No. _____

In The

Supreme Court of the United States

IN RE HAROLD PERSAUD

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under *Martinez v. Ryan*[1] and *Trevino v. Thaler*[2] a Petitioner May Use Fed. R. Civ. P. 60(b) to Reopen a Proceeding Under 28 U.S.C. § 2255 on the Basis that Petitioner's Original Section 2255 Habeas Counsel was Ineffective in Failing to Raise a Patent, Meritorious 2255 Claim, Thereby Creating a Defect in the Original 2255 Proceeding Which Authorizes Reopening the Proceeding under *Gonzalez v. Crosby*?[3]

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[1] *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

[2] *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

[3] *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

PARTIES TO THE PROCEEDING

Harold Persaud, Petitioner

United States of America, Respondent

STATEMENT OF RELATED CASES

United States v. Harold Persaud, No. 1:14-cr-276, United States District Court for the Northern District of Ohio, criminal judgment entered January 5, 2016, judgment denying 28 U.S.C. 2255 petition entered November 27, 2018, order transferring Rule 60(b) motion to court of appeals entered April 14, 2020.

United States v. Harold Persaud, No. 16-3105, Sixth Circuit Court of Appeals, direct criminal appeal, Judgment entered June 13, 2017.

United States v. Harold Persaud, No. 1:14-cr-276, United States District Court for the Northern District of Ohio, judgment denying 28 U.S.C. 2255 petition entered November 27, 2018.

United States v. Harold Persaud, No. 19-3041, Sixth Circuit Court of Appeals, certificate of appealability for appeal of denial of 28 U.S.C. 2255 petition denied March 28, 2019, rehearing *en banc* denied June 6, 2019.

Harold Persaud v. United States, No. 19-216, petition for writ of certiorari (re certificate of appealability) denied October 7, 2019.

STATEMENT OF RELATED CASES – Continued

United States v. Harold Persaud, No. 1:14-cr-276, United States District Court for the Northern District of Ohio, order transferring Rule 60(b) motion to court of appeals entered April 14, 2020.

In re Harold Persaud, No. 20-3423, Sixth Circuit Court of Appeals, order dismissing appeal of order transferring Rule 60(b) motion to court of appeals, entered May 5, 2020.

In re Harold Persaud, No. 20-3422, Sixth Circuit Court of Appeals, order denying motion to file successive 28 U.S.C. 2255 petition and affirming transfer of Rule 60(b) motion entered October 7, 2020 and rehearing *en banc* denied November 24, 2020.

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In The
Supreme Court of the United States

IN RE HAROLD PERSAUD

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Harold Persaud, respectfully prays that a writ of certiorari be issued to review the decision of the Sixth Circuit Court of Appeals in this case.

OPINION BELOW

The Sixth Circuit Court of Appeals decision, *In re Persaud*, is found at 2020 U.S. App. LEXIS 31880. The decision was entered October 7, 2020. Rehearing *en banc* was denied November 24, 2020. A copy of the slip opinion and the order denying rehearing *en banc* is included in the attached appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241 – Power to grant writ

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2255 – Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the

sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by

motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel

under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of *coram nobis*, *coram vobis*, and *audita querela*.

STATEMENT OF THE CASE

Harold Persaud ("Persaud" or the Petitioner) filed a timely Rule 60(b) motion with the United States District Court for the Northern District of Ohio to reopen his prior, timely 28 U.S.C. § 2255 habeas petition to raise a claim of ineffective assistance of counsel relating to plea and sentencing advice. Persaud relied upon a decision from the Seventh Circuit squarely on point, *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), in arguing that ineffective assistance of his habeas counsel permitted reopening his prior § 2255 proceeding under the reasoning of *Trevino v. Thaler*, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). The Government argued below that unpublished decisions of the

Sixth Circuit which refused to apply *Trevino* and *Martinez* to *Section 2241* proceedings (where the question is whether the prior proceeding was inadequate or ineffective) barred the use of an ineffective assistance of habeas counsel claim to *reopen* a § 2255 proceeding under Rule 60(b).

The District Court entered an order pursuant to *Sims v. Terbush*, 111 F.3d 45, 47 (6th Cir. 1997), transferring Persaud's case to the Sixth Circuit Court of Appeals, determining that it was properly treated as a successive § 2255 petition, and not a Rule 60(b) motion. The Sixth Circuit accepted the transfer and opened this matter, Case Number 20-3422.

