No. 19-6426

IN THE

Supreme Court of the United States

JOHN HENRY RAMIREZ,
Petitioner,

v.

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

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Did the Fifth Circuit err when it found Ramirez's allegations of a *Trevino*[1] conflict of interest—premised on federal habeas counsel's failure to pursue the *Trevino* exception for a non-defaulted and insubstantial ineffective-assistance claim—fail to establish extraordinary circumstances sufficient to reopen judgment?

[1] *Trevino v. Thaler*, 569 U.S. 413 (2013).

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BRIEF IN OPPOSITION

Petitioner John Ramirez has unsuccessfully challenged his conviction and sentence in state and federal courts. He was scheduled to be executed in February 2017, but the federal district court granted his motion for a stay based on his allegations that then-federal-habeas counsel was laboring under a conflict of interest. ROA.638–72, 708–16. The district court also appointed substitute counsel. ROA.708–16, 735, 741–86. A year and a half later, Ramirez moved the district court to reopen judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). ROA.799–817, 839–55. The district court denied the motion and a certificate of appealability (COA). ROA.881–97. The Fifth Circuit denied COA. Pet. App'x B.

Ramirez now seeks certiorari review. He asks this Court to review the Fifth Circuit's denial of COA. He asserts that reasonable jurists could debate the district court's conclusions on successiveness, timeliness, and extraordinary circumstances. Because the Fifth Circuit agreed with Ramirez on the successiveness and timeliness issues, the only issue before the Court is whether the Fifth Circuit erred when it found reasonable jurists would not debate that the district court was within its discretion when it found Ramirez failed to demonstrate extraordinary circumstances. Ramirez argues that his circumstances are extraordinary because his state habeas counsel, Michael Gross, continued to represent him in federal habeas proceedings after *Trevino*.

To avail himself of *Trevino*'s exception, Ramirez asserts that Gross failed to raise a substantial *Wiggins*[2] claim in state habeas proceedings.

Ramirez's petition does not raise any issue warranting this Court's attention, as his arguments are unsupported by law and refuted by the record. The post-*Trevino* potential for a conflict of interest that arises when a petitioner is represented by the same counsel in state and federal proceedings is not so extraordinary that it requires reopening judgment in every such case. And certainly not this one. Contrary to Ramirez's allegations, Gross raised a *Wiggins* claim in state habeas proceedings, and then again in federal habeas proceedings. Because the claim was not defaulted, the federal district court reviewed the claim on its merits. Ramirez has already received all the relief—i.e., merits review—that *Trevino* offers. There is no risk of injustice if Ramirez is not permitted to return to receive a second round of same. This Court should deny certiorari.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

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[2] *Wiggins v. Smith*, 539 U.S. 510 (2003).

STATEMENT OF THE CASE

I. Ramirez's Trial

A. Guilt / Innocence

Ramirez was convicted of capital murder for stabbing Pablo Castro twenty-nine times during the course of a robbery. *Ramirez v. Stephens*, 641 F. App'x 312, 314 (5th Cir. 2016).

B. Punishment: Ramirez's decision to end the presentation of mitigating evidence

After the State presented its punishment case, the defense presented an opening argument, outlining the mitigating evidence they planned to present. ROA.2527. Trial counsel described Ramirez's upbringing: His parents were teenagers when he was born and divorced when he was a toddler. "[H]is father never had anything else to do with him. He never paid child support, he never came to visit him, he just disappeared." ROA.2527. His mother "lacked the capacity to care for children . . . her parenting skills were close to zero." ROA.2527. From a young age, his mother verbally abused him, saying "I do not want you, you [expletive] up my life, I hate you." ROA.2527. His mother lived an unstable, irresponsible life. She frequently left Ramirez in charge of two younger siblings born from her relationships with different men. Ramirez would often visit his grandmother to escape his difficult home life. ROA.2527. Trial counsel told the jurors that, after graduating from high school, Ramirez

joined the Marine Corps against the wishes of his family. He completed boot camp but left the service after his commission because "he just couldn't handle it." ROA.2528.

