Undersigned counsel conducted a Due Diligence Inquiry, as discussed in the Pet. at 22-24, and in her pleadings before the Fifth Circuit, below. *See also* Reply to BIO to the COA at 9-13. Denied § 3599 services, Crutsinger's original federal habeas petition contains only Early Stage Claims. *See* Pet. At 23; Reply to BIO to COA, contradicting Respondent's assertion in No. 19-5755 Bio at 19, that counsel "fil[ed] a well-briefed petition."

Further, Mr. Crutsinger is not complaining that "he has not been provided with enough funding," (19-5755 BIO at 18), or "attempting to constitutionalize federal habeas representation." (19A237 BIO at 7-9). In this case, No. 19-5755, and in Case No. 19-5715, the Respondent has quoted Crutsinger IV for the proposition that "Crutsinger ... has been well-represented by his counsel." (19A237 BIO at 10).

Because the court withheld §3599 representation services, creating structural error, counsel's efforts were the equivalent of a well-qualified and experienced airline pilot, without an airplane. No matter how exceptional Captain Sully Sullenberger is, he cannot transport airline ticket-holders from Texas to California without the plane. Similarly, without investigative and expert assistance, Mr. Crutsinger could not plead a "Factually Developed Claim," thus, depriving him of "true merits review." *See* Pet. at 23. Mr. Crutsinger did suffer actual harm, contrary to the Respondent's assertions. (No. 19A237 BIO at 15-16, "pure speculation;" "mere possibility;" "theoretical"). In fact, Mr. Crutsinger was denied <u>*all*</u> meaningful habeas review – in state habeas and federal habeas as well.

The two proceedings, No. 19-5715, and No. 19-5755, viewed as a whole reveal why this Supreme Court should grant certiorari in *both* cases, No. 19-5715, and No. 19-5755, and stay the execution of Mr. Crutsinger. The lower state and federal courts are tethered to "finality." Their results-oriented rulings are in conflict with *Buck*, which rejected the notion that finality is the overriding concern in equitable proceedings in habeas.

CONCLUSION

For all of the aforementioned reasons in this Reply and in his Petition, Mr. Crutsinger respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

/s Lydia M.V. Brandt

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