Out of an abundance of caution that if the Court ultimately agreed with Persaud that it was improper to transfer the matter under *Sims v. Terbush* that Persaud would have been deemed to have waived his objection if he did not file a notice of appeal of the District Court's order, Persaud filed a timely notice of appeal of the District Court's transfer order, which was initially accepted by the clerk of the Sixth Circuit and was used to open Sixth Circuit Case Number 20-3423. Thereafter pursuant to *Howard v. United States*, 533 F.3d 472, 474 (6th Cir. 2008), the Sixth Circuit dismissed Case Number 20-3423, finding that the transfer order was not an appealable order.

Persaud then, in accordance with the Sixth Circuit's procedures under *Sims v. Terbush*, completed an application for permission to file a second or successive § 2255 petition, but at the same time filed a statement

in opposition explaining succinctly why he disagreed with the transfer of his Rule 60(b) petition and its re-classification as a second or successive § 2255 petition.

Persaud filed a supplemental memorandum of law to elaborate on his arguments in opposition to the transfer of his Rule 60(b) motion. However, the three judge panel of the Sixth Circuit denied Persaud relief, holding that the transfer was correct and Persaud did not qualify for permission to file a successive 2255 petition. The Court held that his prior habeas counsel's ineffective assistance of counsel in failing to raise the claim raised in his Rule 60(b) motion did not constitute "excusable neglect," and therefore could not support a Rule 60(b) motion.

Persaud filed a timely petition for rehearing *en banc* which was denied and this petition followed.

REASONS FOR GRANTING THE WRIT

Whether under *Martinez v. Ryan* and *Trevino v. Thaler* a Petitioner May Use Fed. R. Civ. P. 60(b) to Reopen a Proceeding Under 28 U.S.C. § 2255 on the Basis that Petitioner's Original Section 2255 Habeas Counsel was Ineffective in Failing to Raise a Patent, Meritorious 2255 Claim, Thereby Creating a Defect in the Original 2255 Proceeding Which Authorizes Reopening the Proceeding under *Gonzalez v. Crosby*.

Persaud argues that his § 2255 proceeding should be reopened pursuant to Rule 60(b) to allow him to

present a new ground for relief which should have been presented in the original § 2255 proceeding and would have been so presented had Persaud had effective assistance of counsel in his initial § 2255 proceeding.

Rule 60(b) permits a district court to grant relief from a final judgment for several reasons, such as mistake, inadvertence, surprise, *excusable neglect*, newly discovered evidence, fraud, misrepresentation, misconduct, a void judgment, or for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1)-(6) (emphasis supplied). It is proper to apply Rule 60(b) to § 2255 motions. *United States v. Gibson*, 424 F. App'x 461, 464 (6th Cir. 2011) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 529, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005), and *In re Nailor*, 487 F.3d 1018, 1021 (6th Cir. 2007)). A Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532; *see also United States v. Moon*, 527 F. App'x 473, 475 (6th Cir. 2013) (explaining that a Rule 60(b) motion is proper in a motion to vacate where it is attacking "some defect in the § 2255 proceedings" (quoting *Gonzalez*, 545 U.S. at 532)).

Persaud's motion was timely under Rule 60(b). Rule 60(b)(6) motions "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). "What constitutes a reasonable time depends on the facts of each case." *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 906 (6th Cir. 2006). Factors to be considered include the length and circumstances of the delay, the prejudice to

the opposing party by reason of the delay, and the circumstances compelling equitable relief. *See Olle v. Henry & Wright Corp*., 910 F.2d 357, 365 (6th Cir. 1990). Persaud's motion was filed less than six months after the Supreme Court denied certiorari on his appeal of the dismissal of his timely § 2255 petition. There was no prejudice to the Government as a result of the timing of this motion and it was brought as promptly as a review of the underlying record and necessary due diligence could be completed.