Trial counsel also promised that psychologist, Dr. Troy Martinez, would describe how Ramirez's "abusive upbringing, particularly his contacts with his mother when he was a young child, caused him severe emotional and psychological damage." ROA.2528. Dr. Martinez would attribute Ramirez's subsequent violent acts to "free floating rage" that was "tear[ing] at [him]." ROA.2528.

With that overview, the defense began the presentation of evidence. Counsel called Ramirez's father, John Henry Ramirez, Sr. He described his early marriage to Ramirez's mother and his eventual abandonment of the family. ROA.2529–30. After he divorced his wife, he had little involvement in Ramirez's life. He did not pay child support. ROA.2530. He testified that he felt terrible: "[He] should have done more. [He] should have been more involved in [Ramirez's] life." ROA.2530. On cross-examination, Ramirez's father explained that, while not living with Ramirez, he still saw him at birthdays, holidays, parties, and at Ramirez's grandparent's house. ROA.2531. Ramirez's father testified that he loved his son. ROA.2531.

After Ramirez's father's testimony, Ramirez instructed counsel not to present any further mitigation and not to argue against the death penalty in

summation. Counsel informed the court of Ramirez's instruction, and Ramirez confirmed that he did not want to present any more witnesses. ROA.2538.[3] The mitigation expert whom counsel had intended to call testified that he had spoken with Ramirez about his decision and believed that he was competent and was making a considered decision. ROA.2539.

Per Ramirez's instruction, trial counsel's closing argument consisted of a Bible verse. ROA.2543. After the prosecution made their closing arguments, the jury retired for deliberations and returned answers to the special issues requiring the imposition of the death sentence. RPA.2546.

II. Ramirez's Appeal and Postconviction Proceedings

A. Appeal

Ramirez's conviction and sentence were affirmed on appeal. *Ramirez v. State*, No. AP-76100, 2011 WL 1196886 (Tex. Crim. App. 2011).

B. State habeas proceedings

In preparation for the state proceedings, Gross retained a psychologist and mitigation expert. *See* ROA.3876–3918, 4446–51. Gross timely filed a 117-page state habeas application, raising 6 ineffective-assistance-of-trial-counsel

[3] Ramirez asserts that "[i]t was clear to [him] that . . . defense counsel was not prepared, and that further testimony would not serve any purpose." Pet. 2. But he provides no evidence to support his contention, and the record indicates that Ramirez's decision to end his case was based on his desire for the death penalty over a life sentence and his desire to spare his family from testifying about his childhood. ROA.4376, 4432–33.

claims.[4] ROA.3706–3825. Importantly, the state habeas application said that trial counsel "fail[ed] to properly investigate and discover mitigating evidence" in violation of *Wiggins*, 539 U.S. 510. ROA.3811–21, 4361–70. Ramirez argued that trial counsel should have called witnesses to describe his turbulent, abusive, and loveless childhood and supported the claim with affidavits, including one from his mother. ROA.3838–74. The state habeas court summarized the content of the affidavits as "traumatic events that occurred during Ramirez's childhood, including his parents' divorce, abandonment by his father, the tough neighborhood that he grew up in, abusive conduct by his mother, seeing his mother being stabbed by one of her boyfriends, and being shot himself . . . ." *See* ROA.5280. Acknowledging his choice to end the punishment phase, Ramirez also argued in his state habeas application that trial counsel "were ineffective in failing to recognize that [he] was unable and incompetent to direct counsel to not call any further witnesses." ROA.117.

The state habeas court held a three-day evidentiary hearing, ROA.4096–4150, 4343–4513, 4515–91, at which Gross reiterated Ramirez's *Wiggins* claim—i.e., that "counsel failed to investigate and prepare a mitigation case in a death penalty case." ROA.4367–70. Gross questioned Ramirez's trial counsel

[4] Gross raised four other claims in the application that are not relevant to Ramirez's petition before this Court.

and their mitigation specialist on the timing, scope, and quality of their investigation. *See* ROA.4349–87, 4395–96, 4398–99, 4406–23, 4433–40. But trial counsel testified that they were aware of and intended to incorporate into the mitigation defense Ramirez's abusive upbringing and trauma, including that he witnessed his mother's stabbing. ROA.4429–30. Trial counsel informed Ramirez of the evidence they planned to present and had witnesses lined up to testify. ROA.4432. Ramirez explained to counsel that he preferred a death sentence and did not want to put his family through testifying about his childhood. ROA.4431–32. Counsel reluctantly deferred to Ramirez's instruction to end his case in mitigation. ROA.4431.

Gross also called his mitigation expert, who criticized Ramirez's trial team's investigation as inadequate. ROA.4480–4500. The state habeas court disagreed: It found that trial counsel adequately investigated and developed mitigation evidence but ultimately honored Ramirez's instructions not to put on additional mitigation evidence.

> The Court finds that Ramirez has failed to prove by a preponderance of the evidence that his trial attorneys' investigation and development of mitigation evidence was deficient in any way. Specifically, the Court finds that Ramirez's trial attorneys questioned a sufficient number of witnesses and made sufficient preparation for them to testify at the punishment hearing in order to present a convincing mitigation case and to show Ramirez's background and social history, and that the additional witnesses suggested by Ramirez in the present writ proceeding would not have been able to add any significant additional details.

> Alternatively, the Court finds that any deficient performance in the investigation and development of a mitigation case by Ramirez's trial attorneys did not cause prejudice, and specifically that there is not a probability sufficient to undermine confidence in the outcome that, but for this complained-about deficiency, the result of the proceeding would have been different, both in light of the mitigation evidence that was already available to the defense and in light of Ramirez's own decision not to present a mitigation defense at trial for his attorneys to argue against the imposition of the death penalty.

ROA.5282 (¶¶83–84).

While the state habeas court clearly addressed Ramirez's complaints about trial counsel's investigation, it also (inexplicably) found that Ramirez did not so complain:

> The Court finds that [Ramirez] has not raised a complaint in his present application that his trial attorneys were ineffective for failing to investigate mitigation evidence, but instead limited his ground on mitigation evidence to a complaint that, "counsel were ineffective in failing to recognize that [Ramirez] was unable and incompetent to direct counsel to not call any further witnesses during the punishment phase of trial," and that "Defense counsel's performance was deficient in failing to present mitigation testimony."

ROA.5276 (¶55).

The Court of Criminal Appeals (CCA) adopted the state habeas court's recommendation and denied relief. *Ex parte Ramirez*, No. WR-72,735-03, 2012 WL 4834115 (Tex. Crim. App. Oct. 10, 2012) (unpublished order).

C. Federal habeas proceedings

Not long before Ramirez filed his federal habeas petition, this Court issued its decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino*, 569 U.S. 413, which introduced a change to federal habeas procedure. These cases held that if a petitioner defaults an ineffective-assistance-of-trial-counsel claim by not raising it in his initial state habeas application, then state habeas counsel's ineffective assistance in not raising the claim can constitute cause to overcome the default in federal court. *Trevino*, 569 U.S. at 429 (quoting *Martinez*, 566 U.S. at 17). A successful *Trevino* argument allows the petitioner to bring the defaulted claim for the first time in federal court. *See id.* at 416–17.

Four months after *Trevino*, Gross filed Ramirez's federal habeas petition in the district court, raising the same *Wiggins* claim he raised in state habeas proceedings. *See* ROA.146–58. The district court did not find the claim defaulted but denied relief on the merits, finding that "[t]he defense team investigated mitigating evidence for the punishment phase." ROA.589. The Fifth Circuit then denied a COA, finding "reasonable jurists would not find that Ramirez's trial counsel failed to sufficiently investigate and prepare a mitigation case." *Ramirez v. Stephens*, 641 F. App'x 312, 327 (5th Cir. 2016). This Court denied Ramirez's petition for certiorari, which included his claim

that trial counsel's mitigation investigation was inadequate. *Ramirez v. Davis*, 137 S. Ct. 279 (2016).

Ramirez's execution was set for February 2, 2017. Less than a week before his scheduled execution, Gregory Gardner filed in federal district court a motion for appointment of new counsel and a motion for a stay, alleging that then-federal-habeas counsel, Michael Gross, was laboring under a conflict of interest because he served as state and federal habeas counsel. ROA.638–71. The district court stayed the proceedings and replaced Gross with Gardner and Seth Kretzer. ROA.708–16, 735, 741–86.