The Seventh Circuit has expressly held that Rule 60(b) is available to petitioners in Persaud's position to reopen § 2255 proceedings under the holdings of *Trevino v. Thaler*, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015). Before Persaud, the Sixth Circuit had not addressed this question – it had never considered whether Rule 60(b), read in light of *Martinez* and *Trevino*, can be used to reopen a § 2255 proceeding.[4]

The Government argued at the district court that it should reclassify Persaud's Rule 60(b) motion as a successive § 2255 petition and transfer it to the Sixth

[4] The Sixth Circuit has only considered the application of *Martinez* and *Trevino* to the availability of the savings clause of § 2255(e) for purposes of filing a § 2241 petition and then only in unpublished, non-binding, non-precedential decisions. *See Kapenekas v. Snyder-Norris*, 2017 U.S. App. Lexis 17047 (6th Cir. 2017) and *Abdur-Rahiim v. Holland*, 2016 U.S. App. Lexis 13207 (6th Cir. 2016).

Circuit pursuant to *Sims v. Terbush*, 111 F.3d 45, 47 (6th Cir. 1997). This argument rested on the mistaken premise that Persaud's Rule 60(b) motion simply presents a new substantive habeas claim, therefore it is to be treated as a second or successive § 2255 petition and as such was subject to the requirement that a second or successive 28 U.S.C. § 2255 petition be presented first to the Court of Appeals for permission to be filed.

But Persaud's Rule 60(b) is not simply the presentation of a new substantive claim, rather it raises a defect in the integrity of the earlier § 2255 proceeding, in that it argues that his § 2255 counsel failed to present a claim which should have been presented by competent counsel, and under *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), this claim can be presented under Rule 60(b). When a habeas petitioner's Rule 60(b) motion alleges a "defect in the integrity of the federal habeas proceedings," the motion should not be transferred to the circuit court for consideration as a second or successive habeas petition. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Instead, the District Court is required to reach the merits of the Rule 60(b) claim.

The Government correctly understood that Persaud relies upon *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), which authorized a similar claim under Rule 60(b), based on the failure of habeas counsel to raise a meritorious claim in the original § 2255 petition, interpreting *Trevino v. Thaler*, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013) and *Martinez v. Ryan*,

132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) to support such a holding.

The Government's argument below and the Sixth Circuit's opinion in Persaud's appeal, however, failed to address the merits of the *Ramirez* opinion or answer any of the arguments made in *Ramirez*. The Government instead sought to rely solely upon two unpublished savings clause cases from the Sixth Circuit, *Kapanekas v. Snyder-Morris*, No. 16-6310, 2017 WL 3725355 (6th Cir. Apr. 10, 2017) and *Abdur-Rahiim v. Holland*, No. 15-5297 (6th Cir. Jan. 12, 2016), both finding that *Trevino* and *Ryan* applied only to state § 2254 habeas petitions and did not apply to § 2255 petitions. The Government argued that the procedural differences between *Kapanekas* and *Abdur-Rahiim* do not matter. But it is not a matter of simple *procedural* difference. Both *Kapanekas* and *Abdur-Rahiim* were § 2241 petitions, and the argument the petitioners made was that § 2255 had been "inadequate or ineffective" to resolve their claims, arguing that their prior counsel's ineffectiveness rendered the prior proceeding "inadequate."

That ineffective assistance of counsel does not render a proceeding "inadequate" is an entirely different legal question from that presented under Rule 60(b) whether a *defect* in the integrity of the prior proceeding should permit *reopening* of the prior proceeding. If either *Kapanekas* or *Abdur-Rahiim* teach anything, it is to demonstrate why unpublished opinions are not binding authority. The discussion in *Kapanekas* of *Ramirez* is completely inapposite in the context of a

case deciding "inadequacy" under the savings clause. With respect both to the Government and the panel opinions cited, these unpublished off point decisions have no application to the problem raised in this Rule 60(b) motion.

No circuit case has engaged in a Rule 60(b) analysis similar to that in *Ramirez*. Persaud's panel opinion below failed to address the *Ramirez* opinion further than to say in a single sentence that Persaud's raising an entirely new claim distinguished his case from *Ramirez*. The Sixth Circuit failed to answer the arguments made by the Seventh Circuit. If there is an argument to be made with the Seventh Circuit's reasoning, the Government and Sixth Circuit panel opinion failed to make it.

Instead, *Ramirez*'s conclusion that *Martinez* and its progeny permit reopening a § 2255 proceeding is correct and ineffective assistance of counsel in a prior § 2255 habeas proceeding can and does in Persaud's case constitute excusable neglect permitting use of Rule 60(b) to reopen a habeas proceeding in the extraordinary circumstances of a meritorious and dispositive omitted claim.