On August 20, 2018, Ramirez filed in the lower court a Rule 60(b)(6) motion for relief from judgment, premised (again) on his allegation that "[t]rial counsel failed to uncover clearly mitigating evidence." ROA.810. The district court denied Ramirez's motion for Rule 60(b) relief, finding that the motion was a successive petition, untimely, and failed to demonstrate extraordinary circumstances. Pet. Appx. A. The Fifth Circuit denied COA, finding that reasonable jurists would not debate that Ramirez failed to establish extraordinary circumstances. Pet. Appx. B.

Finally, Ramirez filed a petition for writ of certiorari in this Court on the Fifth Circuit's denial of COA based on the district court's rejection of his Rule 60(b) motion. The Director's response follows.

REASONS FOR DENYING THE WRIT

I. Ramirez Provides No Compelling Reason to Grant Certiorari.

At the outset, Ramirez fails to provide justification for granting a writ of certiorari—no allegation of a circuit split, a direct conflict between the state court and this one, or even an issue that is particularly important. *See* Sup. Ct. R. 10(a)–(c). That absence lays bare Ramirez's true request. He is asking this Court to correct the Fifth Circuit's application of a properly stated rule of law. And he takes it one step further, asking this Court to consider—and presumably affirm—the Fifth Circuit's conclusions about the district court's analysis that were favorable to him. But since "[e]rror correction is 'outside the mainstream of the Court's functions,'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J.) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007), one would assume that the affirmation of nondispositive conclusions is too. Ramirez fails to provide adequate justification for expending limited judicial resources on his underlying ubiquitous (and already-reviewed) *Wiggins* claim. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). This Court should deny his petition for this reason alone. *Cf.* Sup. Ct. R. 14(h) (a petition for writ of certiorari should contain a "concise argument *amplifying* the reasons relied on for allowance of the writ" (emphasis added)).

II. The Fifth Circuit Properly Applied the Law and Was Correct to Deny COA.

Ramirez asks this Court to grant certiorari based on the Fifth Circuit's denial of COA yet complains at length about the district court's denial of relief. He argues that the district court should not have treated his petition as successive, Pet. 5, 11, and that the district court should not have found his petition untimely, Pet. 6, 10. But because the Fifth Circuit sided with Ramirez on those issues, they are not before this Court. *See* Pet. Appx. B at 8, 11–12. The appellate court denied COA because reasonable jurists would not debate that the district court was within its sound discretion when it found Ramirez failed to demonstrate extraordinary circumstances. That is the issue before the Court.

A. Standard of Review: Extraordinary Circumstances

Extraordinary circumstances justifying relief under Rule 60(b) "will rarely occur in the habeas context." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). To be entitled to relief, a movant must show that he can assert "a good claim or defense" if his case is reopened. *Buck v. Davis*, 137 S. Ct. 759, 780 (2017) (quoting Wright et al., *supra*, § 2857).

B. Ramirez undebatably failed to demonstrate extraordinary circumstances.

Ramirez asserts that extraordinary circumstances exist because *Trevino* created a conflict of interest that prevented Gross from adequately

representing him in federal habeas proceedings. He argues that the post-*Trevino* potential for a conflict of interest under such circumstances establishes a conflict of interest in every case. Pet. 7–8. He then casts a series of aspersions at Gross for continuing to serve him as federal habeas counsel. Pet. 5, 8–9. And in the final pages of his petition, he attempts to substantiate the alleged conflict by suggesting that Gross did not adequately represent him in federal proceedings because he failed to raise a defaulted and meritorious *Wiggins* claim. Pet. 13–17. The *Wiggins* claim he faults Gross for failing to raise is that trial counsel failed to discover evidence (1) that Ramirez witnessed his mother being stabbed by her boyfriend as a child; (2) and that nine years after Ramirez's trial, the victim's son, Aaron Castro, no longer supported the death penalty. Pet. 16–17. Ramirez's legal assumption is flawed, his accusations unfounded, and his proposed claim neither defaulted nor substantial.

1. A potential conflict of interest does not establish an actual conflict of interest.

At the outset, Ramirez asserts that when Gross represented him in federal habeas proceedings, he was laboring under an "actual conflict of interest." Pet. 7–8. But a conflict of interest is not presumed in every case in which one might potentially arise. In fact, *Christeson v. Roper* specifically refutes the idea that a legal framework requiring counsel to assert his own misconduct is itself sufficient to establish a conflict. 135 S. Ct. 891, 895 (2015)

(recognizing that "not every case in which a counseled habeas petitioner . . . misse[s] AEDPA's statute of limitations . . . necessarily involve[s] a conflict of interest"). The conflict must be substantiated. Ramirez fails to substantiate his.[5]

2. The Fifth Circuit correctly found that Ramirez could not have benefited from *Trevino*.

Cutting through Ramirez's unsupported legal assumption and the accusations against Gross that followed, the Fifth Circuit looked directly to *Trevino*. Gross did not raise a *Trevino* claim. If Ramirez could show that conflict-free counsel could have raised a meritorious *Trevino* claim, then Ramirez's allegations of conflict may have had some support. But because Ramirez's proposed *Wiggins* claim (by way of indisputably conflict-free

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[5] Further, the circuit courts agree that *Martinez* and *Trevino* do not, on their own, constitute extraordinary circumstances. *E.g.*, *Cox v. Horn*, 757 F.3d 113, 115 (3d Cir. 2014) (stating that "much more" than the change in law brought about by *Martinez* is required); *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016); *Diaz v. Stephens*, 731 F.3d 370, 376 (5th Cir. 2013) ("[T]his 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 judgment' under Rule 60(b)(6).") (emphasis added); *McGuire v. Warden*, 738 F.3d 741, 750–51 (6th Cir. 2013) (holding that the change in procedural default rules worked by *Martinez* and *Trevino* is not an exceptional circumstance warranting Rule 60(b)(6) relief); *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015) ("A change in law alone will not suffice" to show extraordinary circumstances…"); *Nash v. Hepp*, 740 F.3d 1075, 1078–79 (7th Cir. 2014) (affirming the denial of petitioner's Rule 60(b)(6) motion since he presented "the 'mundane' and 'hardly extraordinary' situation in which the district court applied the governing rule of procedural default at the time of its decision and the caselaw changed after judgment became final"); *Jones v. Ryan*, 733 F.3d 825, 839 (9th Cir. 2013); *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) (declaring that "the change in the decisional law effected by the *Martinez* rule is not an extraordinary circumstance" sufficient to invoke Rule 60(b)(6)).

counsel) was neither defaulted nor substantial, Ramirez could not have benefited from *Trevino*. Pet. Appx. B 14–17. As such, the Fifth Circuit explained that "no reasonable jurists could conclude that the district court abused its discretion in ruling that Ramirez failed to show extraordinary circumstances justifying Rule 60(b) relief." Pet. Appx. 12. Ramirez nevertheless attempts to debate it.

a. Ramirez's *Wiggins* claim is not defaulted.

Rather than confronting the lower court's conclusion that his *Wiggins* claim is not defaulted, Ramirez simply refers to his claim in a boldface heading as "[t]he defaulted IATC claim." Pet. 13. Notwithstanding Gross's assertion in Ramirez's state habeas application that "[trial] counsel [did not] properly investigate[] the case," ROA.3813, Ramirez asserts that Gross failed to raise and thus defaulted the claim that "[t]rial counsel failed to uncover clearly mitigating evidence." Pet. 13 (internal quotations omitted). While it is difficult to ascertain a meaningful distinction between failing to adequately investigate and failing to uncover evidence, Ramirez assumes that there is one. As support, he cites the state habeas court's finding that he did not challenge trial counsel's mitigation investigation as inadequate. Pet. 14. The Fifth Circuit explained why this argument fails:

> Ramirez argues that Gross failed to present a claim in state court that trial counsel were ineffective in conducting a deficient mitigation investigation. But Gross indeed raised such a claim.