The Rule 60(b) Merits Claim at Issue

PERSAUD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION WHEN HIS TRIAL COUNSEL FAILED TO PROPERLY ADVISE

HIM OF THE SENTENCING CONSEQUENCES OF A GUILTY VERDICT AT TRIAL VERSUS THE SENTENCING CONSEQUENCES OF A GUILTY PLEA, AND HAD PERSAUD BEEN PROPERLY ADVISED HE WOULD HAVE PLED GUILTY INSTEAD OF GOING TO TRIAL AND WOULD HAVE RECEIVED A LESSER SENTENCE.

The issue presented by Persaud's motion has great merit, was patent from the face of the record, and is of such consequence that this Court should exercise its discretion under Rule 60(b) to permit Persaud to reopen the § 2255 proceeding and litigate the question on its merits.

In The Habeas Context, Relief Under Rule 60(b) Is Available In "Extraordinary Circumstances."

Rule 60(b)(6) allows parties to reopen their case in "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Although the Antiterrorism and Effective Death Penalty Act (AEDPA) limits the availability of relief under Rule 60(b) on habeas review, the Supreme Court has explained that Rule 60(b) "has an unquestionably valid role to play in the habeas context." *Id.* at 534; *see also Owens v. United States*, 2020 U.S. App. LEXIS 4657 (6th Cir. 2020) (applying *Gonzalez* to § 2255 proceedings). Indeed, a Rule 60(b) motion is appropriate in the habeas context where it "attacks, not the substance of the federal court's resolution of the claim on the merits, but some defect in the

integrity of the habeas proceeding." *Gonzalez*, 545 U.S. at 532.

> The Supreme Court Has Recognized That Ineffective Assistance Of Habeas Counsel Constitutes "Cause" And "Extraordinary Circumstances" In Other Contexts, Warranting The Conclusion That Ineffective Assistance Of Counsel May Be An "Extraordinary Circumstance" Under Rule 60(b).

In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the Supreme Court recognized that, although the effective assistance of habeas counsel does not rise to the level of a constitutional right, its absence may significantly impair the integrity of habeas proceedings. The rationale for those decisions has equal application here as well.

Martinez addressed whether a federal habeas court may excuse the procedural default of a claim of ineffective assistance of trial counsel when that claim could not have been brought until collateral review but was not properly presented during collateral review based on the ineffective assistance of habeas counsel. *Martinez*, 132 S. Ct. at 1313. The Ninth Circuit Court of Appeals concluded that "absent a right to counsel in a collateral proceeding, an attorney's errors in the proceeding do not establish cause for a procedural default." *Id.* at 1315. The Supreme Court rejected this categorical approach. "To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel," the Supreme Court concluded that, when an ineffective assistance of trial counsel claim

could not have been brought until collateral review, ineffective assistance of counsel at the collateral review stage can excuse a procedural default. *Id.* at 1315, 1320.

The decision in *Martinez*, which eschewed the categorical approach, is grounded in three principles. First, "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system" and "is the foundation for our adversary system." *Martinez*, 132 S. Ct. at 1317. In addition to testing the prosecution's case, "effective trial counsel preserves claims to be considered on appeal, *see, e.g.*, Fed. Rule Crim. Proc. 52(b), and in federal habeas proceedings." *Id.* at 1317-18. Indeed, effective assistance of counsel is the cornerstone of a "fair trial." *Id.* at 1317.

Second, where an ineffective assistance of trial counsel claim cannot be raised until the first-tier collateral review, ignoring the effect of ineffective assistance of habeas counsel raises due process concerns. That is because, where ineffective assistance of trial counsel claims cannot be raised until collateral review, the collateral review procedure is functionally equivalent to first-tier appellate review. *Martinez*, 132 S. Ct. at 1317. And prisoners are entitled to effective assistance of counsel during appeal on direct review (and ineffective assistance of appellate counsel can excuse a procedural default) precisely because the prisoner otherwise would be "denied fair process." *Id.* Like prisoners attempting to raise constitutional claims on direct appeal without adequate counsel, a prisoner without the assistance of adequate habeas counsel will have

"difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim." *Id.* As the Supreme Court recognized: "Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review . . . a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim." *Id.*

Third, in judicial systems where an ineffective assistance of trial counsel claim must be brought on collateral review, habeas counsel's errors can effectively prevent any meaningful review of this claim. That is because in such systems (including most ineffective assistance claims brought in the federal system), "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no . . . state court at any level will hear the prisoner's claim . . . [a]nd if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id.* at 1316. Moreover, allowing ineffective assistance of habeas counsel to excuse a procedural default merely acknowledges that "the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 1318.