> True, the state court characterized Ramirez's mitigation claim as arguing only "that, 'counsel were ineffective in failing to recognize that [Ramirez] was unable and incompetent to direct counsel to not call any further witnesses during the punishment phase of trial,' and that '[d]efense counsel's performance was deficient in failing to present this mitigation testimony;'" instead of arguing "that his trial attorneys were ineffective for failing to investigate mitigation evidence." This characterization is baffling when read against Ramirez's state-court habeas application, which spends nine pages discussing the mitigation evidence that trial counsel should have, but did not, discover—and even more so when read against the state court's own findings and conclusions rejecting the proposition that trial counsel conducted a constitutionally ineffective mitigation investigation.

Pet. Appx. B at 14. And the state court's finding is even more baffling when read alongside the transcripts from the state habeas hearing, in which Gross reiterated Ramirez's *Wiggins* claim, questioned the trial team on their mitigation investigation, and called his own mitigation expert, who criticized the trial team's investigation as inadequate. ROA.4367–70.

Bypassing the lower court's analysis, Ramirez advocates for a selective application of AEDPA that pays deference to petitioners over final state court judgments. Under Ramirez's AEDPA, any postconviction state court finding that supports his theory—e.g., that Gross did not raise a *Wiggins* claim—"shall be presumed correct." Pet. 14. The findings that refute it—e.g., that trial counsel's investigation was adequate and that no prejudice ensued—shall not. Even if AEDPA were turned on its head, Ramirez's claim is still not defaulted.

The Fifth Circuit explained that the claim is also not defaulted because the federal district court did not treat it as such:

> But whether the state court believed that Ramirez defaulted on his deficient-investigation claim makes no difference here because the federal district court did not treat his claim as defaulted. The district court characterized Ramirez's argument in his § 2254 application as "contend[ing] that trial counsel made inadequate efforts to *investigate and prepare* evidence to militate for a life sentence." And it [rejected his claim].
> . . .
>
> Thus, even if Gross did err in not presenting a deficient-investigation claim in state court, his failure to raise a *Trevino* argument in federal court made no difference; the district court considered this claim regardless of default.

Pet. Appx. 14–15. Gross raised Ramirez's *Wiggins* claim in state and federal proceedings, and it was considered and rejected on its merits in both instances.

What remains of Ramirez's argument is that Gross was ineffective because he did not claim trial counsel failed to discover additional evidence—i.e., that Ramirez witnessed his mother's stabbing and of Aaron Castro's 2017 views on the death penalty. But "*Martinez* and *Trevino* do not provide a vehicle for" federal courts to consider additional evidence under such circumstances. Pet. Appx. 15. Because the state court considered Ramirez's *Wiggins* claim, reviewing federal courts are limited to the state court record. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). Thus, even if new counsel had asserted Ramirez's latest version of his *Wiggins* claim in his initial petition, they would have been bound to state court record that Gross developed. Pet. Appx. 15. In

any event, the "shocking" new evidence that Ramirez witnessed his mother's stabbing, while certainly disturbing, is neither shocking nor new. *See* Pet. 17. Trial counsel were aware of this event and planned to present it until Ramirez instructed them to end the presentation of evidence. ROA.4429–30.[6] And Gross presented this evidence in state habeas proceedings. ROA.3857 (Ramirez's mother's affidavit recounting that John observed his mother's boyfriend attack her with a knife). Gross did not fail to raise a *Wiggins* claim, generally, nor even the *Wiggins* claim Ramirez's new counsel asserts today.

Ramirez did not have a viable *Trevino* argument when Gross filed his initial federal petition, and he still does not today. That his new attorneys had a year-and-a-half to identify a defaulted claim and returned only with a slightly modified version of Gross's *Wiggins* claim confirms that. Gross did not defraud the court or abandon Ramirez when he continued to serve as federal habeas counsel.[7] Rather, Gross perceived that the post-*Trevino* potential conflict in same-counsel situations did not come to fruition in this case. And while he may not have been in the best position to make that determination,

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[6] Contrary to Ramirez's assertion, it does *not* appear "that [trial counsel] never ascertained this mitigating information from" Ramirez's mother. Pet. 17. As noted above, counsel testified that they were aware that Ramirez witnessed his mother's stabbing and planned to present it as mitigation. ROA.4429–30. The state court found trial counsel's testimony on this issue credible.