Relying on the three principles that animated *Martinez*, the Supreme Court concluded in *Trevino* that *Martinez* extends to regimes where it is "virtually

impossible," as a practical matter, to raise an ineffective assistance of counsel claim on direct review. *Trevino*, 133 S. Ct. at 1921. The Court began its analysis by reiterating "the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law." *Id.* at 1916-17. Then, it reiterated that *Martinez* flowed from three principles – namely, the importance of effective assistance of trial counsel in our judicial system, the fact that collateral review is functionally equivalent to direct appeal if constitutional claims cannot be brought until collateral review, and the concern that habeas counsel's errors can effectively prevent any review of an ineffective assistance of trial counsel claim. *Id.* at 1917-18. Each of these principles applied equally to a judicial framework that makes it virtually impossible to raise an ineffective assistance of trial counsel claim before collateral review. *Id.* at 1921. Thus, the Court concluded that where a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies." *Id.*

The Supreme Court's decision to reject a categorical approach in *Martinez* and *Trevino* is consistent with its analysis in *Holland v. Florida*, 560 U.S. 631 (2010), where it rejected a categorical rule by the Eleventh Circuit that gross negligence on the part of habeas counsel never amounts to an "extraordinary

circumstance" that would justify tolling the statute of limitations. *Id.* at 644, 649. The *Holland* Court explained that courts of equity must exercise their powers on a case-by-case basis. *Id.* at 649-650. The Court further explained that "[i]n emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity." *Id.* at 650 (internal citation omitted).

Significantly, the Court observed that under such circumstances, habeas counsel's errors cannot be attributable to the petitioner. The Court acknowledged that in *Coleman v. Thompson*, 501 U.S. 722, 752-753 (1991), the Court held that "a petitioner must bear the risk of attorney error" "in the context of procedural default." *Id.* at 650 (internal citation omitted). But, the Court explained, "*Coleman* was a case about federalism . . . in that it asked whether federal courts may excuse a petitioner's failure to comply with a state court's procedural rules." *Id.* (internal citation omitted). By contrast, equitable tolling "asks whether federal courts may excuse a petitioner's failure to comply with federal timing rules." *Id.* This, in addition to "equity's resistance to rigid rules," means that *Coleman* should not be read "as requiring a *per se* approach in this context." *Id.* at 650-651.

The inquiry that governs tolling a statute of limitations parallels the inquiry under Rule 60(b)(6). First, both rely on equitable principles. *See* Charles Alan

Wright, et al., Federal Practice and Procedure § 2857 (3d ed.) (explaining that "[e]quitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b)"). And second, the rigid approach from *Coleman* is similarly inappropriate because in analyzing whether "extraordinary circumstances" exist to justify relief under Rule 60(b), the district court would not be asked to excuse compliance with a state court rule.

The District Court Abused Its Discretion In Concluding That Ineffective Assistance Of Habeas Counsel Could Never Warrant Relief Under Rule 60(b), A Conclusion At Odds With *Trevino* And *Martinez*.

Although *Trevino* and *Martinez* considered whether ineffective assistance of habeas counsel could excuse a procedural default, they are equally applicable to Persaud's Rule 60(b) motion, which sought to reopen a § 2255 proceeding where a substantial ineffective assistance of trial counsel claim had been raised. In particular, to the extent habeas counsel's errors effectively prevented any meaningful consideration of that ineffective assistance of trial counsel claim, *Trevino* and *Martinez* instruct that ineffective assistance of habeas counsel should not have been categorically disregarded simply because there is no constitutional right. Rather, under *Trevino* and *Martinez*, ineffective assistance of habeas counsel may affect the integrity of the habeas proceeding as well.

CONCLUSION

Based on the foregoing argument, Petitioner Persaud respectfully requests this Honorable Court grant certiorari to decide the above question.

Respectfully submitted,

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