[7] Ramirez also suggests that Gross abandoned him because he did not file a clemency petition, but Ramirez explicitly instructed him not to do so. Pet. Exhibit A, *Ramirez v. Davis*, No. 2:12-cv-00410, Docket Entry (DE) 45 at 30–33.

he was right. Gross's reputational interest was never at odds with Ramirez's "strongest argument" because *Trevino* was not that. *See Christeson*, 137 S. Ct. at 894.

b. Ramirez's *Wiggins* claim is not substantial.

In addition to default, to avail himself of the *Trevino* exception, Ramirez must also demonstrate that his *Wiggins* claim is substantial. A "substantial" ineffective-assistance claim is one that has "some merit." *Martinez*, 566 U.S. at 14. Under *Strickland v. Washington*, a petitioner must show (1) "that counsel's representation fell below an objective standard of reasonableness," 466 U.S. 668, 687–88 (1984); and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

As noted above, the Fifth Circuit found that Ramirez could not benefit from *Trevino* because "no reasonable jurist could conclude that [he] has 'a substantial claim of ineffective assistance of trial counsel.'" Pet. Appx. B at 16 (quoting *Martinez*, 566 U.S. at 17). Assuming deficiency, the court explained that "no reasonable jurists would find any merit in Ramirez's prejudice argument." Pet. Appx. B at 16. "As the state court, the district court, and [the Fifth Circuit] . . . previously found, Ramirez's knowing and intelligent decision to cut short his mitigation defense renders irrelevant the quality of trial

counsel's mitigation investigation." Pet. Appx. 16. The three courts' findings are explicitly supported by this Court's precedent.

In *Schriro v. Landrigan*, this Court held, "[I]t was not objectively unreasonable for [a state habeas court] to conclude that a defendant who refused to allow the presentation of mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence." 550 U.S. 465, 478 (2007). Thus, when the district and appellate courts found precisely that, they did not "abandon[] or abdicate[] judicial review," as Ramirez contends. Pet. 13. They applied binding precedent.

Perhaps overlooking *Landrigan*, Ramirez challenges the lower court's prejudice determination in two steps. First, he asserts that his decision to waive his case in mitigation was invalid, which he contends opens the door for prejudice. Pet. 11–12. Then, he asserts that the recently uncovered evidence—of Aaron Castro's recent grace and a traumatic event he witnessed as a child—establish prejudice. Pet. 16–17. He is wrong on both counts.

i. Ramirez waived his waiver claim.

Ramirez did not seek in the lower courts to relitigate whether he competently ordered his attorneys to end his mitigation case. *See* Pet. Appx. B at 17. But today, in this Court, he does. Pet. 11–13. Ramirez cannot contend that the district court abused its discretion for failing to adjudicate an issue that was not before it. Nor can he contend that the Fifth Circuit erred based

on same. *See Sims v. Apfel*, 530 U.S. 103, 109 (2000) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). But because he does, the Director answers his contentions.

ii. Ramirez's decision to end his case in mitigation was valid.

To undermine the lower court's finding of no prejudice on his underlying *Wiggins* claim, Ramirez argues that his decision to end his mitigation case was invalid. He asserts that his decision was not knowing and intelligent because there is no affirmative evidence that he was aware of "all the mitigation found by the attorneys." Pet. 12–13. His argument disregards controlling precedent and the record.

This Court has "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." *Landrigan*, 550 U.S. at 479. Nor has it ever "required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence." *Id.* And it certainly has never required an attorney to enter into the record affirmative proof that he informed his client of "all the mitigat[ing]" evidence he planned to present. *See* Pet. 13. Ramirez's invalid-waiver claim is itself invalid.

But legal authority is not all that Ramirez lacks; his factual allegations are also spurious. He presents no evidence that he did not understand the consequences of his decision but suggests that the lack of affirmative evidence

otherwise proves as much. He is wrong, as the burden is his: He must provide "clear and convincing evidence" to rebut the state court's findings that he understood the consequences of his decision. *See* 28 U.S.C. § 2254(e)(1); ROA.5276–79. The absence of affirmative evidence is not that. And in fact, there is no such absence: Ramirez's counsel summarized in his opening argument the mitigating evidence, which included Ramirez's "abusive upbringing" that "caused him severe emotional and psychological damage." ROA.2526–28. Present for the argument, Ramirez later expressed to counsel his desire to end the presentation of mitigating evidence. Counsel explained the risks to Ramirez, ROA.4431–32, but Ramirez was adamant. He did not want a life sentence, ROA.4376, 4432–33, or "to . . . have to put his family through . . . testify[ing] about his childhood and things of that nature." ROA.4433; *see also* ROA.4376; ROA.5276–79. Ramirez's stated reasons for ending the presentation of mitigating evidence underscore that he understood both the evidence and the consequences. *See Landrigan*, 550 U.S. at 479–80 (interpreting Landrigan's explicit preference for the death penalty as evidence that he "clearly understood the consequences" of forgoing presentation of mitigating evidence). That he may have been "quite upset" does now absolve him of those consequences. *See* Pet. 13 (suggesting that an upset defendant who forgoes mitigation might be entitled to a new punishment trial).

The state habeas court did not contravene or misapply this Court's precedent when it found Ramirez's decision to end the presentation of mitigating evidence to be futile to the prejudice prong of his *Wiggins* claim. *See Landrigan*, 550 U.S. at 478. Thus, the lower courts properly denied relief and COA on this issue in Ramirez's first round of federal habeas proceedings. *Ramirez v. Stephens*, No. 2:12-cv-410, 2015 WL 3629639, at 16–21 (S.D. Tex. 2015); *Ramirez v. Stephens*, 641 Fed. App'x at 327. Ramirez's disregard for the law and the record today does not cast any doubt on the lower courts' adjudication of this issue in the first instance.

The Fifth Circuit properly found that Ramirez's decision to end his case in mitigation renders his prejudice argument futile. Without a viable prejudice argument, Ramirez's *Wiggins* claim is insubstantial and, thus, again ineligible for *Trevino*'s exception.

3. Even if *Pinholster* were disregarded and Ramirez's new evidence considered, his claim is still insubstantial.

Moving beyond the Fifth Circuit's opinion (and *Pinholster*'s restrictions), Ramirez asserts that the latest version of his *Wiggins* claim is substantial—meritorious even. Pet. 14–16. He faults trial counsel for failing to uncover "a terrible combination of serious mental illness and childhood trauma." Pet. 16.

And he supports this contention with Aaron Castro's stated opposition to the death penalty in 2017.[8]

Castro's 2017 view on the death penalty is not evidence of Ramirez's mental illness or childhood trauma. Even so, had trial counsel interviewed Castro at the time of the trial in 2008—and Ramirez provides no evidence that they did not—Castro would have given a different statement. He described his sentiment at that time:

> I was sitting there in the courtroom with my brother and I'm looking down contemplating, "How am I gonna get to this guy?" He's gonna die peacefully if he gets lethal injection. If he just stays the rest of his life in prison, he's gonna get to live his life in jail. I'm gonna go get him.

See Ramirez v. Davis, No. 2:12-cv-410, DE 75 at 29:40–30:22; *see also id.* at 26:50–27:30. Castro went on to explain that he wanted Ramirez to die for nine years before his "change of heart." *Id.* at 55:15–20. Trial counsel was not deficient and Ramirez was not prejudiced by trial counsel's "failure" to inform Ramirez or the jury that Aaron Castro wanted him to die in a less-than-peaceful manner.

What remains of Ramirez's argument is that Gross continued to represent him in state and federal habeas proceedings. But same-counsel

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[8] Ramirez also supports his contention with evidence that he witnessed his mother's stabbing when he was a child. Pet. 16–17. But as noted above, Gross presented this evidence in state habeas proceedings, where trial counsel testified that they were aware of this incident and planned to present it as mitigation.

situations are neither extraordinary[9] nor a "good claim or defense"[10] that might justify reopening judgment. Ramirez's latest version of his *Wiggins* claim underscores that he has no good claim and that the *Trevino* exception was never a defense he could have benefited from. The Fifth Circuit was correct: Reasonable jurists would not debate that the district court was within its sound discretion when it found Ramirez failed to demonstrate the extraordinary circumstances required for Rule 60(b) relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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9 *See, e.g.*, *Beatty v. Davis*, No. 18-8429 (Oct. 7, 2019).

10 *See Buck*, 137 S. Ct. at 780.

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